UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
NORTHWESTERN CORPORATION,	)	
	)	Case No. 03-12872 (CGC)
Debtor.	)	
	)	

MEMORANDUM DECISION

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Dated: July 23, 2004

CASE, J.

Before this Court is the Debtor's Motion for an Order (I) Approving Assumption of Executory Contract, as Amended, Between Debtor and Yellowstone Energy Limited Partnership, and (II) Approving Compromise and Settlement of Claims Between Debtor and Yellowstone Energy Limited Partnership (the "Settlement") [Docket No. 1526]. Harbert Management Corporation filed a Limited Objection to the Debtor's motion. Upon consideration and review of all relevant pleadings; oral argument; the evidence presented at the hearing, and for the reasons set forth below, the Court overrules Harbert's objection and will approve the Settlement.

FACTS

On September 14, 2003 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business and manage its properties as debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

An Official Committee of Unsecured Creditors (the "Unsecured Creditors Committee") was appointed by the Office of the United States Trustee, District of Delaware, on September 30, 2003.

On May 26, 2004, the Court approved the Debtor's First Amended Disclosure Statement and filed its disclosure statement and plan of reorganization. The Debtor's confirmation hearing is scheduled for August 25, 2004.

On January 28, 2004, Yellowstone Energy Limited Partnership ("Yellowstone") filed Adversary Proceeding No. 04-51346, captioned Yellowstone Energy Limited Partnership v. NorthWestern Corporation, pending before this Court, asserting damages in the amount of at

least $271,608.90, plus interest, and seeking certain declaratory and injunctive relief relating to the interpretation of certain operative provisions of the Power Purchase Agreement. The Debtor filed its answer on February 27, 2004 disputing the allegations contained in the Adversary Proceeding. The parties are currently in the discovery phase of the Adversary Proceeding, which has been stayed pending the outcome of the Settlement.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

DISCUSSION

The Debtor purchases power from Yellowstone pursuant to a certain Initial Cogeneration Power Production Power Purchase Agreement (the "PPA"). Yellowstone is a "qualifying facility" ("QF"); this is a particular category of power generation facility under application rules and regulations of the Federal Energy Regulatory Commission ("FERC"). If Yellowstone ceases to meet the QF qualifying criteria, Debtor may terminate the agreement.

There has been substantial litigation between the parties over the PPA. Among the continuing disputes is the timing of required maintenance on the facility and the question of which party has the right to determine when maintenance will occur. The effect of the issue is substantial because the PPA has different pricing of energy during the winter months versus the summer months. Thus, the timing of plant shut down for maintenance may seriously affect obligations due from one party to the other.

The PPA is an executory contract which the Debtor may assume or reject. If rejected, it could lead to substantial rejection damages. If assumed in its current form, however, it would

commit the Debtor to continue to purchase energy from Yellowstone at prices significantly above current market.

In order to settle these various disputes, the Debtor and Yellowstone have agreed to an amendment of the PPA which, among other things, lowers the overall cost of energy to Debtor (although it is still above market) and eliminates the distinction between winter and summer pricing, thereby removing the economic impact of when, and by whom, maintenance is scheduled. The Debtor seeks approval of this compromise under Federal Rule of Bankruptcy Procedure 9019.

An objection was filed by Harbert Management Corporation ("Harbert"), a holder of the Debtor's subordinated debt. Harbert's objection is premised upon its contention that there is a substantial question as to whether or not Yellowstone in fact has QF status. Harbert argues that if Yellowstone has lost its QF status, thereby authorizing the Debtor to terminate the contract, the estate could be relieved from the burdens of both of an above market PPA and a very large damage claim. Harbert asserts that the Debtor has not sufficiently analyzed Yellowstone's QF status and has failed or neglected to obtain from Yellowstone adequate documentation upon which such a determination could be made. Therefore, Harbert seeks the opportunity to obtain such information for the purpose of analysis by an expert of its choosing. For these reasons, Harbert seeks a deferral of the decision on whether this settlement is in the best interests of the estate.

Debtor presented the testimony of Mr. William Austin, Chief Restructuring Officer of the Debtor. Mr. Austin described the negotiations with Yellowstone and the terms of the proposed revised contract. In particular, he identified the savings to the estate from lowering the overall

cost of power and from eliminating the seasonal differences in pricing, thereby resolving the maintenance timing issue. Mr. Austin acknowledged that the Debtor would be delighted if it could terminate (as opposed to reject) the contract; however, he asserted the Debtor had no facts upon which is could challenge Yellowstone's QF status in good faith. In addition, Mr. Austin testified that the Montana Public Service Commission and the Montana Consumer Counsel had made it clear to the Debtor that if it were able to terminate the contract, the Commission and the Counsel would make serious efforts to see that a substantial portion of that savings was passed on to consumers in the form of lower rates. Further, even if termination was not possible but the contract was nevertheless rejected, thereby resulting in substantial rejection damages, the Commission and the Counsel would also in those circumstances seek to pass on a substantial portion of the lower cost benefit to the consumer.

Harbert provided the testimony of an industry expert, Mr. John Mustonen, who suggested that a determination of QF status could be made within a matter of two weeks after receiving adequate documentation from Yellowstone. The issue turns upon whether or not Yellowstone may have used fuels that are richer than those that its QF status would allow; according to Harbert's witness, this information should be readily available in the fuel records of Yellowstone.

Finally, Yellowstone stated that it has been continuously certified as a QF and that there are no proceedings pending before the FERC to revoke that status.

Although the Debtor raised the issue of QF status in the answer to litigation filed by Yellowstone, Mr. Austin testified that the Debtor was aware of no reliable basis upon which such status could be challenged. He acknowledged, however, that Yellowstone had not produced the documents requested by the Debtor in the litigation; the discovery issue was put on hold pending

the outcome of the settlement discussions.

But for the issue of QF status, it is clear that the compromise and settlement negotiated among the parties would satisfy the applicable tests for approval. For example, "the 'reasonableness' of [a] settlement depends upon all factors, including the probability of success, the length and cost of the litigation, and the extent to which the settlement is truly the product of 'arms length' bargaining, and not of fraud or collusion." *Air Line Pilots Assoc. Int'l v. American Nat'l Bank and Trust Co. Of Chicago (In re Ionosphere Clubs, Inc.)*, 156 B.R. 414, 428 (S.D.N.Y. 1993), *affirmed*, 17 F.3d 600 (2d Cir. 1994). A settlement need not be a perfect solution; the inquiry of the court is whether it "falls below the lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 609 (2d Cir.), *cert. denied*, 464 U.S. 822 (1983). *See also In re Woodson*, 839 F.2d 610 (9th Cir. 1988); *In re Louise's Inc.*, 211 B.R. 798 (D.Del. 1997). Here, the benefits are clear: the cost of power is reduced, ongoing litigation is resolved, disputes concerning maintenance are rendered moot, a large damage claim is averted and contentious proceedings with the Commission and Counsel are avoided. The PPA does provide energy that is needed by the Debtor; it would take a period of several months to obtain energy from a different source.

The fundamental flaw in Harbert's argument is that a determination of QF status is manifestly not a process that can be determined in two weeks. The issue lies within the jurisdiction of the FERC, not this Court and certainly not Harbert's expert. It is a technical issue that Yellowstone has made clear it would defend vigorously and would, without question, require months at a minimum to resolve, as has been recently demonstrated by similar proceedings commenced at the FERC against another party. This inevitable delay would have serious

consequences. First, the outcome is unclear and therefore the benefit of the delay is uncertain. Second, the agreement is premised upon an effective date of July 31, 2004. Third, if approval of the agreement were put on hold, the litigation would continue, at substantial cost, and with the maintenance issue unresolved as summer ends and winter approaches. Fourth, the lack of resolution could affect the confirmation hearing on Debtor's plan that is scheduled for late August. And, fifth, any victory may be Pyrrhic given the position of the Commission and Counsel,

Given these facts, the Debtor's decision to forgo a challenge to Yellowstone's QF status as part of a settlement of all pending disputes does not fall below "the lowest point in the range of reasonableness." Indeed, under these circumstances, the Courts finds that the Debtor's exercise of discretion is well within controlling standards of reasonableness.

CONCLUSION

For the foregoing reasons, Harbert's objection is overruled and the Settlement will be approved. Debtor is to submit a form of order under certification of Counsel.

Charles G. Case, II
United States Bankruptcy Judge