UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MEGAN-RACINE ASSOCIATES, INC.	CASE NO. 92-00860
Debtor	Chapter 11

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers the thirteenth and apparently final fee application ("Final Application") of Examiner Robert E. Barton, P.E. ("Examiner").[1] The Final Application covers the period January 31, 1996 through August 31, 1996, and seeks fees of $31,159.00 and disbursements of $3,509.04. Prior to the instant application, the Court has approved numerous interim fee applications of the Examiner.

The Final Application appeared on the Court's motion calender at Syracuse, New York on August 20, 1996, along with motions by the Examiner seeking an order ratifying his resignation and discharging him and his surety from the Examiner's Bond.

Opposition to the Final Application was filed by the United States Trustee ("UST"), Niagara Mohawk Power Corporation ("NIMO"), The Federal Deposit Insurance Corporation ("FDIC") and the Debtor.

At the August 20, 1996 hearings the Court reserved decision on the Final Application.

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[1]The Examiner resigned his duties as of July 15, 1996, allegedly pursuant to the Order of Appointment dated June 11, 1992.

The Court, however, denied the motions seeking ratification of the Examiner's resignation and his surety's release from the surety bond. *See* Order dated August 29, 1996.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (2)(A) and (B).

DISCUSSION

The Final Application is somewhat distinct from its predecessors in that during the time period covered by the Final Application, on May 2, 1996, Debtor's co-generation facility located at Canton, New York, experienced an explosion and fire that resulted in significant damage to the steam turbine and generator causing the plant to shut down. Additionally, as indicated, the Examiner resigned his duties during the period, on July 15, 1996. While the Final Application indicated at paragraph five that it relates to services rendered between January 1, 1996 through August 31, 1996, the time records cease on July 15, 1996, the date of the Examiners resignation.

The UST objects to the Final Application contending that inclusion of significant travel time billed at full hourly rates and utilization of too many personnel at the facility following the explosion and fire dictates against approval of the Final Application. NIMO objects to the Final Application on the ground that the Examiner conferred no benefit on the Debtor's estate during the application period and the need to maintain the status quo with respect to the Debtor's cash

reserves in light of the explosion and fire. NIMO also asserts that there was no need for the Examiner to have been accompanied by two associates on his May 4, 1996 trip to the facility. The Debtor appears to blame the Examiner for the decision of the Federal Energy Regulatory Commission ("FERC") dated December 14, 1995, which found the Debtor to be out of compliance with certain FERC regulations for the period 1991 through 1994. Much of that period was during the time the Examiner was allegedly overseeing operation of the facility. Finally, the FDIC argues that it would be premature to consider the Examiner's Final Application until an examination of potential claims against the Examiner have been considered.

The Examiner responds to the objectors pointing out that the travel time objection of the UST has been raised several times on prior fee applications and on each occasion the Court has rejected the objection. In defense of the additional personnel called in, the Examiner points out that they were engineers with years of experience in the investigation, testing and design of utility plants, as well as in catastrophic failure analysis, that the personnel on site were not engineers and were "trained drivers" not capable of determining why the car's engine had failed and how to fix it. *See* Examiner's Response to Objections, dated August 19, 1996 at ¶ 19. The Examiner further outlines the actions he undertook at the time of the explosion and fire as well as the coordination of parties that he orchestrated in the days and weeks following the loss including efforts undertaken even while he was on a vacation trip shortly after the events of May 2nd.

The Examiner argues that under his direction plans for returning the plant to service as soon as possible were developed, however, due to the objection of several parties in interest, the Debtor was unable to utilize the necessary cash collateral to implement his plan. Nevertheless, the services are compensable in reliance on 11 U.S.C. § 330(a) since the value of the services

must be judged at the time the services are rendered not with hindsight. Concerning the objections of NIMO and Debtor that this Final Application should be denied or held in abeyance because funds may not be available, the Examiner contends that he should not be denied fees in light of his resignation because of vague speculation regarding the outcome of the case.

Finally, the Examiner addresses the FDIC's objection to the effect that the Examiner may have liability to the Debtor's estate, arguing that it is not a reason to delay compensation since the complexity of the liability issue will require significant time and may be resolved in another forum.

CONCLUSION

As pointed out in the Examiner's Final Application he was appointed by this Court by an Order dated March 27, 1992. To date, he has filed twelve interim fee applications on which he has been awarded a total of $504,606.50 in fees and $77,326.17 in disbursements. The current Final Application covers generally six and one half months of 1996 ending on July 15, 1996 when the Examiner purportedly resigned in accord with the Court's 1992 Order. The current fees sought in the Final Application total $31,159.00 together with $3,509.04 in disbursements.

The Court has reviewed the Application, the time records, the Objections and the Response. The bulk of time reflected in the Final Application is not dissimilar from that detailed in the prior twelve applications and approved by this Court to include travel time billed at the Examiner's full hourly rate. The only novel issue presented by the Final Application is the activities of the Examiner following the May 2nd explosion and fire and his perceived need to

involve two other engineers employed by Bibb and Associates, Inc., the Examiner's employer.[2] The Court has reviewed the Examiner's explanation for the utilization of two other engineers at the time of the fire and explosion and does not find that utilization to be unreasonable.

The Court notes, however, that this is a Final Application pursuant to 11 U.S.C. § 330 in a Chapter 11 case that is still far from a final resolution. It is a Final Application by a professional who after earning a half a million dollars in fees suddenly resigns without explanation.

The Examiner argues that 11 U.S.C. § 330(a) as amended in 1994 requires the Court to determine benefit to the estate as of the date the services were rendered, not at a later point in time with the benefit of hindsight. 11 U.S.C. § 330(a)(5) also teaches that a bankruptcy court may order the disgorgement of professional fees where interim compensation exceeds the amount of compensation finally approved.

Here the Court is presently unable to finally determine the benefit of the Examiner's services to the Debtor's estate given the state of flux the case finds itself in after approximately five years of almost constant litigation. Whether or not concerns such as the December 1995 decision of the FERC and the subsequent explosion and fire have any real bearing on the ultimate analysis of the Examiner's fees remains to be seen.

Holding back some $31,000 to abide the reorganization, liquidation or conversion of this Debtor in a case which has already authorized payment to the Examiner of approximately five hundred thousand dollars does not seem unreasonable or overly burdensome even though this

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[2]The Court notes that the fees attributable to the non-Examiner personnel for the period covered by the Final Application is $7200.00

must be considered a Final Application. *See In re Public Service Co. of New Hampshire*, 93 B.R. 823, 832 (Bankr. D.N.H. 1988), 3 COLLIER ON BANKRUPTCY ¶ 331.03 [3] at 331-13 (Lawrence P. King ed. 15th ed. 1996).

Accordingly, the Court will adjourn a determination of the Final Application until the first October 1997 motion term in Syracuse, New York, or such earlier date as a plan of reorganization or liquidation is scheduled for confirmation or a hearing on conversion or dismissal of the case..

IT IS SO ORDERED.

Dated at Utica, New York

this 3rd day of February 1997

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge