

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7047

Petitions of: (1) USGen New England, Inc. for consent )  
to transfer its Bellows Falls Project to the Vermont )  
Hydroelectric Power Authority; (2) Town of )  
Rockingham and Vermont Hydroelectric Power )  
Authority for certificates of public good and consent to )  
purchase, own, and lease the Bellows Falls )  
Hydroelectric Generating station; and (3) Bellows Falls )  
Power Company for approval to operate the Bellows )  
Falls Hydroelectric Generating Station in Bellows Falls, )  
Vermont, and for *de minimus* regulation )

Order entered: 9/8/2005

ORDER RE MOTION TO AMEND

Introduction

On June 6, 2005, the Vermont Public Service Board ("Board") issued an Order in this Docket in which we approved a proposal whereby, through various transactions, the Town of Rockingham ("Rockingham"), subject to voter approval, would acquire the Bellows Falls Hydroelectric Generating Station (the "Dam"). Subsequently, Rockingham's voters twice rejected the proposal. On August 10, 2005, Bellows Falls Power Company, LLC ("BFPC") filed a motion to amend our June 6, 2005, Order in this proceeding ("June Order"). In its motion, BFPC asks us to approve changes to the transactions that we reviewed and authorized in our June Order. Without an evidentiary record developed with due regard for the parties' rights, we cannot grant BFPC's motion.

Background

On August 11, 2005, the Board invited comments on, among other things, BFPC's Motion to Amend. The Board conducted a duly-noticed status conference to further consider

BFPC's motion on August 30, 2005. On September 1, 2005, BFPC filed a stipulation between itself, Vermont Hydroelectric Power Authority ("VHPA") and Rockingham, providing certain details of the amended transaction.<sup>1</sup>

Upon receipt of the Stipulation, the Board invited further comments from the parties. With several days to reply, the Department and TransCanada filed responses.

At the status conference, June Tierney, Esq., appeared for the Vermont Department of Public Service ("Department"); Richard Saudek, Esq., appeared for Rockingham; Gerald Tarrant, Esq., appeared on behalf of BFPC; Nancy Malmquist, Esq., Downs, Rachlin & Martin, P.C., and Herbert Zarov, Esq., Mayer Brown Rowe & Maw (admitted pro hac vice), appeared for TransCanada Hydro Northeast, Inc. ("TransCanada"); Jeffrey J. McMahan, Esq., Dinse, Knapp & McAndrew, P.C., appeared on behalf of VHPA; and Kimberly K. Hayden, Esq., Primmer & Piper, P.C., appeared on behalf of The Island Corporation ("Island").

#### Positions of the Parties

BFPC, VHPA and Rockingham ask the Board to approve the amended transaction and, as appropriate, modify our June Order to allow VHPA to lease the Dam to BFPC and to allow BFPC to lease the Dam from VHPA.<sup>2</sup> BFPC proposes to modify the transactions in the following manner:

If the Town remains unable to purchase the [Dam] from VHPA, VHPA wishes to consummate the purchase of the [Dam] under the Option Agreement pursuant to the Board's Order of June 6, 2005, and thereafter lease the [Dam] to BFPC, which will in turn operate the [Dam] in the same manner as it proposed when it received a [CPG] and [COC] to operate the [Dam] from the Public Service Board on June 6, 2005.<sup>3</sup>

According to BFPC, as part of the transaction, BFPC has also "agreed to provide [Rockingham] with an option to accept the transfer of the Dam from BFPC after 74 years for one dollar, subject

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1. Stipulation between BFPC, VHPA, and Rockingham ("Stipulation"), September 1, 2005.

2. BFPC Motion to Amend, August 10, 2005. The Department supports BFPC's motion.

3. *Id.* However, according to BFPC, VHPA, and Rockingham, the Option Agreement allows for Rockingham to assign its rights to VHPA for the purpose of financing the transactions contemplated by Rockingham, VHPA and BFPC. Response of VHPA, Rockingham, and BFPC to Board Memorandum, August 26, 2005 at 1. *See also* Stipulation at ¶ 1. "[T]he financing arrangement consists of VHPA retaining ownership of the facility and leasing it to BFPC . . ." *Id.*

to all necessary regulatory and voter approvals."<sup>4</sup> BFPC, VHPA and Rockingham maintain that the transactions for which they are seeking Board approval "are transactions contemplated by the Option to Purchase, for the benefit of the Town."<sup>5</sup>

BFPC, with the support of the Department, proposes that the Board approve these changes without the need for further evidentiary hearings.<sup>6</sup> According to both parties, the record in this Docket contains sufficient evidence upon which the Board can base its decision.

BFPC submitted the Stipulation in order to "clarify" the financing arrangements between BFPC, VHPA, and Rockingham, and to "support" the Board's "review and approval" of BFPC's motion to amend.<sup>7</sup> BFPC describes the financing arrangement as consisting of VHPA retaining ownership of the facility and leasing it to BFPC under the lease agreement approved by the Board. In addition, BFPC indicates that the signatories to the Stipulation have made further agreements regarding property taxes, conveyance of the Dam to Rockingham (at the end of the financing period), an electricity production royalty, and the use of certain property by Rockingham (during the financing period).<sup>8</sup> According to BFPC, either it or VHPA now has an option, upon notice to Rockingham and receipt of the necessary regulatory approvals, "to collapse the Lease Agreement by transferring the [Dam] to BFPC for one dollar."<sup>9</sup>

BFPC, VHPA and Rockingham have asked the Board to act quickly on these amended transactions. At the August 30, 2005, status conference, BFPC asked for a Board Order on or before September 9, 2005. BFPC submitted the Stipulation less than a week ago. Furthermore, by letter dated September 7, 2005, BFPC requested that the Board act upon its motion by the close of business today, September 8, 2005.<sup>10</sup>

TransCanada opposes BFPC's motion on several grounds. First, according to TransCanada, the Option Agreement (paragraph 17, specifically) reviewed by the Board in our June Order is not valid for any other purpose than "VHPA's financing of [Rockingham's]

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4. *Id.* at 2.

5. *Id.*

6. DPS Comments on Board Memorandum, August 29, 2005.

7. Stipulation at 1.

8. *Id.*

9. *Id.* at 2.

10. Letter to Judy Whitney, Deputy Clerk of the Board, September 7, 2005.

purchase of the [Dam]."<sup>11</sup> Second, according to TransCanada, the Option Agreement contains a forum selection clause that specifically provides that:

all disputes with respect to [the Option] Agreement shall be determined in either the United States Bankruptcy Court for the District of Maryland or the United States District Court for the District of Vermont, depending on Optionor's status in the bankruptcy proceedings.<sup>12</sup>

Third, TransCanada contends that "other factual and legal issues not addressed by the Board's questions [in the Board's August 24, 2005, Memorandum] also affect TransCanada's rights and duties under the Option Agreement."<sup>13</sup>

In its comments on the Stipulation, TransCanada states that the Stipulation appears to be "an attempt to formalize (or accept) aspects of the 'offer' of BFPC contained in its letter of August 1, 2005," to Rockingham.<sup>14</sup> TransCanada continues to characterize the proposal envisioned in BFPC's motion to amend as "a new and different transaction in many material respects."<sup>15</sup>

Island also opposes BFPC's motion. Relying on reasons similar to those articulated by TransCanada, Island maintains:

the substitution of parties to this very complex and expensive transaction constitutes a material change that requires a full and fair assessment of the material facts and an evaluation as to whether the applicable statutory criteria can be met.<sup>16</sup>

Island also argues that proceeding with summary approval of BFPC's motion would not be appropriate because "there has been no assessment of the financial consequences (benefits or risks) of the new transaction."<sup>17</sup>

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11. Response of TransCanada to Board's August 24, 2005, Memorandum at 2.

12. *Id.* at 6. No party has disagreed with TransCanada's position with regard to the implications of the forum selection clause. The dispute rests with regard to the degree to which the Board can act with regard to the request to modify its June Order as requested by BFPC, VHPA and Rockingham.

13. *Id.* at 1. TransCanada adds that "given the limited time for response, these comments do not represent a full discussion of the issues raised." *Id.*

14. TransCanada Letter of September 6, 2005.

15. *Id.*

16. Island's Comments in Advance of August 30, 2005, Status Conference.

17. *Id.*

### Discussion

In order to approve these proposed transactions, we must find that the sale of the Dam "will promote the general good of the state."<sup>18</sup> We are unable to do so on the present record. Not only have we been asked to approve a set of transactions that are significantly different from those originally filed in February of this year, but we are asked to conduct our review in an unrealistically short time period.

BFPC filed its motion on August 10, 2005. That filing contained only a general description of the amended \$72 million transaction for which BFPC seeks approval. Not until Thursday, September 1, 2005, did BFPC submit the Stipulation that provides details of the proposal. While the Stipulation clarifies many of the details of the newly-proposed transactions, we and the parties still lack sufficient information necessary to review the new transactions being proposed. It may well be that the transactions, as amended, can be shown to promote the general good; however, at this time, without an evidentiary record developed with due regard for the parties' rights, we cannot reach that conclusion.

For example, we must, of necessity, review the appropriateness of the proposed ownership of the Dam, both its ultimate disposition, and its status in the interim. With the original proposal, these issues were fully vetted and explored. While the original proposal involves various transactions, they centered upon, and culminated in, TransCanada's transfer of the Dam to Rockingham.<sup>19</sup> In that first proposal, VHPA's role was that of financing intermediary between TransCanada and Rockingham.<sup>20</sup> Rockingham represented, and we found, that:

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18. 30 V.S.A. § 109. During the status conference, BFPC and the other proponents of its motion argued that the Board need not review the benefits to Rockingham. While this argument may have merit with respect to review under 30 V.S.A. § 231, we cannot make the requisite § 109 determination without exploring and considering such benefits.

19. The Board's Order of June 6, 2005, reviewed a number of transactions that would result in the transfer of the Dam from TransCanada to the VHPA, and from the VHPA to Rockingham. TransCanada was granted a Certificate of Consent ("COC") to transfer the Dam to VHPA. VHPA received a Certificate of Public Good ("CPG") to acquire the Dam, and a COC to transfer the Dam to Rockingham. Rockingham received a CPG to acquire and own the Dam and a COC to lease the Dam to BFPC. We also granted BFPC a CPG to operate the Dam under the terms of the lease.

20. See Order of June 6, 2005, at Finding No. 10.

On December 7, 2004, the Town, VHPA and BFPC executed a Master Agreement that provided that, upon the conveyance of the Dam to VHPA, the Town will accept conveyance of the Dam from VHPA, and VHPA will convey the Dam to the Town.<sup>21</sup>

According to John Sayles, Interim Manager of the VHPA:

[T]he agreements between the parties . . . require VHPA to act in a financing capacity by putting VHPA in Rockingham's shoes until closing occurs, at which time ownership is transferred to [Rockingham] . . . ."<sup>22</sup>

Rockingham's witness, Richard Silkman, testified that:

VHPA's purpose is to serve as a financial intermediary. In this capacity, Rockingham has assigned its interest in the Option Agreement and the Lease Agreement to the VHPA for financing purposes. At closing, VHPA will instantaneously transfer back to Rockingham title to the [Dam] and its interests in the Lease Agreement.<sup>23</sup>

Under BFPC's alternative proposal, VHPA and Rockingham's roles change. Instead of temporarily acquiring the Dam to facilitate Rockingham's ultimate ownership and lease of the Dam to BFPC, VHPA would be the owner and lessor. While we did review the appropriateness of VHPA's ownership of the Dam in the original proposal, we did so in the context of the proposal placed before us. In that context, VHPA would own the Dam and then "instantaneously" transfer it to Rockingham.<sup>24</sup> That proposal placed VHPA in a more limited position to facilitate the financing of a purchase for Rockingham, not in an ownership role.

This is different. While VHPA may in fact be a suitable owner, we cannot determine this without additional information. The existing record was developed with VHPA serving solely a financing function, and with Rockingham – not VHPA – as the ultimate owner of the Dam.

Similarly, the alternative proposal places VHPA in the role of lessor. Also, according to the Stipulation, either BFPC or VHPA now has an option, upon notice to Rockingham and receipt of the necessary regulatory approvals, "to collapse the Lease Agreement by transferring the [Dam] to BFPC for one dollar."<sup>25</sup> In this Docket, we considered Rockingham as the lessor of

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21. Order of June 6, 2005, at Finding No. 10, citing to Rockingham exh. 10.

22. Sayles pf. 2/10/05 at 7.

23. Silkman pf. 2/10/05 at 17 (emphasis added).

24. *Id.*

25. Response of VHPA, Rockingham, and BFPC to Board Memorandum, August 26, 2005, at 1.

the Dam, and the lessor/lessee relationships to be between Rockingham and BFPC. There is an insufficient record as to the implications of VHPA replacing Rockingham in this role.

These and other issues presented by the amended proposal and Stipulation would need to be considered in the context of further evidentiary hearings in which all parties have the opportunity to present evidence in support of their positions. We conclude that further process is due in order that the rights of all the parties (as well as the interests of the general public) are protected. We are prepared to set a schedule for further investigations into these amended transactions and Stipulation.

We note that during the status conference BFPC suggested that our approval of these amended transactions would not be unlike our review of other similar cases such as the transfer of this and other Connecticut River dams.<sup>26</sup> We disagree for one very fundamental reason. In those cases, parties had full opportunity to explore the details and merits of the proposed transactions. The same opportunity must be afforded in the present case. BFPC, VHPA and Rockingham have given this Board three business days (not including the day of filing) to review and render a decision on their Stipulation. We emphasize, the amended proposal may be as beneficial as its proponents want us to conclude. But, at this point, we cannot grant BFPC's motion without better understanding the implications of the transactions that we would be approving. Given BFPC's request for an order today, on the current record, the only order we can issue is one denying BFPC's motion. Accordingly, we deny the motion.

So Ordered.

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26. See, e.g., Docket 7038, Order of 3/25/05; see also Docket 6039, Order of 6/29/98.

Dated at Montpelier, Vermont, this 8th day of September, 2005.

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\_\_\_\_\_) PUBLIC SERVICE  
\_\_\_\_\_) BOARD  
s/David C. Coen\_\_\_\_\_) OF VERMONT  
\_\_\_\_\_)  
s/John D. Burke\_\_\_\_\_)

OFFICE OF THE CLERK

FILED: September 8, 2005

ATTEST: s/Judith C. Whitney  
Acting Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)*