

UNITED STATES OF AMERICA 112 FERC ¶62,206
FEDERAL ENERGY REGULATORY COMMISSION

USGen New England, Inc.
TransCanada Hydro Northeast Inc.
Town of Rockingham, Vermont
Bellows Falls Power Company, LLC
Vermont Hydro-Electric Power Authority

Project No. 1855-030

ORDER DENYING MOTION TO SUBSTITUTE APPLICANTS AND
APPLICATION TO TRANSFER LICENSE

(Issued September 09, 2005)

This order denies a motion to substitute a new entity for a current transferee applicant and for transfer of the license for the Bellows Falls Project No. 1855 on the grounds that the licensee does not agree to the substitution and the current transferee applicant is not qualified to be a licensee for the project.

BACKGROUND

By application filed October 29, 2004, USGen New England, Inc. (USGenNE) and TransCanada Hydro Northeast Inc. (TC Hydro NE) requested Commission approval of the transfer of USGenNE's licenses for its five hydroelectric projects, including the license for the Bellows Falls Hydroelectric Project, from USGenNE to TC Hydro NE.¹ The application was filed in order to implement part of USGenNE's plan to liquidate its assets pursuant to the U.S. Bankruptcy Code. On July 8, 2003, USGenNE filed with the United States Bankruptcy Court for the District of Maryland a voluntary petition for relief under Chapter 11 of the Bankruptcy Code due to its deteriorating financial condition. On September 29, 2004, USGenNE entered into an Asset Purchase and Sale Agreement with TC Hydro NE whereby TC Hydro NE would acquire the five hydroelectric projects under a bidding/auction process conducted by the Bankruptcy Court. The agreement was made

¹ The Bellows Falls license was issued to New England Power Company in 1979 for a term ending April 30, 2018. 8 FERC ¶ 61,122 (1979). The license was transferred to USGenNE in 1998. 82 FERC ¶ 62,138 (1998). The project is located on the Connecticut River in Windham and Windsor Counties, Vermont, and in Cheshire and Sullivan Counties, New Hampshire.

subject to an option to purchase the Bellows Falls Project that USGenNE conveyed to the Town of Rockingham, Vermont (the Town) under an option agreement executed July 13, 2004. The transfer application was approved by order issued January 24, 2005, conditioned on TC Hydro NE filing copies of conveyance documents and the form showing TC Hydro NE's acceptance of the transfer order.²

Prior to the consummation of the USGenNE-TC Hydro NE transfer, by application filed January 26, 2005, USGenNE; the Town; Bellows Falls Power Company, LLC (BFPC); and Vermont Hydro-Electric Power Authority (VHPA) requested Commission approval of the transfer of USGenNE's license for the Bellows Falls Project to the Town and BFPC. The application was based on the Town's option to purchase the Bellows Falls Project.³ The application also requested approval of a financing plan whereby VHPA would, at the closing of the sale of the project, and for financing purposes only, take title to project property and immediately transfer it to the Town. The application did not seek to make VHPA a licensee. Public notice of the transfer application was issued, and TC Hydro NE filed a timely motion to intervene requesting party status only.⁴ No comments or protests were filed.

In a supplement to the application, filed May 24, 2005, TC Hydro NE and the other applicants reported that TC Hydro NE had, on April 1, 2005, closed on its purchase of the Bellows Falls Project (thus becoming the licensee), and they requested that TC Hydro NE be substituted for USGenNE as the transferor for the application. Public notice of the May 24 supplemental request was issued. No comments, protests, or motion to intervene were filed. That request is unopposed and is granted.

In a motion filed August 10, 2005, as supplemented August 17, 2005, VHPA, the Town, and BFPC request that VHPA be substituted for the Town as a transferee applicant. While the Town, in accordance with the requirements of the option agreement, has obtained a Certificate of Public Good from the Vermont Public Service Board (VPSB) authorizing the Town's purchase of the project, which the VPSB issued on June 6, 2005,⁵ the Town has not secured all of the necessary authorizations to

² 110 FERC ¶ 62,052.

³ The option agreement is included as Attachment A to the January 26, 2005 application.

⁴ The motion was timely, unopposed, and accordingly granted by operation of Rule 214(c)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. Section 385.214(c)(1) (2004).

⁵ The Certificate of Public Good is included as Exhibit A of the August 10 motion.

demonstrate that it has the legal competence to become a licensee for the project. Under the governing Vermont statute (30 V.S.A. § 604(d)), the Town is empowered to acquire, own, and operate the Bellows Falls Project "if duly authorized by its voters."⁶ The Town's voters have twice voted down a proposal to authorize the Town to purchase the project.

The motion stated that the Town had assigned its option to purchase the project to VHPA. The motion cited a November 23, 2004 order of the Bankruptcy Court allowing the substitution of VHPA for the Vermont Public Power Supply Authority (VPPCA) in the option agreement and allowing the Town to assign the option agreement to VHPA "for the purposes set forth in the Option," all without TC Hydro NE's consent and over TC Hydro NE's objection.

The motion also stated that the Town, VHPA, and BFPC entered into a Master Agreement governing arrangements between them before and after VHPA acquires the project from TC Hydro NE. Under section 2.12(a) of the Master Agreement, VHPA has the right to sell the project to BFPC if the Town does not assume all of VHPA's interest in the project by one business day following the closing. Under the original transaction, USGenNE (and now TC Hydro NE) would convey title for the Bellows Falls Project to VHPA for financing purposes only, and VHPA would immediately pass title to the Town, and the Town would then lease the project to BFPC. Under the current proposal, TC Hydro NE would convey title for the project to VHPA, which would then lease the project to BFPC.⁷ The motion noted that TC Hydro NE is not a signatory to the Master Agreement.

⁶ The statutory provisions are included as Attachment D to the January 26, 2005 application.

⁷ The Master Agreement is included as Attachment C to the January 26, 2005 application. The August 10 motion is unclear about exactly what rights in project property VHPA would hold. While the wording of section 2.12(a) of the Master Agreement speaks of VHPA selling the project to BFPC, under the latest proposal of the Town, VHPA, and BFPC (*see* p. 4 of their August 10 motion), VHPA would lease the project to BFPC to operate the project and VHPA would retain rights in the project as the lessor that require it to be a licensee along with BFPC. Licensees must hold all rights in project property necessary to fulfill all license requirements. However, the Commission does not typically involve itself in agreements assigning rights in project property among co-licensees, because each co-licensee is jointly and severally liable to fulfill all license requirements. *See, e.g., KAMO Electric Coop., Inc. and Okla. Municipal Power Auth.*, 41 FERC ¶ 61,046 at p. 61,143 (1987). Here, it is sufficient to find that, as noted, the motion to substitute states that VHPA would hold rights in project property that would require it to

The August 17 supplement to the motion to substitute transferee applicants requested issuance of an order deciding the application prior to September 11, 2005, explaining that TC Hydro NE, under the option agreement has a right to void the option if "governmental approvals" are not "in place" by that date.⁸ Also on August 17, 2005, TC Hydro NE filed a letter stating that it did not join in the August 10 motion; that it disagrees with several representations in the motion and that it would file a full description of its position on August 31.

Public notice of the August 10 motion and August 17 supplement was issued on August 19, 2005, establishing September 1, 2005, as the deadline for filing answers to the motion and supplement. On September 1, 2005, TC Hydro NE filed an answer to the motion. As described below, it refused to join in the request to substitute transferee applicants on ground that the substitution is not allowed under the option agreement.

DISCUSSION

Section 8 of the FPA provides "[t]hat no voluntary transfer of any license ... shall be made without the written approval of the Commission" The only form of involuntary transfer referred to in section 8 is under the proviso of section 8 for "a mortgage or trust deed or judicial sales made thereunder or under tax sales" Therefore, with the exception of the "involuntary" transfers described in the Section 8 proviso, a licensee cannot be compelled to transfer its project license.⁹ Moreover, under section 6 of the FPA, a license may not be altered without the agreement of the licensee, and changing a licensee constitutes such an alteration.¹⁰ Consequently, absent a completed involuntary transfer of the license, TC Hydro NE is the licensee for the

be a licensee.

⁸ See p. 4 of the August 17 filing. The filing (*id.*) also quotes section 5 of the option, which provides in part that "all governmental approvals [must be] in final nonappealable form." Since initial Commission orders approving transfers are subject to a 30-day rehearing period, it appears that an initial order approving the transfer should have been issued by August 12 to meet the movants' deadline for issuance of a "final nonappealable" order by September 11. Moreover, the parties dispute the issue of whether or not the above-described June 6, 2005 Certificate of Public Good approving the transfer of the project to the Town covers the current proposal to substitute VHPA for the Town in the sales transaction.

⁹ See *Pittsburgh Water and Sewer Authority*, 67 FERC ¶ 61,200 at n. 8 (1994).

¹⁰ *Id.*

Bellows Falls Project, and absent its agreement, VHPA cannot be substituted for the Town as a transferee applicant.

In their motion to substitute transferee applicants, movants argue that TC Hydro NE's purchase of the Bellows Falls Project was made subject to the Town's option to purchase the project; that the Town has validly assigned its option to VHPA, consistent with the provisions of the option agreement; that the Master Agreement authorizes VHPA to close the option transaction in the event that the Town cannot do so; that TC Hydro NE is legally bound by the assignment to VHPA; and that TC Hydro NE's signature on the May 24, 2005 motion to substitute itself for USGenNE as the transferor obliges it to transfer the project to VHPA and BFPC.

In its reply to the motion, TC Hydro NE argues that the option agreement allowed the Town to substitute VHPA for VPPCA for financing purposes only and not for all purposes, as movants allege;¹¹ that the Town has no right under its option agreement to assign its option to VHPA, as movants propose; that it (TC Hydro NE) is not a party to the Master Agreement, and the Master Agreement can not provide VHPA with any more rights to acquire the project than it has under the option agreement; and that accordingly, it (TC Hydro NE) is not bound to honor the alleged assignment to VHPA.

The basis of the motion to substitute involves a contractual dispute between movants and TC Hydro NE concerning the Town's right to assign its option to purchase the Bellows Falls Project. It is well-settled that the Commission is not the proper forum for resolving such disputes. As the Commission found in *Halecrest Company*, 60 FERC ¶ 61,121 at p. 61,413 (1992):

¹¹ TC Hydro NE cites (at pp. 10-11 of its September 1 filing) Paragraph 17 of the option agreement, which in part provides:

Optionee [Town] may not assign this Agreement without the prior written consent of Optionor, which consent may be withheld in Optionor's sole discretion, except that Optionee may assign this Agreement in its sole discretion and upon notification of Optionor to the Vermont Public Power Supply Authority for the purpose of financing the transaction contemplated herein; provided, however, upon the termination of such financing that the Optionee shall own the project after the financing period.

The FPA does not confer on this Commission any jurisdiction or authority to resolve disputes between the licensee and third parties that concern interests in real property, contractual obligations, fiduciary relationships, or fraudulent misrepresentation not entailing any alleged violation of the FPA or the Commission's regulations.^[12]

Therefore, the Commission cannot decide here that TC Hydro NE has contractually consented to the substitution of VHPA for the Town, as movants allege.

Movants further allege (p. 7 of their August 17, 2005 filing) that the entire transfer application, including the substitution of transferee applicants, can be considered as an "involuntary transfer" under the Section 8 of the FPA. They contend that the above-cited Bankruptcy Court's November 23, 2004 order approving the assignment of the option from the Town to VHPA over the objection of TC Hydro NE means that the Town can assign its interest in the option to VHPA for any and all purposes that the Town was to fulfill in the sales transaction, notwithstanding TC Hydro NE's objections.

However, the proposed transfer does not qualify as a so-called involuntary transfer under the proviso of FPA Section 8. USGenNE's proposal in its bankruptcy proceeding to sell its projects, including Project No. 1855, to TC Hydro NE was made: "In order to raise capital to meet [USGenNE's] financial obligations [after it] examined its options and, in consultation with its creditors, decided to sell its generating assets, including its Commission-licensed hydroelectric project's."¹³ While the proposed sale required the bankruptcy court's approval, it was not and is not a judicial sale made under "a mortgage or trust deed," as the section 8 proviso requires. Contrary to movants' contentions, TC Hydro NE's substitution for USGenNE as the licensee/transferor in the application to transfer the Bellows Falls license to the Town, and TC Hydro NE's objection to the transfer to VHPA as a substitute for the Town, do not convert this voluntary transfer into an involuntary transfer.

¹² Citing, *inter alia*, *New York Irrigation District*, 46 FERC ¶ 61,379 at p. 62,183 (1989) (Commission is not the proper forum to adjudicate allegations of breach of contract and breach of fiduciary duty); and *Mary C. Heather and Joseph A. Guerrieri*, 54 FERC ¶61,329 (1991) (Commission is not the proper forum in which to resolve dispute over title to land).

¹³ See the application for approval of the transfer of USGenNE's licenses to TC Hydro NE, filed October 29, 2004, at pp. 1-2.

As noted, in support of their contention that the sale of the Bellows Falls Project involves an involuntary transfer of the project's license, movants contend that the Bankruptcy Court's November 23, 2004 order required TC Hydro NE to comply with the proposed transfer to VHPA. However, in response to this contention, TC Hydro NE argues that the Bankruptcy Court's order simply enabled VHPA, instead of VPPCA, to acquire the project temporarily for financing purposes only, as described in the option agreement. TC Hydro NE (pp. 15-16 of its September 1, 2005 answer) cites wording in the court's order providing that "that the Town, may, if need be, assign the Option Agreement to VHPA *for the purposes set forth in the Option*" (*emphasis added*) and that such substitution "does not constitute a material modification of the Option." This wording appears to support TC Hydro NE's contention that the court's order, like the option itself, permitted only the substitution of VHPA for VPPCA as a financing entity in the sale of the Bellows Falls Project and did not permit VHPA to be substituted for the Town in the sale.

However, the Commission can no more resolve the disputed interpretation of the Bankruptcy Court's November 23, 2004 order as it applies to the option agreement than it can resolve the disputed interpretation of the option agreement itself.¹⁴

Accordingly, since TC Hydro NE is the licensee for the Bellows Falls Project, and it has not joined in the motion to substitute VHPA for the Town as a transferee applicant, the motion must be denied.

The Town has failed to demonstrate that it is qualified to be a licensee for the Bellows Falls Project, and therefore the application to transfer the license for the Bellows Falls Project from TC Hydro NE to the Town and BHPC must be denied.

The Director orders:

(A) The request filed May 24, 2005, to substitute TransCanada Hydro Northeast Inc. for USGen New England, Inc. as the transferor applicant is granted.

¹⁴ Movants themselves argue (p. 4 of their August 17 filing) that their dispute with TC Hydro NE is best decided in an appropriate judicial forum, and that therefore the Commission should approve the substitution of applicants and the transfer and not allow TC Hydro NE's refusal to join the motion to substitute applicants thwart the option to purchase the Bellows Falls Project. However, the jeopardy that the option is facing cannot be remedied here by ignoring the requirements of the Federal Power Act.

(B) The motion filed August 10, 2005, and supplemented August 17, 2005, to substitute Vermont Hydro-Electric Power Authority for the Town of Rockingham, Vermont as a transferee applicant is denied.

(C) Transfer of the license for the Bellows Falls Project No. 1855 from TransCanada Northeast Inc. to the Town of Rockingham, Vermont and Bellows Falls Power Company, LLC is denied.

(D) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 CFR § 385.713.

Joseph D. Morgan
Director, Division of Hydropower
Administration and Compliance