

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MARYLAND  
(Greenbelt Division)**

In re:

USGen New England, Inc.,

Debtor.

Case No. 03-30465 (PM)

Chapter 11

**EMERGENCY MOTION FOR ENFORCEMENT  
AND/OR CLARIFICATION OF PRIOR ORDERS**

**INTRODUCTION**

The Town of Rockingham, Vermont (the "Town"), requests the Court to enforce and/or clarify its prior order of July 23, 2004 (the "Order"), adopting the commitment of the Debtor and the Town to the Option Agreement (the "Option"), concerning the Bellows Falls Project, a hydroelectric project owned by the Debtor. Specifically, the Town seeks an order from the Court ordering TransCanada Hydro Northeast, Inc. ("TransCanada") to cease and desist in its efforts to undermine the Option in violation of its agreements with the Debtor, and to expressly allow certain minor revisions to the Option which do not work any material changes in the underlying deal, all in compliance with the express covenant of good faith agreed to by the parties to the Option, and by TransCanada by virtue of its adoption of the Option in an Asset Purchase Agreement (the "APA"), for the Debtor's hydroelectric assets, also approved by this Court.

This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Town seeks the Court's exercise of its authority under 11 U.S.C. § 105 and its inherent authority to enforce its own orders.

On July 23, 2004, after a vigorously contested adversary proceeding, the Court approved a Consent Decree and Order compromising the claims of the Town and the Debtor, through the terms of an Option agreement. As discussed below, the Option contained not an implied, but an express covenant of good faith, mandating that the parties work in a commercially reasonable manner to get the deal done, not to defeat it.

After the Option was approved by the Court, the Debtor entered into an Asset Purchase Agreement (the "APA"), dated September 29, 2004, for its hydroelectric facilities, with TransCanada, also approved by the Court. In the APA, TransCanada agreed to be bound by the terms of the Debtor's contracts relating to the Debtor's hydroelectric facilities, including, expressly, the Option.

The Town is nearing the time for exercise of the Option by the deadline, December 1, 2004. It is arranging for funding of the \$72,046,000, but there are unanticipated wrinkles in proceeding. In short, while there is an antiassignment provision that allows assignment of the Option to a Vermont state agency, the agency named in the Option cannot participate, it has been learned after the fact, and another Vermont state agency can and is willing to participate in a transaction that would secure the funding. A second issue involves return of the \$72,046,000 deposit from the Escrow Agent under the Option, in the event the Option is exercised, but, for any reason, the Town fails later to close. The Town has asked the Debtor to consent to minor changes to the Option to address these concerns, but the Debtor, citing fear of claims by TransCanada under the APA, has declined. Most egregiously, however, TransCanada is directly attempting to torpedo the Town's ability to exercise the Option by soliciting votes of Rockingham's citizens against exercise of the Option.

## ARGUMENT

### I. TransCanada Hydro Northeast, Inc. has Violated the Covenant of Good Faith

TransCanada Hydro Northeast, Inc. ("TransCanada") has agreed, in the APA, to be bound by the terms of the Option between the Debtor and the Town of Rockingham, Vermont (the "Town"), concerning purchase of the Bellows Falls Project. See e.g., APA §§ 3.1, 3.2(b) and 9.9(b). The Option is Exhibit 1.1(a)(i) to the APA. The Option, § 28, contains an express covenant of good faith, obligating the Debtor to work with the Town in good faith to consummate the transaction:

The parties hereby expressly covenant to conduct themselves in good faith in relation to performance of the terms of this Agreement. Good faith shall include both honesty in fact and commercially reasonable conduct undertaken in an effort to accomplish, not defeat, the goals delineated by this Agreement.

Having agreed to be bound by the Option, TransCanada is bound also not to try to defeat the performance of the Option. Unfortunately, TransCanada is subverting the Town's ability to perform the Option.

TransCanada has seen fit to inject itself into an upcoming vote of the Town by sending a letter to each voter in the Town, urging the voters to vote against the Town acquiring the Bellows Falls Project. A copy of the letter is attached as Exhibit A. Were TransCanada a resident of the Town, the attached letter might be considered a form of protected political speech. TransCanada is not, however, a resident or a taxpayer of the Town of Rockingham. Rather, it is simply an outside commercial entity that seeks to undermine the Town's deal with the Debtor so that, by the terms of its own deal with the Debtor, TransCanada may acquire the dam itself. That too might be protected activity, in a neutral setting, (or, perhaps, tortuous activity), but TransCanada has already agreed to be bound by the deal, and the deal has been sanctioned by a prior order of this Court. TransCanada is therefore attempting to frustrate the clear intent of this Court, which

has ordered the duties placed on the Debtor under the Option to be performed. TransCanada, in turn, has agreed to perform the Debtor's duties to the Town, and is the beneficiary of the Court's approval of the APA. Trying to kill a deal to which one is already bound is the quintessence of bad faith dealing.

Vermont recognizes an implied covenant of good faith in all contracts, see Carmichael v. Adirondack Bottled Gas Corp. of Vermont, 635 A.2d 1211 (Vt. 1993), and, in the Option, the covenant is express and defined. The effect of the violation of the covenant of good faith engaged in by TransCanada cannot be quantified. Rockingham seeks ownership of the Bellows Falls Project for a host of reasons, elaborately discussed in the proceedings leading up to the Consent Decree adopting the Option, and those reasons deal with tax relief, future development of the Town, its industrial base for the next 100 years, and other plainly unquantifiable matters involving the health and welfare of its citizens and the public policy of the State of Vermont concerning municipally owned utilities. Indeed, if TransCanada successfully manages to prevent exercise of the Option through its bad faith injection into the Rockingham vote, TransCanada will claim that its actions are insulated from liability because the voters, not TransCanada, did not let the deal go forward.

TransCanada's breach of the covenant of good faith goes to the heart of the contract, because it seeks to incapacitate the Town from performing the Option itself, by preventing the Town from obtaining the voter approval needed. "An underlying principle implied in every contract is that each party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement." Id. at 1216. The purpose of a covenant of good faith is "to ensure that parties to a contract act with 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" Id. (quoting Restatement

(Second) of Contracts § 205 comment a (1981)). When such a breach goes to the heart of a contract, and results in unquantifiable, indeed, unknowable, harm, the Court has the full panoply of remedies in equity, from rescission, to reformation, to specific performance. See Hilder v. St. Peter, 478 A.2d 202, 209 (Vt. 1984).

The Court must order TransCanada to cease interfering with the vote of the residents of the Town, and to cease any other activity designed to frustrate the performance of the Option. TransCanada, in addition, must be directed to send a new communication to the residents of the Town, withdrawing its opposition to consummation of the Option.

II. TransCanada (and US Gen) must Allow Minor Clarifications to the Option

The Court should additionally order TransCanada and US Gen to assist the Town by cooperating in reasonable requests by the Town for commercially reasonable accommodations so the Town can accomplish the deal, or to rescind the contract entirely.

A. Substitution of State Agency

Section 17 of the Option is an antiassignment clause, but it permits an assignment of the Option to the Vermont Public Power Supply Authority in order to accomplish the transaction. At the time, both US Gen and the Town believed that that agency would be the appropriate state entity. It turns out, however, that the internal constraints on that agency's authority discourage it from financing arrangements that extend beyond 10 years. The Town learned this after the fact. The Town has learned also, however, that another state agency, the newly formed Vermont Hydroelectric Power Authority, wishes to assist the Town to accomplish the transaction. The Town has asked the Debtor to agree to substitute the VHPA for the Vermont Public Power Supply Authority.

The Debtor has responded by saying it does not believe it can, citing constraints on its discretion arising from its recent commitments made in the Asset Purchase Agreement with TransCanada Hydro Northeast, Inc. ("TransCanada"), particularly § 9.3(a)(3), which provides that the Debtor shall not "(A) amend, modify, or change in any material respect any Assigned Contract or Lease. (Emphasis added.) There is no question that the Option is an assigned contract to which TransCanada has agreed to be bound. The question is, however, whether the substitution of one Vermont state agency for another to accomplish the very same goal is a material change to the Option, and simply formulating the question leads to the answer--obviously not.

Whether TransCanada, in another effort to kill the Option, is behind the unreasonable refusal to allow the substitution is unknown, but it is plain that such a substitution works no material change, and any spirit of commercial reasonableness would permit such a substitution. Under the terms of the TransCanada APA, sale of the Bellows Falls Project is revenue neutral to the Debtor, and, as to TransCanada, it either purchases the project as part of the \$505,000,000 it has agreed to pay, or its purchase does not include the project, but it receives the \$72,046,000 paid by the Town. The fact that, post drafting of the Option, it turns out that the Town must utilize a different public entity than originally contemplated, makes no material difference in the workings of the Option, its outcome, or the monies involved.

TransCanada plainly desires to acquire the Bellows Falls Project, rather than allow the Town to acquire it, as evidenced by the letter to the voters of the Town. It is not apparent how the requested substitution could work any material change in the Option, or, for that matter, in the larger deal under the APA, to which TransCanada has agreed to be bound. As to the Bellows Falls Project, there is in fact no difference between TransCanada and the Debtor. The money is the same, the outcome, is the same, no matter what state agency the Town utilizes. Both the

Debtor and TransCanada should comply with the covenant of good faith, be commercially reasonable in an effort to permit the transaction to proceed, as they are expressly bound to be, and not be obstructionist when a commercially reasonable accommodation is requested to deal with what was, at most, a mutual mistake in identifying the proper state agency to which the Option could be assigned. It is not commercially reasonable to refuse to permit the substitution where it makes no difference in the outcome of the deal and thus is not a material change.

Of course, the issue of mutual mistake or reformation is not critical here. Section 28 of the Option was included because it was contemplated that minor difficulties might pop up in the future, hindering the parties, and §28 was designed to promote reasonable cooperation in overcoming such difficulties. The substitution of one state agency for another is not really reformation ; it is completely within the terms of the contract s goal of fostering reasonable accommodations. To the extent, however, that mutual mistake is a necessary argument, designating the wrong state agency was the result of an exchange under which the Debtor agreed that, if needed, the Town could transfer the Option to a Vermont state agency, and left it to the Town to name the agency in the final drafts of the Option. The Debtor agreed to accept whatever agency the Town named, and did so. Thus, both parties relied on the same information, that the named agency was capable of participating in the deal, and that turns out now to have been wrong. "The usual remedies applied to mutual mistake in contract formation are rescission and reformation." Rancourt v. Verba, 678 A.2d 886, 889 (Vt. 1996). "The jurisdiction of courts of equity to reform written instruments which through fraud or mistake fail to speak the true agreement of the parties, has long been firmly established." Shearer v. Welch, 223 A.2d 552, 554 (Vt. 1966). The "true agreement" in the Option was that the Town could involve a state agency capable of participating. That is all that the requested substitution seeks to clarify.

B. Clarification Regarding Return of the Deposit

Under the Option, the Town places \$72,046,000 in escrow, upon exercise of the Option, pending closing of the deal. A variety of provisions deal with return of the deposit if the closing does not occur, for a variety of reasons. The Option provision at issue, however, is not a model of draftsmanship:

13.1. Remedies. If Optionor shall fail to complete Closing in accordance with its obligations under the terms of this Agreement, then Optionee shall have the sole option of either: (a) terminating this Agreement, in which event Optionor shall be released and relieved of any further liability and this Agreement shall thereupon be null and void, and Optionee shall be entitled to return of any deposit made or (b) suing Optionor for specific performance. If Optionee shall fail to complete closing in accordance with the terms of this Agreement, then this Agreement shall be considered null and void except for the provisions of Paragraphs 11, 12.3, 27 and 29, and any provisions of the Consent Order entered into by the Parties, which shall survive such termination.

Subsection (a), dealing with Optionor's [Debtor's] default, contains the comforting clause "and Optionee [the Town] shall be entitled to return of any deposit made." The last sentence, dealing with the Town's default, omits the comforting language, although it repeats the "null and void" language. This absence of parallel structure concerning return of the deposit begs the question, as to what happens to the deposit if the Town defaults and refuses to close despite being able to do so. The fact that this question exists has caused understandable nervousness on the part of the entities willing to provide Optionee, that is, the Town, under the Option, \$72,046,000 for a long-term lease.<sup>1</sup> The money would be paid in advance, and used to fund the deposit, and, if the closing on the Option does not occur, there is considerable interest in return of the \$72,046,000. The Town has requested that the Debtor insert the magic words for return of the deposit into the last sentence of § 13.1, but the Debtor again has cited § 9.3(a)(3) of the APA with TransCanada as its reason for refusing to cooperate. The Town submits that this

request is yet another nonmaterial change to the Option, which seeks only to clarify its stated purpose, not change it. As is readily apparent from the quoted section of the Option, the consequences of the Town's failure to close are spelled out in detail. The agreement becomes "null and void" (just as it can under the first sentence of § 13.1, if the Debtor did not close and the Town elected that remedy), and the last sentence of § 13.1 specifies that certain sections survive the evaporation of the contract. None of those sections impose a monetary penalty that would affect the deposit. In any event, when a contract provides that it becomes null and void, there can be no claims made on the contract for contract damages.

In Knight v. McNeil, 99 A. 728 (Vt. 1917), a buyer and seller exchanged promissory notes that were to be returned if a purchase of a grocery store did not close. The agreement for sale provided that, in certain instances, the agreement became "null and void." When the buyers backed out, they asked for their promissory note back. The Court found that, under specific terms of the agreement, the time had passed when the buyers could back out and have the agreement become "null and void". The court agreed, however, that the seller would not have been able to keep the promissory note had the agreement become "null and void," because, had that occurred, there could be no damages claim. Case law from other jurisdictions is consistent. See Collins v. Finnell, 29 P.3d 93, 100 (Wyo. 2001) (no enforceable contract rights where a contract is null and void. If the agreement is void, it cannot be a contract because the law will neither give a remedy for its breach nor recognize its performance as a duty); see also Paternostro v. Capitano, 205 So.2d 894, 896 (La. App. 1968) ("In view of the fact that the plaintiffs did not obtain the loan as stipulated by February 3, 1966, by the very terms of the agreement it became null and void; consequently, the plaintiffs cannot obtain specific

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<sup>1</sup> The source of funding is to be from Brascan, by means of an upfront payment for a lease of the facility, thus providing the Town with the expertise needed to operate the project.

performance or damages predicated upon a contract which had become null by virtue of the very terms thereof."); cf. Restatement (Second) of Contracts § 7, comment A ("A promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor is often called a void contract. . . . [H]owever, such a promise is not a contract at all" since it is "void of legal effect").

One cannot provide for a contract to become null and void, and then argue for damages for breach of it, thus there can be no claim on the deposit if the Town does not close. The Option Agreement provides that, upon failure to close by the Town, the Option becomes null and void, except for the specific provisions the parties agreed would survive, and a special liquidated damages provision, in § 13.2, that is relevant only if, after the failed closing, the Town attempts to purchase the dam or interferes in its sale to a third party.

What else could possibly happen to the deposit once the contract becomes null and void, except that it be returned to the Town? The Town therefore seeks an order from this Court requiring the Debtor and US Gen to accept the proposed clarifying language for Option § 13.1, such that the phrase "and Optionee [the Town] shall be entitled to return of any deposit made" is inserted after the word "terminated" in the last sentence of that section.

None of what is being requested of the Debtor and TransCanada makes any monetary difference to the deals struck and sanctioned by this Court concerning the Bellows Falls Project. Nothing sought here by the Town works any material change in the terms of the Option, or in the TransCanada APA. Besides the request for the Court to prohibit inappropriate behavior by TransCanada concerning the upcoming vote of the Town on the Option, the request to the Court for the two small changes to the Option is simply to make clear the original purposes of the Option, not to work any substantive changes in it. Whether the Court sees the requested changes

as the ministerial correction of mutual mistakes or of drafting errors, or as changes within the reasonable level of cooperation expressly undertaken by the good faith covenant in the Option, or as some form of reformation of the Option to compensate for the misdeeds of TransCanada in trying to destroy the deal, the changes requested are miniscule.

No aspersions on the good faith of the Debtor are intended here. The Debtor, if not for fear of claims by TransCanada, would surely have already agreed to the modest changes requested, the changes being well within the bounds of commercial reasonableness. Unfortunately, with an actively hostile TransCanada in the background, apparently doing everything it can to undermine the deal, the Town must seek the protection of the Court by formal process, so that the Court's orders may be implemented as intended.

#### CONCLUSION

For the foregoing reasons, the Emergency Motion for Enforcement and/or Clarification of Prior Orders must be granted.

/s/ John P. McVeigh  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 16<sup>th</sup> day of November, 2004, a copy of the foregoing Emergency Motion for Enforcement and/or Clarification of Prior Orders was served electronically and/or mailed, postage prepaid, to John Lucian, Esquire, Blank Rome LLP, 250 W. Pratt Street, Suite 2201, Baltimore, Maryland 21201; to Mark E. Richards, Esquire, Blank Rome LLP, The Chrysler Building, 405 Lexington Avenue, New York, New York 10174; to Francis P. Dicello, Esquire, Robert M. Marino, Esquire, 1301 K Street, N.W., Suite 1100, East Tower, Washington, D.C. 20005-3317; to Marc F. Sperber, Esquire, Mayer Brown Rowe & Maw, 190 South LaSalle Street, Chicago, Illinois 60603; and to Christine Johnston, Esquire, Assistant General Counsel, TransCanada, 450 1<sup>st</sup> Street S.W., Calgary, AB, Canada T2P5H1.

/s/ Alan M. Grochal  
Alan M. Grochal