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FEDERAL ENERGY
COMMISSION

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VIA HAND DELIVERY

The Honorable Magalie R. Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: TransCanada Hydro Northeast Inc. Vermont Hydro-electric Authority
Docket No. EC05-122

Dear Ms. Salas:

Enclosed for filing are the original and fourteen copies of Motion to Intervene and Protest of TransCanada Hydro Northeast Inc. to Application Under Section 203 of the Federal Power Act, Request for Expedited Consideration, and Waivers. Also enclosed are two additional copies. Please date stamp the additional copies and return them to the messenger.

If you have any questions concerning this filing, please contact the undersigned at 202-662-2715.

Thank you for attention to this matter.

Respectfully submitted,



Kenneth L. Wiseman
Counsel for TransCanada Hydro Northeast Inc.

cc: Service List

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

TransCanada Hydro Northeast Inc.
Vermont Hydro-electric Authority

Docket No. EC05-122-000

FILED
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FEDERAL ENERGY REGULATORY COMMISSION

**MOTION TO INTERVENE AND
PROTEST OF TRANSCANADA HYDRO NORTHEAST INC.
TO APPLICATION UNDER SECTION 203 OF THE FEDERAL POWER ACT,
REQUEST FOR EXPEDITED CONSIDERATION, AND WAIVERS**

Pursuant to Rules 211, 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or the "Commission"), 18 C.F.R. §§ 385.211, 385.212, and 385.214 (2004), TransCanada Hydro Northeast Inc. ("TC Hydro NE") hereby moves to intervene in the above-referenced proceeding, and, as set forth below, protests the Application of Vermont Hydro-electric Power Authority ("VHPA"). By its Application, VHPA, without TC Hydro NE's agreement or authorization, seeks an order that would authorize TC Hydro NE to transfer to VHPA the FPA jurisdictional facilities associated with the Bellows Falls hydroelectric project, Project No. 1855 (the "Bellows Falls Project" or the "Project"), which is owned and operated by TC Hydro NE. In support of its Protest, TC Hydro NE states as follows:

**I.
INTRODUCTION**

TC Hydro NE protests the Applications because there is no contractual obligation for TC Hydro NE to transfer the Bellows Falls Project to VHPA (i) under the terms of the transaction that VHPA describes as the Proposed Transaction or (ii) under the facts and circumstances as they exist as of the date of this filing.

In its Application, VHPA asks the Commission to act on an expedited basis, characterizing the issue as a routine, run of the mill matter whose substance has supposedly "already been approved by the Commission in its order authorizing the disposition of the Bellows Falls Project." Application, at 1. This is most misleading. First, the transaction previously authorized by the Commission contemplated that, consistent with the terms of the Option Agreement from which VHPA's rights arise, VHPA would have served merely as a conduit to acquire, and simultaneously transfer, the Project to the Town of Rockingham. Under the Proposed Transaction described in the Application, on the other hand, VHPA will own the Project and grant the Town some kind of option (the terms of which, if they exist, are unclear) to acquire it 74 years from now. Second, the new, Proposed Transaction, unlike the transaction previously reviewed by the Commission, squarely violates the terms of the Option Agreement. That Agreement provided that VHPA could be assigned the Town's rights under the Option "for the purpose of financing the transaction contemplated herein; provided, however, upon the termination of such financing that the Optionee [the Town] shall own the project after the financing period." Option Agreement, Paragraph 17, [emphasis supplied]. But in seeking approval for the Proposed Transaction from the Vermont Public Service Board -- approval VHPA does not yet have, despite its representations to the Commission the contrary¹--John Sayles, on behalf of VHPA, testified that the Proposed Transaction would bring "benefits to the Town and the State *without the Town needing to acquire the dam.*" August 10, 2005 Prefiled Testimony in Vermont Public Service Board Docket No. 7047, at 2, [emphasis supplied]. But if the Town does not acquire the dam, the transaction would be in violation of the Option Agreement requirement that the Town acquire the Project. And while the Option Agreement

¹ For that reason, the Commission is not the lone obstacle blocking VHPA from obtaining TC Hydro NE's assets.

permitted VHPA to finance the Town's purchase of the Project, in the Proposed Transaction. VHPA asks the Commission to approve the transfer of the jurisdictional assets to VHPA – not to the Town. Finally, although the Application is remarkably silent on this point, closing on the Option Agreement, and previous regulatory approvals obtained from the state of Vermont, were subject to the Town's citizens approving the transaction. On August 22, 2005, the citizens voted for a second time not to close on the Option Agreement.

To be sure, resolution of the parties rights under the Option Agreement must be resolved in the United States District Court for the District of Vermont pursuant to a forum selection clause in the Option Agreement itself. Resolution of any such contractual dispute by the U.S. District Court would be consistent with the parties' contractual arrangements and with the Commission's long-standing view, first articulated in *Arkansas La. Gas Co. v. Hall*, 7 FERC ¶ 61,175 at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979), that it will not assert jurisdiction over contractual issues otherwise litigable in courts when: (1) the Commission possesses no special expertise which makes the case peculiarly appropriate for Commission decision; (2) there is no need for uniformity of interpretation of the type of question raised in the dispute; and (3) the case is not important in relation to the regulatory responsibilities of the Commission.^{2 3}

² See, e.g., *Kansas Gas Serv. v. Enbridge Pipelines KPC*, 100 FERC ¶ 61,111 at 61,439-40 (2002); *Niagara Mohawk Power Corp. v. Rochester Gas & Elec. Corp.*, 98 FERC ¶ 61,307 at 62,314 (2002); *Trigen-Syracuse Energy Corp.*, 95 FERC ¶ 61,326 at 62, 153 (2001); *Southern Cal. Water Co. v. Southern Cal. Edison Co.*, 94 FERC ¶ 61,286 at 62,027-28 (2001); *Southern Co. Energy Mktg., L.P.*, 86 FERC ¶ 61,131 at 61,459 (1999); *Duquesne Light Co.*, 84 FERC ¶ 61,309 at 62,406-07 (1998); *Rio Grande Elec. Coop., Inc. v. Cent. Power & Light Co.*, 77 FERC ¶ 61,245 at 61,975-77 (1996); *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009 at 61,021 (1995); *Florida Power Corp.*, 68 FERC ¶ 61,351 at 62,413 (1994); *Doswell Ltd. Partnership v. Virginia Elec. and Power Co.*, 61 FERC ¶ 61,196 at 61,730-31 (1992); *City of Camden, S.C. v. Carolina Power and Light Co.*, 56 FERC ¶ 61,149 at 61,550 (1991); *The Villages of Edgerton and Montpelier, Ohio v. Ohio Power Co.*, 49 FERC ¶ 61,306 at 62,161-62 (1989).

³ The key factor in making the determination under the third prong of this test is whether the parties' dispute reduces to a case-specific question. Where, as here, the issue involved affects only the parties involved in the dispute and the issue can be determined by the terms of their contract, the Commission has taken the position that the limited issue presented by the parties' dispute does not warrant the assertion of Commission jurisdiction.

For the foregoing reasons, TransCanada has declined to join in the Application because the Proposed Transaction violates its contractual rights, and the Commission need not permit itself to be placed in the middle of any contract dispute. Also for these reasons that will be discussed more fully below, TC Hydro NE protests VHPA's Application.

II. BACKGROUND

The genesis of the dispute between the parties arises from a voluntary petition for relief under Chapter 11 of the Bankruptcy Code filed by USGen New England Inc. ("USGenNE") on July 8, 2003. In furtherance of its bankruptcy petition, USGenNE, with Bankruptcy Court approval, undertook an effort to sell all its generating assets. As part of USGenNE's effort to divest itself of those assets, USGenNE and TC Hydro NE executed an agreement on September 29, 2004, pursuant to which USGenNE agreed to sell and TC Hydro NE agreed to buy certain hydroelectric generation assets with a total generating capacity of approximately 560 megawatts (MW) and, *inter alia*, related equipment, contracts, leases, and FERC licenses.

The assets consisted of generating systems and associated transmission facilities on two rivers in New England: the approximately 476 MW Connecticut River system in New Hampshire and Vermont and the approximately 84 MW Deerfield River system in Massachusetts and Vermont. The systems included 13 dams with 41 hydroelectric generating units. The Connecticut River system (which is relevant to the pending application) included: the Comerford Dam, which has four hydroelectric generating units (operating under FERC License No. 2077); the McIndoes Dam and the Moore Dam, which have four units each (operating under FERC License No. 2077); the Bellows Falls Project, which utilizes three generating units (operating under FERC License No. 1855); the Vernon Dam, which has eight generating units (operating

under FERC License No. 1904); and the Wilder Dam, which has three generating units (operating under FERC License No. 1892).

The sale and transfer of the hydro assets was subject to Bankruptcy Court and Commission approval. The U.S. Bankruptcy Court for the District of Maryland, Greenbelt Division, provided its approval in an order issued December 16, 2004. The Commission issued its order approving the transfer of the jurisdictional assets associated with the hydroelectric projects from USGenNE to TC Hydro NE in an order dated December 27, 2004.⁴ The Commission also issued an order on January 24, 2005, which authorized USGenNE to transfer each of the licenses associated with the projects to TC Hydro NE.⁵ USGenNE transferred the hydro assets to TC Hydro NE on April 1, 2005.

As noted above, one of the assets that USGenNE transferred to TC Hydro NE was the Bellows Falls Project. The Bellows Falls Project was and is subject to the Option Agreement which was entered into by USGenNE and the Town on July 13, 2004. The Option Agreement provides the Town the right to purchase the Bellows Falls Project under certain terms and conditions, and as part of its agreement with USGenNE, TC Hydro NE became bound by the terms of the Option Agreement. On December 1, 2004, the Town made an initial decision to exercise its option to purchase the Bellows Falls Project. On December 7, 2004, the Town assigned the option to VHPA solely for the purpose of financing a transaction culminating in ownership of the Project by the Town as specified in the Option Agreement. In addition, the Town, VHPA and Bellows Falls Power Company ("BFPC") entered into a Master Agreement, an agreement to which TC Hydro NE is not a party. BFPC is a limited liability company, the membership interests of which are held indirectly 50 percent by Brascan Corporation and 50

⁴ *USGen New England, Inc.*, 109 FERC ¶62,245 (2004).

⁵ *USGen New England, Inc.*, Project Nos. P-1855-028 (Jan. 24, 2005).

percent by Emera Inc. The Master Agreement contemplates that immediately after the closing under the Option Agreement (at which TC Hydro NE would transfer the Bellows Falls Project to VHPA as a financing vehicle for the Town), VHPA would transfer the Project to the Town.

Consistent with its obligations under the Option Agreement, on May 24, 2005, TC Hydro NE filed a joint application with the Town in Docket No. EC05-88-000 requesting Commission authorization to transfer the FPA-jurisdictional facilities associated with the Project to VHPA, based upon VHPA's contractual obligation to immediately thereafter transfer the Project to the Town. The Commission approved that application based upon the transaction that was described therein on July 1, 2005.⁶

On May 24, 2005, TC Hydro NE also joined with the Town, BFPC and USGenNE in asking that TC Hydro NE be substituted for USGen NE as transferor in an application to transfer the Bellows Falls Project license to the Town and BFPC. An application seeking authorization to transfer the license to the Town and BFPC previously had been filed on January 26, 2005 with USGenNE as the transferor since at that time USGenNE still owned the Project and the license. The transaction that was contemplated, and which was described in both the January 26, 2005 Application and the May 24, 2005 Motion to Substitute, was consistent with the terms of the Option Agreement, *i.e.*, the transferor would sell the Project to VHPA solely as a financing vehicle for the Town, and at closing, VHPA immediately would transfer the Project to the Town.

Events have transpired, however, that have rendered the January 26 Application and May 24 Motion moot at least as of this time. On July 12, 2005, the Town held a required vote to authorize its purchase of the Project. In that vote, the Town voted overwhelmingly not to acquire

⁶ *TransCanada Hydro Northeast Inc.*, 112 FERC ¶62,001 (2005). The Commission also had approved the substance of that transaction in a prior order issued in Docket No. EC05-41-000. In that order, which contemplated that USGenNE, rather than TC Hydro NE, would be the transferor, the Commission approved USGenNE's transfer of the Bellows Falls Project to VHPA, again with VHPA immediately transferring the Project to the Town. *USGen New England, Inc.*, ¶62,222 (2005).

the Project. Moreover, a revote was held on August 22, 2005, and the Town once again rejected the proposal for it to become the owner of the Project. As a result, the Option Agreement to which TC Hydro NE is a party does not convey any right to VHPA to acquire the Project based upon the facts and circumstances as they exist today, *i.e.*, VHPA's right to acquire the Project for the sole purpose of serving as a financing vehicle is dependent upon the Town acquiring the Project which as of today, in light of the two votes against the Town's acquisition of the Project, is something that the Town is not empowered to do. Thus, TC Hydro NE has no legal obligation to sell the Bellows Falls Project to VHPA.

III. PROTEST

A. The Proposed Transaction Violates the Option Agreement

As previously indicated, VHPA represents in its Application that "the substance of the Proposed Transaction has already been approved by the Commission in its orders authorizing the disposition of the Bellows Falls Facility."⁷ As discussed above, this claim is untrue. The transaction that previously was authorized by the Commission contemplated that, consistent with the terms of the Option Agreement, VHPA would hold title to the Project for a nanosecond, and that title thereafter would be transferred to the Town. However, under the Proposed Transaction (as defined below) in the instant Application, the Town would have no interest in the Project at all. VHPA claims a right to obtain the Project under this new arrangement asserting that the Master Agreement among the Town, VHPA and BFPC provides that "if the Town is not able or ready to take title to the Bellows Falls Facility at closing, VHPA has the legal right to take title

Application at 1.

from TC Hydro NE in the Option Transaction and then hold title pursuant to the Master Agreement Transaction."⁸

The fallacy in VHPA's representation is that TC Hydro NE is not a party to the Master Agreement, and as a result, that agreement cannot confer upon VHPA rights to purchase the Bellows Falls Project that would be inconsistent with the terms of the Option Agreement. Thus, VHPA's grab at TC Hydro NE's assets must fail because VHPA has no right to acquire the Bellows Falls Project, even as a financing vehicle, since the Town chose not to take title to the Project and therefore failed to meet conditions to closing under the Option Agreement.

The principal basis of TC Hydro NE's Protest thus is that the transaction underlying the Application violates its rights under the Option Agreement and cannot be consummated. In its Application, VHPA represents that it is seeking a mere technical correction to prior applications concerning this Project since "the substance of the [August 10] Proposed Transaction has already been approved by the Commission in its orders authorizing the disposition of the Bellows Falls Facility...."⁹ This is not true. The transaction described in the Application (the "Proposed Transaction") is materially different from the January 26 proposal. In the January 26 transaction, VHPA would have acted as a mere conduit to facilitate financing of the option exercise and to transfer ownership and lease rights at closing to the Town in the event that certain conditions precedent, including a favorable vote from the Town's citizens, were satisfied. By contrast, in the Proposed Transaction for which VHPA now seeks approval, the VHPA would become the owner, lessor and transferor of ownership rights to BFPC, a third party, whether or not the conditions precedent, including approval by the Town's voters, were met. The transaction

⁸ Application at 5.

⁹ *Id.* at 1.

described in the January 26 filing—in which TransCanada joined—was consistent with the Option Agreement. The Proposed Transaction—which is the subject of this Protest—is not.

1. **The Proposed Transaction Is Inconsistent with the Express Terms of the Option Agreement.**

Paragraph 17 of the Option Agreement provides as follows:

Optionee [the 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 [the Town] shall own the project after the financing period.** [emphasis supplied]. This Agreement shall apply to, inure to the benefit of and be binding upon and enforceable against the parties hereto and their respective permitted successors and assigns, to the same extent as if specified at lengths throughout this Agreement and notwithstanding an assignment hereunder. Optionee [the Town] shall be jointly and severally liable with any assignees [the VPHA] for all of the obligations of Optionee hereunder.

Paragraph 17 thus permits assignment without the Optionor's consent if, and only if, three conditions are met: (i) the assignment is to a particular state agency, (ii) the assignment is for purposes of financing the purchase of the Facility by the Town, and (iii) the Town owns the Facility after such financing. The Proposed Transaction that is the subject of the current Application is invalid under the Option Agreement, because, among other reasons, it violates the second and third of these requirements.

The Town, as Optionee, is not permitted – with one narrow exception – to assign the rights under the Option Agreement without the consent of the Optionor, which consent can be withheld in the Optionor's sole discretion. The single exception is that the Town can assign the

Option to the Vermont Public Power Supply Authority¹⁰ "for the purpose of financing the transaction contemplated herein." Nothing in Paragraph 17. or anywhere else in the Option Agreement, permits VHPA to replace the Town as Optionee or to do anything but finance the Town's purchase of the Facility.

In addition, Paragraph 17 of the Option Agreement makes clear that for all purposes other than financing, the Town remains the Optionee after the assignment. Paragraph 17 provides that "upon the termination of such financing . . . the Optionee [clearly, the Town] shall own the project." And it provides further that "notwithstanding an assignment hereunder, Optionee shall be jointly and severally liable with any assignee for all of the obligations of Optionee [again, clearly the Town] hereunder." In both of these provisions, the "Optionee" remains the Town despite the assignment, and the assignee and the Optionee remain separate entities. Neither provision makes sense if the assignee "for the purpose of financing the transaction contemplated herein" is also the Optionee for all other purposes as well.

While it is not at all clear what particular form the Proposed Transaction would take,¹¹ it is crystal clear that VHPA's role would no longer be limited to financing the Town's purchase of the Project, as required by the Option Agreement. By twice voting against taking ownership of the Project, the Town—the entity for whom the transaction contemplated by the Option Agreement was to be financed by VHPA—has made clear that it does not wish to own the

¹⁰ VHPA was substituted for the Vermont Public Power Supply Authority by order of the Bankruptcy Court. See discussion *infra*.

¹¹ For example, the Application, at page 1, contains a request by VHPA for authorization for TC Hydro NE to transfer certain FPA jurisdictional facilities associated with the Facility to VHPA which will hold title and lease the Facility to BFPC. However, only a few pages later in the Application, VHPA relies on section 2.12 of the Master Agreement for the authority to undertake such transaction notwithstanding the fact that section 2.12 states "In the event that the Town does not, within one Business Day of the Closing assume all of VHPA's interest in the Facility lease and accept a transfer of all VHPA's interest in the Property...the VHPA shall have the right to sell to sell to [BFPC] and [BFPC] shall have the right to Purchase from VHPA, for one dollar, all of VHPA's interest in the Facility Lease and the Property . . ." Obviously, a transaction in which VHPA owns the Facility and leases it to BFPC is materially different from a transaction in which BFPC owns the Facility (and VHPA is out of the picture).

Project. For that reason, VHPA converted its role in the Proposed Transaction from a mere conduit facilitating a financing transaction in which the Town would be the owner and beneficiary—its role in the transaction described in the January 26, 2005 filing – to an owner and lessor under a 74 year lease in which the Town has no interest whatsoever. Accordingly, VHPA is most decidedly not acting, in the Proposed Transaction, for the purpose of financing the Town's purchase of the Project as required by the Option Agreement, and the proposed Transaction squarely violates one of the conditions set forth in Paragraph 17 for an assignment without the consent of the Optionor – namely, that the assignment be for "purposes of financing" the transaction contemplated by the Option Agreement.

Moreover, the Proposed Transaction also violates another condition of Paragraph 17 for an assignment without the consent of the Optionor – that the Town "shall own" the Project after the financing. Though it is unclear how exactly, if at all, VHPA intends to transfer the Project to the Town after the 74-year lease expires, what is clear is that, contrary to the express language in the Option Agreement, it is not a certainty that the Town will actually take ownership of the Project at some point in the future, if at all. For one, though it is not possible to predict the state of the world 74 years from now, presumably the transfer of the Project from VHPA to the Town will require certain regulatory and other approvals (including approvals of the Commission) that of course have not yet been obtained. Thus, the Proposed Transaction fails to meet the third condition required under the Option Agreement for an assignment without the Optionor's consent and is therefore invalid.

2. The Rejection By The Voters Of The Town Precludes Closing on the Option Agreement and Transfer of the Project to VHPA.

VHPA asks the Commission to approve the Application "because the date for ensuring that the Option Transaction can be consummated is rapidly approaching and certain

arrangements approved in [the Commission's March 8, 2005 Order in Docket No. EC05-41-000] may not be put in place." Application at 3. What is not in place – though the Application fails to discuss the point -- is an affirmative vote of the Town to acquire the Project as a prerequisite to VHPA obtaining any acquisition rights. However, in Docket No. P-1855-030, VHPA, along with the Town and BFPC (the "Joint Movants") advised the Commission that "the Town has not yet secured all of the necessary authorizations to demonstrate that it has the legal competence, as required by Section 9(b)(2) of the Federal Power Act, to become a co-licensee of the Project." August 10, 2005 Motion in Docket No. P-1855-030 at 1. The Joint Movants go on to say that the reason for the delay in securing the required authorizations is that the Town voted against consummating the purchase of the Project on July 12, 2005 and "has scheduled a revote on the issue for August 22, 2005...." *Id.* at 6. The Joint Movants then explain that "this filing is made to ensure that the condition for this government approval to be in place by September 11, 2005 is achieved in order for VHPA to acquire and hold title to the Project to consummate the Option Transaction." *Id.*

The August 22, 2005 revote—which had not yet taken place at the time the Joint Movants filed the current pleadings – was critical because approval by the Town's citizens was a condition precedent to consummation of the transaction contemplated by the Option Agreement. In Paragraph 10.4(a) of the Option Agreement, the Town represented and warranted that it had the power "to purchase the Property as provided in this Agreement" subject to "a contemplated vote of the citizens of the Optionee to exercise the Option and the necessary approval of the Vermont Public Service Board...." In Paragraph 10.4(b), the Town represented that "[a]ll requisite actions necessary to authorize Optionee to enter into this Agreement and the remaining

agreements provided for and to carry out its obligations have been, or by the Closing Date will have been, taken...."¹²

But on August 22, 2005, the Town's citizens voted—for a second time—not to acquire the Project. Because a "Yes" vote was necessary for the Town to have the legal competence to take title to the Project, and because the Town's taking title to the Project was a requirement of the Option Agreement, the transaction contemplated by the Option Agreement cannot be consummated.

3. Nothing In The November 23, 2004 Bankruptcy Order, The December 7, 2004 Assignment Or The Master Agreement Provides VHPA Rights Exceeding Those That It Enjoyed Under The Option Agreement.

The approvals VHPA now seeks from the Commission would authorize a transaction permitting VHPA to circumvent the Option Agreement's requirements that (i) VHPA act for the purpose of financing the Town's purchase of the Project, (ii) the Town own the Project at the conclusion of the financing, and (iii) the Town's voters approve the Town's purchase. To justify this expansion of VHPA's rights as assignees and the complete excision of the voting requirement from the Option Agreement, VHPA relies on the November 23, 2004 Order of the Bankruptcy Court for the District of Maryland (Greenbelt Division) (the "Order") and the December 7, 2004 Assignment and Master Agreement entered into among the Town, VHPA and BFPC. VHPA's argument must be rejected because neither the Order nor the Master Agreement can provide VHPA any rights it did not enjoy under the Option Agreement.

¹² Notwithstanding the assignment of the Option Agreement to VHPA for purposes of financing, as established above the Town remained the "Optionee" under the Option Agreement subsequent to such assignment. Thus, the representations and warranties of the "Optionee" under the Option Agreement remain the representations and warranties of the Town.

a. **The Bankruptcy Order Does Not Convert VHPA From An Assignee For Purposes Of Financing To An Assignee For All Purposes.**

VHPA suggests that the limitations on assignment set forth in the Option Agreement have somehow been trumped by the November 23, 2004 Order of the Bankruptcy Court authorizing VHPA to substitute for VPPSA as assignee. The most cursory review of the Order and the proceedings that led to it, including the representations made to the Bankruptcy Court by the Town, demonstrate that this is not so. The Order provides "that the Town may, if need be, assign the Option Agreement to VHPA for the purposes set forth in the Option." [emphasis supplied]. That should be the end of the discussion. The Order goes on to say that such substitution "does not constitute a material modification of the Option." This was consistent with the Town's own representations to the Bankruptcy Court about the significance of substitution of the VHPA for another Vermont state agency and the related assignment to the VHPA: in the hearing seeking court approval of the assignment, counsel for the Town described the substitution as "a minor modification" that merely involved a "miniscule change from one Vermont state agency to another." Transcript of Bankruptcy Proceedings at 80, 84 (Nov. 18, 2004). In short, the Order and the proceedings leading to its issuance make clear that the substitution of VHPA and the subsequent assignment of the Option Agreement from the Town to the VHPA did not change the express limitations contained in the Option Agreement that VHPA's role would be, as the Order expressly states, "for the purposes set forth in the Option."

b. **Neither The Assignment Of The Option Agreement, Nor The Terms Of The Master Agreement, Gives VHPA Rights As Assignee That Are Inconsistent With The Option Agreement.**

VHPA also suggests that the December 7, 2004 Assignment Agreement entered into between the Town and VHPA and the Master Agreement of the same date entered into among VHPA, the Town and BFPC gave VHPA expanded rights as assignee and made it the valid

assignee for all purposes of the Option Agreement. Both the Assignment Agreement and the Master Agreement dutifully recite the language in the Option Agreement limiting VHPA's role to financing the transaction contemplated by the Option Agreement. See, e.g., Master Agreement, Fourth recital. ("the Town has assigned all of its rights and obligations under the Option Agreement to the VHPA for purposes of financing the exercise of the Option . . . which assignment is subject to the continuing rights of the Town as provided in the Option Assignment.") But both also contain broad language, nowhere to be found in the Option Agreement, and upon which VHPA now apparently relies, describing VHPA as the assignee of the Option Agreement without the limiting language. See, e.g., Assignment of Option to Purchase ¶ 1 (purporting to assign "all the right, title and interest of the Town now existing or hereafter acquired in and to the Option Agreement.").

The complete answer to this argument is that TC Hydro NE is not a party to either the Assignment or the Master Agreement. VHPA cannot deprive TC Hydro NE of its rights under the Option Agreement through the simple expedient of entering into separate contracts, to which TC Hydro NE is not a party, purporting to change those rights. Rather, both the Assignment Agreement and the Master Agreement are entirely derivative of the Option Agreement and cannot give VHPA, or anyone else, rights to the Facility that are greater than, or inconsistent with, rights granted under the Option Agreement. Still less can they unilaterally deprive the Optionor of the benefit of its bargain in negotiating the provisions in the Option Agreement.

For all these reasons, the Proposed Transaction violates the Option Agreement and cannot be consummated.

B. If There Is A Contractual Dispute Concerning The Parties' Rights And Obligations, That Dispute Will Have To Be Resolved By The United States District Court For The District Of Vermont

TC Hydro NE believes that VHPA's contractual rights, or a lack thereof, are not subject to reasonable dispute, *i.e.*, VHPA currently has no right to purchase and own the Bellows Falls Project.

However, it is evident from VHPA's explanation of its alleged right to acquire the Project that there may be a factual dispute concerning the parties' contractual rights and obligations. That being the case, if VHPA maintains its view, there may be a need to have an adjudication to sort out the parties' contractual rights.

Consistent with Commission precedent and the parties' choice of forum, the court that must hear the dispute is the United States District Court for the District of Vermont.

Paragraph 23 of the Option Agreement contains a forum selection clause for "all disputes" arising under the Option Agreement. Paragraph 23 provides, in full:

23. Governing Law; Jurisdiction. This Agreement shall be governed by and interpreted in accordance with the law of the State of Vermont, without giving effect to any conflict of law principles or provisions. For so long as Optionor continues to be subject to Bankruptcy Court proceedings and owns the Property, all disputes with respect to this Agreement shall be determined by the United States Bankruptcy Court for the District of Maryland (Greenbelt Division) (the "Bankruptcy Court"). At such time as Optionor is no longer subject to Bankruptcy Court proceedings, or Optionor no longer owns the Property, all disputes under this Agreement shall be determined in the United States District Court, District of Vermont.

Based upon this provision, it is clear that the United States District Court for the District of Vermont now has jurisdiction over all disputes that arise under the Option Agreement, including any dispute over the validity or scope of the Town's assignment to VHPA.¹³ The

¹³ As previously indicated, USGenNE, with the Bankruptcy Court's approval, transferred its right, title and interest in all of its hydroelectric assets to TC Hydro NE on April 1, 2004, including the Bellows Falls Project that is the subject of the Option Agreement. Therefore USGenNE no longer owns the Project, and pursuant to the specific

Commission therefore cannot and should not proceed to adjudicate the parties' rights under the Agreement given the clear language of Paragraph 23.

It is well established under Vermont and Federal law that forum selection clauses are enforceable and that such a clause "should control absent a strong showing that it should be set aside." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *see also Int'l Collection Serv., Inc. v. Gibbs*, 147 Vt. 105, 107 (1986) (quoting *The Bremen*, 407 U.S. at 10, and enforcing forum selection clause); C. Wright & A. Miller, Federal Practice & Procedure, § 3803.1 (1986 & 2005 Supp.). Further, forum selection clauses "should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Bremen*, 407 U.S. at 10. The burden of making such a showing is on the party resisting application of the clause and that party must show that "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18.

Here, there can be no question that the Federal District Court of Vermont is a fair and reasonable forum. The Option Agreement, *including its forum selection clause*, was specifically approved by the Bankruptcy Court's July 23, 2004 order. *USGen New England, Inc. v. Town of Rockingham, Vermont*, Adv. Proc. No. 03-03148 (PM)(Bankr. D. Md. 2004) at p. 4, ¶ 3. In these circumstances, the Option Agreement's forum selection clause is fair, reasonable and enforceable. Consequently, given the clear language of Paragraph 23, any contractual dispute must be adjudicated by the United States District Court for Vermont.

terms of Paragraph 23 of the Option Agreement, any potential dispute is to be determined by the United States District Court, District of Vermont. Moreover, because USGenNE has confirmed its chapter 11 plan of reorganization and emerged from bankruptcy, it is clear that the resolution of this dispute will have no impact upon USGenNE, the administration of its bankruptcy estate or the interests of its creditors. As a result, it is also clear that this dispute does not "arise in" and is not "related to" the USGenNE bankruptcy and, as a result, the Bankruptcy Court no longer has jurisdiction over this matter (or, in the unlikely event such jurisdiction continues to exist, we believe that it is likely that the Bankruptcy Court would abstain from hearing this matter since its resolution will have no impact on the USGenNE estate).

Moreover, Commission precedent supports adjudication of any contractual dispute by the U.S. District Court for Vermont. As previously indicated, the Commission has taken the position in numerous orders that courts are the more appropriate body to address such issues – even when such issues arise in jurisdictional agreements which is not the type of document at issue here.¹⁴

Furthermore, the cases VHPA relies upon for its apparent position that the Commission should act in a perfunctory manner have no relevance to this case. VHPA cites *Southhaven Holdings, LLC*, 110 FERC ¶62,060 (2005), *Pittsfield Generating Company, L.P.*, 106 FERC ¶62,044 (2004) and *Newco, LLC*, 104 FERC ¶62,154 (2003) for the proposition that in all three cases, “the Commission . . . granted authorization under Section 203 for transactions under which reluctant sellers or transferors were not applicants.”¹⁵ VHPA relies upon those cases apparently to get over the obvious problem that TC Hydro NE, although it is the owner of the Project, is not a co-applicant.

However, the cases relied upon by VHPA provide no support for VHPA’s attempt to induce the Commission to trample on TC Hydro NE’s ownership rights. In each of those cases, while the transferor did not join as an applicant in the filing, the transferor also did not object to the proposed disposition of the assets. In fact, notwithstanding VHPA’s claim that those cases involved “reluctant sellers,” there is nothing in any of the decisions to support a claim that the transferors were opposed to the transfers. Moreover, none of the transferors in those cases protested the applications. As a result, those cases involved facts that are diametrically opposed to the instant case in which TC Hydro NE is filing this protest to alert the Commission that it should take no action that inadvertently or otherwise would interfere with TC Hydro NE’s ownership rights or would modify VHPA’s or TC Hydro NE’s contractual rights and obligations.

¹⁴ See n. 2, *supra* at p. 3.

¹⁵ Application at 3, n. 7.

C. The Vermont Public Service Board Has Not Yet Given Its Approval For The Proposed Transaction

VHPA's Application also has material misrepresentations concerning the status of other governmental approvals that are a condition to closing. On page 11, VHPA states "[i]n addition, VHPA has obtained authorization from the Vermont Public Service Board (the "PSB" or the "Board") to take title to the Facility." As support for this statement, VHPA, in footnote 30, refers to a "Certificate of Public Good issued pursuant to 30 V.S.A. § 248" issued to VHPA as part of the order and certificates issued [by the Vermont Public Service Board] in . . . Docket No. 7047, Order of June 6, 2005, included as Exhibit B" to the VHPA Application. Contrary to VHPA's assertion, it does not have the authority from the Board to close the transactions described in the Application and own the Project. Similar to the proceedings at the Commission, the transaction that previously was authorized by the Board in Vermont, subject to conditions including approval by the voters of the Town of Rockingham, contemplated that, consistent with the terms of the Option Agreement, VHPA would hold title to the Project for a nanosecond, and ownership thereafter would be transferred to the Town.

In an apparent mistake that resulted in providing misleading information to the Commission, VHPA has filed with the Commission as part of Exhibit B to its Application, certain Vermont Board Certificates of Public Good and Consent that VHPA and BFPC do not hold. Attached hereto as Exhibit A are the corrected Certificates of Public Good and Certificates of Consent that were in fact issued by the Board in Vermont for its June 6th Order and provided to the parties, which corrected errors contained in the Certificates filed with the Commission by VHPA as support for its Application. Under various statutes in Vermont that require companies to obtain advance approval from the Public Service Board, the Board is required to issue orders, certificates of public good, certificates of consents, and other approvals.

The corrected Certificate of Public Good under 30 V.S.A. § 231 issued by the Vermont Board to VHPA only authorizes VHPA "to acquire" the facility (and unlike the Certificate of Public Good issued to the Town of Rockingham, does not authorize VHPA to continue to "own" the Facility). Despite the erroneous suggestion by VHPA to the Commission on page 4 of the Application that it indeed has the authority it requires for the transactions in the Application, the only party authorized by the Vermont Public Service Board and issued a Certificate of Public Good "to acquire and own" the Facility if the Closing occurred under the Option Agreement is the Town of Rockingham.

Consistent with the "temporary acquisition of the Dam" by VHPA presented to and discussed by the Board on page 11 of its Order, the Board issued a "Certificate of Consent to Transfer Assets" consenting to the transfer of the Project from VHPA to the Town of Rockingham. It is also apparent from the corrected copy of the Board's "Certificate of Consent for Lease of Assets" filed by TC Hydro NE with this Protest, that the only party authorized by the Board to lease the "Bellows Falls Hydroelectric Generating Station (the "Dam") of the Town of Rockingham" to BFPC is the Town. Despite the misleading suggestion by VHPA that it "has obtained authorization from the Vermont Public Service Board," VHPA has not obtained from the Board the authority required in Vermont to lease the Project to BFPC.

At page 11 of its Order in Vermont Docket No. 7047 issued June 6, 2005, the Board discussed and recognized only VHPA's limited role in the transactions presented to it, as promoting the general good of the State of Vermont.

The Board acknowledged on page 11-12 that "[t]he stipulating parties specifically request that the Board issue a CPG pursuant to § 248 authorizing VHPA to acquire and own the dam. They agree that the proposed transfer of the Dam, and VHPA's role in these transactions, will

promote the general good of the State of Vermont. . . . We note that the record reflects that VHPA, in spite of its mandate, has little in the way of experience and background to operate a hydroelectric generating facility and to successfully participate in a competitive wholesale energy market. That expertise, as we recognize below, is possessed by BFPC. However, because VHPA's role in this process has essentially been a financing facilitator, we consider its temporary acquisition of the Dam to be a reasonable proposal, particularly since it is only a temporary ownership of the Dam. Moreover, because VHPA is a necessary link in Rockingham's ultimate acquisition of the Dam - we conclude that its acquisition is in the general good of the State."

Therefore, the authority and Certificate of Public Good issued by the Vermont Public Service Board to VHPA to temporarily "acquire" (but not continue to "own") the Facility, and the Certificate of Consent issued by the Public Service Board for VHPA to specifically transfer the Facility to the Town of Rockingham, do not support the VHPA's suggestion to the Commission that it has obtained authorization from the Vermont Public Service Board necessary for the transaction described in its Application.

IV.
CORRESPONDENCE AND COMMUNICATIONS

All correspondence and communications with respect to this proceeding should be addressed to the following persons:

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ghalstead@andrewskurth.com
jspina@andrewskurth.com

V.
MOTION TO INTERVENE

TC Hydro NE, a Delaware corporation, is a direct, wholly-owned subsidiary of TransCanada PipeLine USA Ltd., a Nevada corporation. TransCanada PipeLine USA Ltd. is a direct, wholly-owned subsidiary of TransCanada PipeLines Limited ("TCPL")¹⁶, a Canadian corporation, which is a direct subsidiary of TransCanada Corporation ("TransCanada"), which also is a Canadian corporation. TC Hydro NE has its principle place of business in Westborough, Massachusetts. TC Hydro NE's sole business purpose is to own and operate the hydroelectric assets that were transferred to it by USGenNE pursuant to the authority granted by the Commission in *USGen New England, Inc.*, 109 FERC ¶62,245 (2004) and *USGen New*

¹⁶ TCPL owns and operates natural gas transmission facilities in Canada and has equity interests in several pipelines in the United States. These include Great Lakes Gas Transmission System, Iroquois Gas Transmission System, Portland Gas Transmission System, Tuscarora Gas Transmission System, and the Northern Border Gas Transmission System.

England, Inc., Project Nos. P-1855-028 (Jan. 24, 2005). Among its assets is the Bellows Falls Project which is the subject of the Application filed by VHPA.

As the owner of the Bellows Falls Project, and as shown in its Protest filed herewith, TC Hydro NE has a direct and substantial interest in this proceeding as the Commission's rulings may have a direct impact on TC Hydro NE's ownership rights. TC Hydro NE will not be adequately represented by any other party in this proceeding, and, unless permitted to intervene and participate fully, may be bound or adversely affected by a Commission order issued herein without an opportunity to have its views heard and considered. TC Hydro NE's intervention, and its participation as a party in this proceeding, is in the public interest.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, TC Hydro NE respectfully requests that the Commission grant this motion to intervene and afford TC Hydro NE all rights attendant to full party status. TC Hydro NE also protests the Application for the reasons stated herein and requests such relief to which TC Hydro NE may be entitled.

Respectfully submitted,



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Gloria J. Halstead
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Attorneys for TransCanada Hydro Northeast Inc.

Date: August 31, 2005

CERTIFICATE OF SERVICE

I, Kenneth L. Wiseman, an attorney for TransCanada Hydroelectric Northeast Inc., hereby certify that a true and correct copy of the foregoing document was served on all parties of record in this proceeding on this 31st day of August, 2005 by U.S. mail, first class delivery.

A handwritten signature in black ink, appearing to read 'K. Wiseman', written over a horizontal line.

Kenneth L. Wiseman

EXHIBIT A

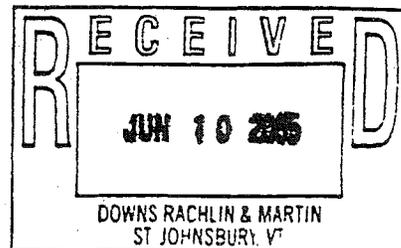
112 State Street
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State of Vermont
Public Service Board

MEMORANDUM



To: Parties in PSB Docket No. 7047
From: Susan M. Hudson, Clerk of the Board *sh*
Re: Bellow Falls Hydroelectric Project – Corrections to Certificates
Date: June 8, 2005

On June 6, 2005, the Public Service Board issued an Order, two Certificates of Consent, and three Certificates of Public Good in the above-captioned docket. Due to technical errors, three of the Certificates contained incorrect language. In addition, a Certificate of Consent for the sale of the Bellows Falls Hydroelectric Generating Station by TransCanada Hydro Northeast Inc. to Vermont Hydroelectric Power Authority was inadvertently omitted, and not issued.

Would you please replace the enclosed, corrected Certificates for the ones sent to you on June 6th. The corrections are as follows:

Certificate of Consent for Bellows Falls Power Company to lease the Dam from the Town of Rockingham: (1) the title was changed to read "Lease" instead of "Transfer"; and (2) the last word in the first paragraph was changed from "transfer" to "lease."

Certificate of Public Good to Vermont Hydroelectric Power Authority: (1) § 248 in the title was changed to read "§ 231"; and (2) deleted the words "and transfer" in the third line of the first paragraph.

Certificate of Public Good to Town of Rockingham: (1) added "& 248" to the second line of the title; and (2) changed October 30, 2005 to read "October 3, 2005" on the last line of Paragraph No. 5 on page 2.

Also enclosed is the Certificate of Consent for the TransCanada/Vermont Hydroelectric transaction.

We apologize for these errors and any inconvenience they may have caused.

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7047

Petitions of: (1) TransCanada Hydro Northeast)
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)

CERTIFICATE OF CONSENT FOR LEASE OF ASSETS
ISSUED PURSUANT TO 30 V.S.A. § 109

IT IS HEREBY CERTIFIED that the Public Service Board ("Board") of the State of Vermont has this date found and adjudged that the lease of the Bellows Falls Hydroelectric Generating Station (the "Dam") of the Town of Rockingham, Vermont, to Bellows Falls Power Company, LLC, will promote the general good of the State of Vermont, and the Board hereby consents to said lease.

Petitioners shall file this Certificate of Consent with the Vermont Secretary of State, pursuant to 30 V.S.A. § 109.

Dated at Montpelier, Vermont, this 6th day of June, 2005.

_____)
_____) PUBLIC SERVICE
_____) BOARD
s/David C. Coen_____) OF VERMONT
_____)
s/John D. Burke_____)

OFFICE OF THE CLERK

FILED: June 6, 2005

ATTEST: s/Susan M. Hudson
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)

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7047

Petitions of: (1) TransCanada Hydro Northeast)
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)
)

Entered: 6/6/2005

CERTIFICATE OF PUBLIC GOOD
ISSUED PURSUANT TO 30 V.S.A. § 231

IT IS HEREBY CERTIFIED that the Public Service Board of the State of Vermont on this date finds and adjudges that the issuance of a Certificate of Public Good ("Certificate") to the Vermont Hydroelectric Power Authority ("VHPA") to acquire the Bellows Falls Hydroelectric Generating Station (the "Dam") in Vermont will promote the general good of the State of Vermont. This Certificate is subject to the following conditions:

1. VHPA is not required to make any filings with the Public Service Board or the Vermont Department of Public Service pursuant to 30 V.S.A. § 108 governing financings; and
2. Neither this Certificate nor the Dam may be transferred without the prior consent of the Public Service Board.

Dated at Montpelier, Vermont, this 6th day of June, 2005.

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

OFFICE OF THE CLERK

FILED: June 6, 2005

ATTEST: s/Susan M. Hudson
Clerk of the Board

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STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7047

Petitions of: (1) TransCanada Hydro Northeast)
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)

Entered: 6/6/2005

CERTIFICATE OF PUBLIC GOOD
ISSUED PURSUANT TO 30 V.S.A. §§ 231 & 248

IT IS HEREBY CERTIFIED that the Public Service Board ("Board") of the State of Vermont on this date finds and adjudges that the issuance of a Certificate of Public Good ("Certificate") to the Town of Rockingham, Vermont ("Rockingham") to acquire and own the Bellows Falls Hydroelectric Generating Station (the "Dam") in Vermont will promote the general good of the State of Vermont. This Certificate is subject to the following conditions:

1. Any amendments of Rockingham and Bellows Falls Power Company's ("BFPC") Federal Energy Regulatory Commission ("FERC") license for the Dam shall be filed with the Board and the Vermont Department of Public Service ("Department");
2. Rockingham and BFPC shall comply with the Vermont Dam Safety Act, 10 V.S.A. § 1081 *et seq.*, to the extent that such requirements are not inconsistent

with requirements imposed by FERC in connection with its regulation of the hydro facilities;

3. Rockingham shall make filings with the Board and the Department pursuant to 30 V.S.A. § 108 governing financings associated with the Dam;

4. Neither this Certificate nor the Dam may be transferred without the prior consent of the Public Service Board;

5. Rockingham shall hold a vote pursuant to the requirements of 30 V.S.A. § 248 (c) to allow Rockingham's voters to decide whether Rockingham should consummate the sale now due to close no later than October 3, 2005.

Dated at Montpelier, Vermont, this 6th day of June, 2005.

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

OFFICE OF THE CLERK

FILED: June 6, 2005

ATTEST: s/ Susan M. Hudson
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)