

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MARYLAND
(Greenbelt Division)

2003 AUG 28 P 2 57

In re:)

USGen New England, Inc.)

Debtor)

Chapter 11
Case No. 03-30465

**MOTION OF WHEELABRATOR NORTH ANDOVER INC. PURSUANT TO 11 U.S.C.
§§ 105 AND 365(d)(2) FOR ORDER
(I) COMPELLING ASSUMPTION OR REJECTION OF A CERTAIN EXECUTORY
CONTRACT BY A DATE CERTAIN AND
(II) REQUIRING ADEQUATE ASSURANCE OF FUTURE PERFORMANCE**

Wheelabrator North Andover Inc. ("WNA") hereby files this motion (the "Motion") for entry of an order (the "Order"): (i) compelling the above captioned debtor, USGen New England, Inc. (the "Debtor"), to assume or reject a certain executory contract in the form of a Power Purchase Agreement, dated as of January 6, 1981 (as amended, the "PPA") by and between the Debtor (as assignee of New England Power Company) and WNA (f.k.a. Massachusetts Refusetech, Inc.), a copy of which is attached hereto collectively as Exhibits A-1, A-2 and A-3, on or before September 30, 2003, or such other date as determined by this Court; (ii) requiring adequate assurance of future performance of the PPA by the Debtor in the form of prompt payment of all invoices issued to the Debtor for services under the PPA immediately prior to, and following, the Petition Date (as defined below); and (iii) granting WNA immediate relief from the automatic stay under § 362 of the Bankruptcy Code (as defined below), without further motion or order of this Court, to allow WNA to exercise its rights under the PPA immediately upon a rejection of the PPA by the Debtor. In support of this Motion, WNA respectfully states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the 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.

BACKGROUND

A. The Chapter 11 Case.

2. On July 8, 2003 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Maryland. The Debtor continues to operate its business and manage its properties as a debtor-in-possession pursuant to §§1107 and 1108 of the Bankruptcy Code. No trustee, examiner or statutory committee has been appointed in this bankruptcy proceeding.

B. WNA’s Operations and the Impact of any Non-Performance by the Debtor of its Obligations under the PPA.

3. WNA owns and operates a solid waste fueled electric power generating facility (the “Facility”) in North Andover, Massachusetts. WNA obtains half of the solid waste necessary to fuel the Facility from twenty-three communities in northeastern Massachusetts. Chapter 328 of the Massachusetts Acts of 1988 established the North East Solid Waste Committee (“NESWC”), which is composed of the twenty-three communities. A list of the twenty-three NESWC communities is attached hereto as Exhibit B. Each of these communities has entered into an essentially identical Service Agreement with WNA, each dated as of April 8, 1981 (a “Service Agreement” and collectively, the “Service Agreements”). Under the terms of the Service Agreements, the NESWC communities pay service fees to WNA for the disposal of their solid waste (the “Service Fees”) on a pro rata basis in accordance with the annual tonnage of solid waste that each community delivers or is obligated to deliver to WNA. *See* Affidavit of

Shawn Worster attached hereto as Exhibit C (hereafter, “Worster Affidavit at ¶ 3”).

4. WNA and the Debtor are parties to the PPA which does not expire until September 25, 2005. Under the terms of the PPA, WNA is obligated to sell to the Debtor all of the electric energy generated by the Facility (the “Energy”) and the Debtor is obligated to buy from WNA all of the Energy (except for electric energy necessary for the Facility’s operation and subject to a “Steam Utilization Right”).¹ The payments that WNA receives from the Debtor for the Energy under the PPA (the “Energy Revenues”) represent approximately 20% of the total revenue necessary to operate and maintain the Facility. Accordingly, the loss of the Energy Revenues would significantly harm WNA’s operations at the Facility.

5. Under the terms of the Service Agreements, WNA and the NESWC communities share in the Energy Revenues, with ~10.5% allocated to WNA and ~89.5% allocated to the NESWC communities. The NESWC communities’ portion of the Energy Revenues operates as an offset to the Service Fees due under the Service Agreements. Under the formula for calculation of the Service Fees in the Service Agreements, the NESWC communities are required to pay WNA for: (i) the cost of operating and maintaining the Facility to provide for the disposal of the solid waste generated in the communities; (ii) the full cost of the construction of the Facility; and (iii) certain other costs. *See* Worster Affidavit at ¶ 3.

6. Under the PPA, the Energy is delivered and billed to the Debtor on a monthly basis and payment for all bills is required within thirty days of the Debtor’s receipt of such bill.

¹ The “Steam Utilization Right” gives WNA the right to sell or otherwise utilize up to a maximum of 30% of the average monthly steam produced by the Facility for purposes other than the generation of electricity. Since operations began in September, 1985, all of the energy generated at the Facility has been used to create and sell electricity pursuant to the terms of the PPA.

The NESWC communities' portion of the Energy Revenues from such bills is substantial, averaging between \$500,000 to \$800,000 per month. *See* Worster Affidavit at ¶ 3.

7. The receipt of their portion of the Energy Revenues is an integral component of the operating budget for each of the twenty-three NESWC communities. The expected Energy Revenues are factored into the respective town budgets, and the loss of such revenues will have significant, deleterious effects on those communities, including, perhaps, the need to appropriate additional funds for the payment of the service fee and very possibly the need for raising additional revenues from citizen-approved property tax over-rides. Additionally, if for any reason the NESWC communities are not able to appropriate the additional funds to fill any budgetary gap created by the loss of their portion of the anticipated Energy Revenues, many of the NESWC communities could be in the position of having to lay off critical personnel, such as teachers or public safety workers, in order to meet their Service Fees obligations under the Service Agreements. Accordingly, the performance or non-performance of the Debtor of its obligations under the PPA has an enormous, and potentially devastating, impact on all twenty-three NESWC communities and their almost half a million residents. *See* Worster Affidavit at ¶ 3.

8. The PPA contains a creditworthiness provision under which the Debtor must maintain an investment grade rating of either Baa3 or higher from Moody's Investors Service ("Moody's") or BBB from Standard & Poor's ("S&P") for its long term senior unsecured or other corporate debt. If the Debtor is downgraded below this investment grade rating by Moody's and S&P, this creditworthiness provision requires the Debtor to either: (a) provide a guarantee from one of its affiliates who meets such investment grade criteria for the "Credit Amount" (as defined below) or (b) provide an irrevocable letter of credit or surety bond from a

financial institution for the “Credit Amount.” The “Credit Amount” is defined as an amount equal to the sum of the bills for the Energy for the four months prior to the need to determine the Credit Amount.

9. In October of 2002, the Debtor was downgraded below the requisite investment grade rating by Moody’s and S&P. The Debtor did not, however, obtain either a guaranty or a letter of credit for the Credit Amount as it was required to do under the PPA. This clear contractual obligation of the Debtor remained unfulfilled as of the Petition Date. Had the Debtor fulfilled this obligation, immediate assumption or rejection of the PPA by the Debtor would be unnecessary and the twenty-three NESWC communities would not be facing the possibility of having to make further cuts in their already strained operating budgets.

10. The last monthly bill invoiced to the Debtor prior to the Petition Date was the June, 2003 bill in the amount of \$866,266.08 (the “Final Pre-Petition Bill”). A copy of the invoice for the June bill is attached hereto as Exhibit D-1. Of the total amount of the Final Pre-Petition Bill, \$777,953 is allocated to NESWC under the Service Agreement, and the remainder is to be retained by WNA. To date, the Final Pre-Petition Bill remains unpaid and the Debtor has indicated to WNA that it only intends to pay the Pre-Petition Bill upon a court determination that it must do so in its bankruptcy proceeding.

11. The pricing terms of the PPA allow the Debtor to purchase the Energy at a discount of 10% below the Debtor’s incremental cost of fuel during peak periods and a discount of 20% below the New England Spot Price (the hourly Market Clearing Price for Energy as reported by Independent System Operator New England) during off-peak periods. Thus, the PPA is extremely advantageous to the Debtor in that it allows the Debtor to purchase the Energy

at below market rates. Accordingly, the Debtor should be in a position to quickly determine whether the PPA is a contract that it wishes to assume or reject.

RELIEF REQUESTED

12. By this Motion WNA respectfully requests that this Court enter an Order: (i) compelling the Debtor to assume or reject the PPA on or before September 30, 2003, or such other date as determined by this Court; (ii) requiring adequate assurance of future performance of the PPA by the Debtor pending the Debtor's decision to assume or reject the PPA in the form of (a) prompt payment of the June invoice attached hereto as Exhibit D-1, (b) prompt payment of the July invoice attached hereto as Exhibit D-2, and (c) prompt payment of any subsequent invoices submitted to the Debtor under the PPA; and (iii) granting WNA immediate relief from the automatic stay under § 362 of the Bankruptcy Code, without further motion or order of this Court, upon a rejection of the PPA by the Debtor, to allow WNA to exercise all of its rights under the PPA without further delay. Given both the damaging effect that lack of performance of the PPA by the Debtor would have on WNA's operations and the potentially devastating effect such non-performance would have on the twenty-three NESWC communities, assumption or rejection of the PPA by the Debtor on an immediate basis is clearly justified and appropriate. By entering the Order, the court would, in two respects, provide both WNA and NESWC with a level of financial certainty necessary given the potential financial harm they are facing should the Debtor fail to fulfill its payment obligations under the PPA. Absent the relief requested herein, the twenty-three NESWC communities will have underfunded operating budgets for the current fiscal year that will require these communities to either obtain additional budget appropriations or take other drastic action.

ARGUMENT

A. The Debtor Should be Compelled to Assume or Reject the PPA Pursuant to §§ 105 and 365(d)(2) of the Bankruptcy Code.

13. Section 105(a) of the Bankruptcy Code provides as follows:

The court may issue an order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a). This section allows bankruptcy courts broad authority and discretion to enforce the provisions of the Bankruptcy Code either under specific statutory or equitable common law principles.

14. The purpose of § 105(a) is to “assure the Bankruptcy Court’s power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction.” 2 *Collier on Bankruptcy* ¶ 105.01, at 105-3 (15th ed. 1996). Thus, § 105(a) of the Bankruptcy Code essentially codifies the bankruptcy court’s inherent equitable powers. *See In re Management Technology Corp.*, 56 B.R. 337, 339 (Bankr. D.N.J. 1985) (finding the court’s equitable power derived from § 105).

15. Section 105(d) further provides, in relevant part, that:

The court, on its own motion or on the request of a party in interest, may—

(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) *sets the date by which the trustee must assume or reject an executory contract or unexpired lease. . .*

11 U.S.C. § 105(d) [emphasis added]. Thus, a determination by this Court compelling the Debtor to assume or reject the PPA falls squarely within the purview of this Court's equitable powers under § 105 of the Bankruptcy Code.

16. Section 365(d)(2) of the Bankruptcy Code states as follows:

In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan *but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.* 11 U.S.C. § 365(d)(2) [emphasis added].

17. Section 365(d)(2) thus provides a clear mechanism by which a party to an executory contract in a bankruptcy proceeding may force a debtor to determine whether it wishes to accept or reject such executory contract within a specified period of time prior to the confirmation of a plan of reorganization. Here, WNA, as a party to the PPA, has the right to make this request to compel the Debtor to make a determination regarding assumption or rejection of the PPA within a specified period of time.

18. In deciding whether to accelerate a debtor's decision under § 365(d)(2), a court must balance the interests of the non-debtor contracting party against the interests of the debtor and its estate, and weigh the equities in the case. *See, e.g., In re Physician Health Corp.*, 262 B.R. 290, 292 (Bankr. D. Del. 2001); *In re Mayer Pollock Steel Corp.*, 157 B.R. 952, 965 (Bankr. E.D. Pa. 1993); *In re Dunes Casino Hotel*, 63 B.R. 939, 949 (D.N.J. 1986).

19. The equities in this case indisputably weigh in favor of granting this Motion. WNA's operations at the Facility will be significantly harmed in the event of any non-performance of the PPA by the Debtor. The twenty-three NESWC communities, and their almost half a million residents, face potentially devastating consequences from any non-

performance of the PPA by the Debtor. The gravity of these harms and the risks associated with them far outweigh the minimal risk to the Debtor of assuming the PPA, which allows the Debtor to purchase the Energy at below-market rates.

20. The Energy Revenues represent approximately 20% of the revenue necessary to operate and maintain the Facility. Accordingly, WNA cannot afford to be in a position of not knowing the Debtor's intentions with respect to the PPA when those intentions could result in a total loss of a significant portion of the revenue upon which WNA depends to operate the Facility.

21. Similarly, the twenty-three NESWC communities and their almost half a million residents also cannot afford to be in a position of not knowing the Debtor's intentions with respect to the PPA, of which they are direct beneficiaries via the Service Agreement with WNA. Should the Debtor fail to perform its obligations under the PPA, the NESWC communities would cease to receive on average between \$500,000 to \$800,000 a month. The operating budgets of the various NESWC communities are based on the receipt of such revenues. If the NESWC communities were suddenly faced with the complete loss of these revenues, it would create a significant shortfall in their respective operating budgets. In fact, the loss of these revenues, even for a short period of time, would ultimately require the NESWC communities to cutback vital community services in order to cover the respective budget deficits resulting from the loss of these revenues. The NESWC communities, to overcome such budget deficits, would be forced to call special town meetings and special town elections seeking to obtain overrides to balance their respective budgets. This process is very expensive, difficult, time consuming and particularly troublesome, given that the NESWC communities are already under tremendous fiscal pressures due to current economic conditions and state-wide cut-backs in funding to

municipalities. Accordingly, the harm to the NESWC communities that flows directly from the Debtor's decision with respect to the PPA is overwhelming and thus clearly favors a decision requiring the Debtor to quickly make clear its intentions with respect to the PPA. *See* Worster Affidavit at ¶ 3.

22. In contrast to the serious and far-reaching nature of the harms to both WNA and NESWC set forth above, the granting of this Motion to compel the Debtor to quickly assume or reject the PPA places no greater burden or harm upon the Debtor than that of making what should be a fairly simple, straightforward decision for the Debtor – determining whether a contract that allows the Debtor to purchase electric energy at below-market rates is a beneficial asset to the Debtor and would thus be a useful part of its eventual plan of reorganization.

23. In sum, the equities clearly favor a quick determination by the Debtor as to rejection or assumption of the PPA.

B. The Debtor Should be Compelled to Provide Adequate Assurance of Payment Under the PPA Pending its Decision of Assumption or Rejection.

24. It is well-settled that the non-debtor party to an executory contract in a Chapter 11 proceeding is barred from enforcing the contract while the debtor remains free to enforce the contract's terms pending its determination of assumption or rejection of the contract. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) (creditor in chapter 11 proceeding precluded from bringing unfair labor practices charge against debtor-in-possession to enforce terms of executory contract in form of collective-bargaining agreement); *United States Postal Service v. Dewey Freight System, Inc.*, 31 F.3d 620, 624 (8th Cir. 1994) (after debtor commences Chapter 11 proceeding, but before executory contracts are assumed or rejected under § 365(a), those contracts remain in existence, enforceable by debtor but not against debtor); *In re El Paso Refinery, L.P.*, 220 B.R. 37, 43-44 (Bankr. W.D. Tex. 1998) (from time of filing of Chapter 11

to assumption or rejection of executory contract, non-debtor party is barred from enforcing contract and its terms); *In re Monarch Capital Corp.*, 163 B.R. 899, 907 (Bankr. D. Mass. 1994) (non-debtor party may not enforce executory contract prior to its assumption or rejection and thus non-debtor party cannot terminate contract by reason of debtor's defaults thereunder).

25. Thus, pending its determination of assumption or rejection of the PPA, the Debtor may continue to require WNA to deliver the Energy in accordance with the terms of the PPA without paying for the Energy, leaving WNA with only a post-petition administrative claim for the reasonable value of such performance. *See NLRB*, 465 U.S. at 531; *United States Postal Service*, 31 F.3d at 625; *In re El Paso*, 220 B.R. 37 at 43.

26. Given the devastating effects on the NESWC communities and the financial harm to WNA from any non-performance of the PPA by the Debtor, as set forth in section A above, WNA should not be required to continue delivering the Energy to the Debtor without adequate assurance of timely payment in accordance with the terms of the PPA.

27. Further, in accordance with the provisions of the PPA, the Debtor was required to obtain a guarantee or letter of credit, in favor of WNA, upon its failure to meet a certain credit rating. Had the Debtor complied with its contractual obligations, WNA might not now be in the position of having to seek such adequate assurance from this Court. Accordingly, in the absence of the protection of the guaranty or letter of credit, WNA should, at a minimum, receive from the Debtor adequate assurance of future payment during the period pending assumption or rejection of the PPA.

C. Upon Rejection of the PPA by the Debtor, WNA Should be Granted Immediate Relief from the Automatic Stay under § 362 of the Bankruptcy Code.

28. Under Section 365(g) of the Bankruptcy Code, rejection of an executory contract constitutes a breach of such contract. 11 U.S.C. § 365(g). Section 365(g) does not, however, equate this breach of contract with a termination of the contract and several circuit courts have held that the language of § 365(g) does not mean that the executory contract has been terminated, but only that a breach has been deemed to have occurred. *See In re Continental Airlines*, 981 F.2d 1450, 1459 (5th Cir. 1993); *In re Modern Textile, Inc.*, 900 F.2d 1184, 1191 (8th Cir. 1990).

29. Section 362(d) of the Bankruptcy Code provides that relief from the automatic stay of § 362(a) may be appropriate where it has been determined that the relevant property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2)(B). In this case, if the Debtor rejects the PPA and this Court allows such rejection, the PPA would no longer be necessary for the Debtor's reorganization. Therefore, relief from the automatic stay would be appropriate.

30. WNA thus requests that it be granted immediate relief from the automatic stay under § 362 of the Bankruptcy Code, without further motion or order of this Court, upon a rejection of the PPA by the Debtor, so that WNA may protect its interests, and those of the NESWC communities, with respect to the PPA.

WHEREFORE, WNA respectfully requests that this Court enter the Order attached hereto as Exhibit E: (i) compelling the Debtor to assume or reject the PPA immediately; (ii) requiring adequate assurance of future performance under the PPA by the Debtor; (iii) granting WNA immediate relief from the automatic stay in the event the PPA is rejected or deemed rejected; and (iv) granting such other relief that the Court deems just and proper.

No further memorandum will be filed.

Signed this 28th day of August, 2003.

By: 

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CERTIFICATE OF SERVICE

I, Brooke Schumm III, hereby certify that on this 28th day of August, 2003, a copy of the foregoing Motion was served on all parties on the attached service list by first class mail.

A handwritten signature in cursive script, reading "Brooke Schumm III", is written above a horizontal line.

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