

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

In re:)	
)	
USGen New England, Inc.,)	Case No. 03-30465 (PM)
)	
Debtor.)	Chapter 11
)	

**MOTION FOR AUTHORITY TO REJECT POWER PURCHASE AGREEMENT
WITH PITTSFIELD GENERATING COMPANY, LP**

USGen New England, Inc., debtor and debtor in possession (the “Debtor”), by and through its undersigned attorneys, files this Motion (the “Motion”) for Authority to Reject Power Purchase Agreement with Pittsfield Generating Company, LP (“Pittsfield”), and states as follows:

JURISDICTION AND VENUE

1. 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 statutory predicates for the relief sought in this Motion are §§ 365 and 105 of title 11 of the United States Code (the “Bankruptcy Code”), as complemented by Rule 6006 of the Federal Rules of Bankruptcy Procedure.

BACKGROUND

The Chapter 11 Case

2. On July 8, 2003 (the “Petition Date”), the Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Pursuant to §§ 1107 and 1108 of the Bankruptcy Code, the Debtor is continuing to operate its business and manage its properties as a debtor in possession. No trustee or examiner has been appointed in the Debtor’s chapter 11 case. On July 17, 2003, the Office of the United States Trustee appointed an official committee of unsecured creditors (the “Creditors’ Committee”) in the Debtor’s chapter 11 case.

Prior Proceedings

3. Pittsfield filed a Motion to Conduct Examination Under Rule 2004 (Dkt. 119) (“2004 Motion”) returnable August 20, 2003 which sought to compel the Debtor to produce witnesses for examination and documents in advance of those examinations. Pittsfield also filed a Motion Pursuant to 11 U.S.C. §365 returnable a week later, August 27, 2003, for Order to (i) Compel Assumption or Rejection of a Certain Executory Contract and (ii) Require Adequate Assurance of Future Performance (Dkt. 121) (“Motion to Compel Rejection”) which sought to compel the Debtor to determine now, before any of the normal preliminary steps have been completed, to either assume or reject the Pittsfield Power Purchase Agreement dated December 9, 1987, as amended (“PPA”). A copy of the PPA is attached to the Motion to Compel Rejection as Exhibit 1.

4. The Debtor filed an objection the 2004 Motion and opposition to Motion to Compel Rejection. In its opposition, the Debtor agreed to reject the PPA effective August 31, 2003 and to pay Pittsfield in the normal course at the contract rate for services performed through August 31, 2003.

5. At the conclusion of the hearings on August 27, 2003, this Court denied the Rule 2004 Motion and directed the Debtor to file a motion to reject the PPA and reserved on the issue of whether the effective date of the rejection of the PPA would be August 31, 2003. The Court also declared the Motion to Compel Rejection moot in light of the direction to the Debtor to file this Motion.

The Debtor and Its Business Operations

The Debtor's Formation and Business

6. The Debtor was incorporated on August 1, 1997 for the purpose of acquiring and operating the non-nuclear generating business of New England Electric System. The Debtor is an indirect, wholly-owned subsidiary of PG&E National Energy Group, Inc.

7. The Debtor is in the business of owning and operating electric generating facilities in New England (the "Facilities") and buying and selling electricity and other energy-related products at wholesale. All of these Facilities are located and all of the Debtor's significant sales take place in New England.

The Debtor's Generating Facilities

8. The Debtor owns three Facilities (Brayton Point Station, Salem Harbor Station and Manchester Street Station) that use coal, oil or natural gas for fuel. The Debtor also owns two hydroelectric systems, one of which spans the Connecticut River (Connecticut River System) and one of which spans the Deerfield River (Deerfield River System), and leases the Bear Swamp pumped-storage facility.

SUMMARY OF PITTSFIELD PPA

9. The Debtor has analyzed the PPA and determined in its sound business judgment, and as testified by Mr. Ernest Hauser, the Debtor's President, that the pricing and terms contained in the PPA exceed the current market. Also, the Debtor has determined that it

does not need this PPA to achieve a successful reorganization or fulfill existing supply obligations because, *inter alia*, the Debtor has other viable alternatives at more competitive prices.

RELIEF REQUESTED

10. By this Motion, the Debtor seeks entry of an order pursuant to §§ 365 and 105(a) of the Bankruptcy Code authorizing and approving the rejection of the PPA. The Debtor requests that rejection be made effective as of August 31, 2003 in furtherance of the Court's statements at the hearing on August 27, 2003.

11. The PPA is a contract between wholesale energy dealers, and this Motion involves a request by a power purchaser (the Debtor) to cease purchasing power under the PPA. The PPA does *not* involve the sale of power to a traditional public utility that serves retail load, and this Motion does *not* involve a request by a power seller to cease selling power to a traditional public utility that serves retail load. For this reason, this Motion involves a situation different from that which arose in the recent Federal Energy Regulatory Commission ("FERC") proceedings where an affiliate of NRG Energy, Inc. (NRG Power Marketing, Inc. ("NRG-PMI")) sought to reject a contract where it was the power *seller* in its chapter 11 case pending in the United States Bankruptcy Court for the Southern District of New York. There, NRG-PMI, a "public utility" regulated by FERC pursuant to Part II of the Federal Power Act, was attempting to reject a contract pursuant to which it *sold* energy to a traditional public utility for resale to the public at retail. FERC refused to allow NRG-PMI to cease energy sales under the contract because of its concern that NRG-PMI's abandonment of service under the contract would adversely affect the retail customers of the power purchaser, a traditional public utility. The instant Motion, which involves a request by the *purchaser* of power to cease purchasing power under the PPA, does not raise such public interest concerns.

12. In order to facilitate the transition of the operation of the PPA from the Debtor to Pittsfield, the Debtor requests that the Court enter the proposed order attached hereto, rejecting the PPA effective as of August 31, 2003, with the understanding that the Debtor is willing to enter into an arrangement acceptable to the Debtor where the Debtor would continue bidding, scheduling and settling the PPA for a transitional period of 30 days post rejection (the "Transition Period") while Pittsfield makes appropriate arrangements to take over the bidding, scheduling and settling of the PPA or to secure a third party to provide similar services.

**APPLICABLE AUTHORITY/
BASIS FOR RELIEF REQUESTED**

13. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, "subject to the court's approval, may assume or reject any executory contract ... of the debtor." 11 U.S.C. § 365(a).

14. It is well-settled in this Circuit that the business judgment rule applies to a debtor's decision to reject an executory contract or unexpired lease; absent a showing of gross abuse or bad faith, the debtor's decision must stand. *See Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043, 1046 (4th Cir. 1985); *see also In re U.S. Airways Group, Inc.*, 287 B.R. 643, 645 (Bankr. E.D. Va. 2002) (court approved debtor airline's motion to, *inter alia*, reject aircraft leases); *In re Harborview Development 1986 Ltd. Partnership*, 152 B.R. 897, 899 (D.S.C. 1993) (court affirmed bankruptcy court decision authorizing chapter 11 trustee to abandon debtor's lease of commercial property to insider corporation); *In re Hardie*, 100 B.R. 284, 287 (E.D.N.C. 1989) (court approved debtor's rejection of executory contract based on sound business judgment). In the oft cited *Lubrizol* opinion, the Fourth Circuit articulated the business judgment rule as follows:

Courts addressing [the rejection issue] must start with the proposition that the bankrupt's decision upon it is to be accorded the deference mandated by the sound business judgment rule as generally applied by courts to discretionary actions or decisions of corporate directors. See *Bildisco*, 465 U.S. at ----, 104 S.Ct. at 1195 (noting that the business judgment rule is the "traditional" test); *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad*, 318 U.S. 523, 550, 63 S.Ct. 727, 742, 87 L.Ed. 959 (1943) (applying business judgment rule to bankrupt's decision whether to affirm or reject lease)...

As generally formulated and applied in corporate litigation the rule is that courts should defer to--should not interfere with--decisions of corporate directors upon matters entrusted to their business judgment except upon a finding of bad faith or gross abuse of their "business discretion." See, e.g., *Lewis v. Anderson*, 615 F.2d 778, 782 (9th Cir. 1979); *Polin v. Conductron Corp.*, 552 F.2d 797, 809 (8th Cir. 1977). Transposed to the bankruptcy context, the rule as applied to a bankrupt's decision to reject an executory contract because of perceived business advantage requires that the decision be accepted by courts unless it is shown that the bankrupt's decision was one taken in bad faith or in gross abuse of the bankrupt's retained business discretion.

Lubrizol, 756 F.2d at 1046-47.

15. This Court applies the business judgment rule set forth in *Lubrizol* as a matter of course. As Judge Schneider has explained:

In determining whether to permit a debtor to reject an executory contract, the Court defers to the debtor's sound business judgment. This rule has generally been applied by courts to discretionary actions and decisions in the realm of corporate litigation, as well as to a debtor's decision to affirm or reject an executory contract. *Lubrizol*, *supra*, at 1046-47. The issue is "whether the decision of the debtor that rejection will be advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice." *Id.* at 1047.

In re Constant Care Community Health Center, Inc., 99 B.R. 697, 702 (Bankr. D. Md. 1989) (J. Schneider) (citations omitted); see also *In re Merry-Go-Round Enterprises*, 241 B.R. 124, 130 (Bankr. D. Md. 1999) (J. Derby) citing *Lubrizol*, 756 F.2d 1043 at 1046. ("This court allowed

[debtor] to assume the leases because it found that [debtor] had used sound business judgment in determining that assuming each of the leases was in the best interest of the estate”).

16. Upon review and analysis of the Debtor’s obligations under the PPA, the Debtor has concluded that the relief requested in this Motion is in the best interests of the Debtor, its estate and its creditors. Further, the Creditors’ Committee supports the rejection of the PPA. Elimination of the Debtor’s payment obligations under the PPA will alleviate significant economic burdens on the Debtor and its estate, as the Debtor will avoid incurring unnecessary administrative costs associated with the PPA from the effective date of rejection through the end of the contract term in 2010. Moreover, as set forth by the uncontroverted testimony of Mr. Ernest Hauser, the Debtor simply no longer requires the energy which is provided under the PPA and has viable alternatives at better prices. The PPA is not necessary to ensure that the Debtor will have an adequate supply of energy available to meet its obligations as the Debtor believes it can generate what it needs itself and, on the infrequent occasions where it would have a shortfall, it is more economic for the Debtor to cover such shortfall through alternative arrangements at current market prices which are substantially lower than the contract prices contained in the PPA. The PPA imposes excessive cost and expense to the Debtor’s estate without corresponding benefits. Thus, the PPA is neither needed nor desirable for the Debtor’s continued operations.

17. Pittsfield would like the effective date of the rejection to be as far into the future as possible for one simple reason—Pittsfield enjoys a real economic benefit under the PPA. Quite simply, the economic terms of the PPA are above market. This fact is not refuted. Pittsfield filed its Motion to Compel Rejection and forced the Debtor to expend resources at a time when the Debtor was stretched to its limits. Regardless of the Debtor’s resource limitations, the Debtor responded to Pittsfield in early August with its intent to reject the PPA and attempted

to resolve the matter consensually. Pittsfield knew that rejection of the PPA was imminent and cannot now claim to be surprised by the proposed August 31, 2003 effective date of rejection. Thus, the rejection should be made effective as the Debtor sought as of August 31, 2003.

18. In short, the Debtor has determined, in the reasonable exercise of its sound business judgment, that the PPA is burdensome and provides no economic value to its estate. Accordingly, the Debtor requests authority to reject the PPA effective as of August 31, 2003.

19. Pursuant to Local Rule 9013-2, no memorandum of law accompanies this Motion.

WHEREFORE, the Debtor respectfully requests entry of an order (a) authorizing the Debtor to reject the PPA as of August 31, 2003 and (b) granting the Debtor such other and further relief as this Court may deem just and proper.

BLANK ROME LLP

/s/ John Lucian

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2003, a copy of the foregoing Motion (the “Motion”) for Authority to Reject Power Purchase Agreement (the “PPA”) with Pittsfield Generating Company, LP (“Pittsfield”) was sent by electronic and/or facsimile transmission, and was mailed first class, postage prepaid to the parties identified on the Service List filed in this case, including counsel for the Official Committee of Unsecured Creditors and the Office of the United States Trustee. The Motion was also mailed first class, postage prepaid to Pittsfield, as counterparty to the PPA. The undersigned further certifies in accordance with ¶ 5 of this Court’s Administrative Order No. 02-03 that service was completed contemporaneously with the filing of the motion.

/s/ John Lucian