

**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 OF DEBTOR FOR ORDER PURSUANT TO 11 U.S.C. §§ 105 AND 365(a)
AUTHORIZING THE DEBTOR TO REJECT CERTAIN EXECUTORY CONTRACTS
BETWEEN THE DEBTOR AND BEAR SWAMP GENERATING TRUST NO. 1 LLC
AND THE DEBTOR AND BEAR SWAMP GENERATING TRUST NO. 2 LLC**

USGen New England, Inc. (“USGen” or “Debtor”), by counsel, hereby moves this Court for entry of an order pursuant to 11 U.S.C. §§ 105 and 365(a) authorizing the Debtor to reject certain executory contracts between the Debtor and the Bear Swamp Generating Trust No. 1 LLC (“Trust No. 1”) and the Debtor and Bear Swamp Generating Trust No. 2 LLC (“Trust No. 2”) (Trust No. 1 and Trust No. 2 are referred to herein collectively as the “Trusts”), and in support thereof states as follows:

JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) in that it is a matter concerning the administration of the Debtor’s estate, and venue in this matter is proper under U.S.C. §§ 1408 and 1409. The statutory predicates for the relief sought herein are Sections 105 and 365(a) of Title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”).

Relief Requested

2. By this Motion, the Debtor seeks authority under §§ 105 and 365 of the Bankruptcy Code, to reject, effective September 30, 2003, the following executory contracts between the Debtor and the Trusts (Trust No. 1 owns 75% interest in the Bear Swamp Project defined in paragraph 7 below which interest is subject to each of the (T1) agreements described below, and Trust No. 2 owns a 25% interest in the Bear Swamp Project which interest is subject to each of the (T2) agreements described below):

- Facility Site Sublease Agreement (T1) dated as of November 30, 1998 between Bear Swamp Generating Trust No. 1¹ as Ground Sublessor and USGen New England, Inc., as Ground Sublessee (the “T1 Site Sublease”)(Exhibit A-1) ;
- Facility Lease Agreement (T1) dated as of November 30, 1998 between Bear Swamp Generating Trust No. 1 as Owner Lessor and USGen New England, Inc., as Facility Lessee (the “T1 Facility Lease”)(Exhibit A-2);
- Facility Site Sublease Agreement (T2) dated as of November 30, 1998 between Bear Swamp Generating Trust No. 2² as Ground Sublessor and USGen New England, Inc., as Ground Sublessee (the “T2 Site Sublease”)(Exhibit A-3);
- Facility Lease Agreement (T2) dated as of November 30, 1998 between Bear Swamp Generating Trust No. 2 as Owner Lessor and USGen New England, Inc., as Facility Lessee (the “T2 Facility Lease”)(Exhibit A-4);
- Participation Agreement (T1) dated as of November 23, 1998 among USGen New England, Inc., Bear Swamp Generating Trust No. 1, Wilmington Trust Company, as Owner Trustee, Bear Swamp I LLC, The Chase Manhattan Bank,³ as Lease Indenture Trustee, and The Chase Manhattan Bank, as Pass Through Trustees (Exhibit B-1); and
- Participation Agreement (T2) dated as of November 23, 1998 among USGen New England, Inc., Bear Swamp Generating Trust No. 2, Wilmington Trust Company,

¹ Bear Swamp Generating Trust No. 1 subsequently converted to a Delaware limited liability company and changed its name to Bear Swamp Generating Trust No. 1 LLC.

² Bear Swamp Generating Trust No. 2 subsequently converted to a Delaware limited liability company and changed its name to Bear Swamp Generating Trust No. 2 LLC.

³ The Chase Manhattan Bank has been replaced by HSBC Bank, USA as Lease Indenture Trustee under the T1 and T2 Lease Indentures and as the Pass Through Trustee under the Pass Through Trust Agreements.

as Owner Trustee, Bear Swamp II LLC, The Chase Manhattan Bank, as Lease Indenture Trustee, and The Chase Manhattan Bank, as Pass Through Trustees (Exhibit B-2).

The T1 and T2 Site Subleases will be referred to herein collectively as the "Site Subleases," and the T1 and T2 Facility Leases will be referred to herein collectively as the "Facility Leases." The Site Subleases and Facility Leases will be referred to herein collectively as the "Bear Swamp Leases." The Participation Agreements, (T1) and (T2) described above, will be referred to herein collectively as the "Participation Agreements". True and correct copies of the Bear Swamp Leases and the Participation Agreements are attached hereto as Exhibits A 1-4 and Exhibit B 1-2 respectively and incorporated herein by reference.

BACKGROUND

3. On July 8, 2003 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor is operating its business and managing its properties and assets as a debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

4. On July 24, 2003, the Office of the United States Trustee filed an amended notice of the appointment of the following members to the official unsecured creditors' committee: JP Morgan Chase Bank, Algonquin Gas Transmission Company, Banc of America, SSI, DZ Bank AG (New York Branch), Covanta Haverhill, HSBC Bank, USA, as Indenture Trustee, Mohawk River Funding, III LLC, and Bear Swamp Generating Trust No. 1 LLC, c/o Verizon Capital Group.

5. The Debtor is in the business of owning and operating several electric power generating facilities in New England. The Debtor was incorporated on August 1, 1997, for the purpose of

acquiring and operating substantially all of the non-nuclear electric generating plants and related facilities, including the Bear Swamp Project (defined below), then owned by New England Power Company ("NEP"), a subsidiary of New England Electric System.

6. The Debtor is an indirect, wholly owned subsidiary of PG&E National Energy Group, Inc. ("NEG"). NEG, PG&E Energy Trading Holdings Corporation ("PGET") and its subsidiaries, PG&E Energy Trading-Power, L.P., PG&E Energy Trading-Gas Corporation and PG&E Energy Trading Investments Corporation, affiliates of the Debtor, are operating as debtors in possession in chapter 11 cases (Case Nos. 03-30459 and 03-30461 through 03-30464) also filed in this Court on July 8, 2003. Two additional cases were filed on July 29, 2003, PG&E Energy Services Ventures, Inc. and Quantum Ventures, and are jointly administered with NEG.

7. One of the facilities acquired from NEP and presently operated by the Debtor, referred to herein as the Bear Swamp Project (also referenced herein as the "Project"), is comprised of a two-unit pumped storage hydroelectric generating facility with a total rated capacity of 589 megawatts and a small conventional hydroelectric generating facility with a rated capacity of 10 megawatts (commonly referred to as the Fife Brook Station) along the Deerfield River in Rowe, Massachusetts. The Bear Swamp Project was constructed by creating an upper reservoir on elevated land adjacent to the Deerfield River and drilling a large tunnel to a powerhouse, a reinforced subterranean structure, located directly beneath the upper reservoir. A lower reservoir also was formed by constructing a dam on the Deerfield River. The powerhouse was then connected to the lower reservoir through a series of similar tunnels. Within the powerhouse is power-generating equipment including the valves and pipes that control the water flow. The power generating equipment is capable of pumping water from the lower reservoir to the upper

reservoir and generating electricity as water flows from the upper reservoir to the lower reservoir. The Project is fully automated and can be controlled from a remote location. The Fife Brook Station manages flows out of the lower reservoir into the Deerfield River.

8. The Bear Swamp Project is used to provide peaking electricity during periods when the demand for electric energy is high. It also provides quickly available electricity in the event of unanticipated and sudden outages at one or more generating resources in New England. The Project pumps water from the lower reservoir to the upper reservoir at night, when the cost of electric energy is relatively inexpensive. During peak periods, when electric energy is in greater demand and thus more costly (e.g., during heat waves or prolonged periods of frigid temperatures), the water is released from the upper reservoir through the powerhouse to the lower reservoir to generate electric energy. A pumped storage facility like Bear Swamp generally does not provide electric energy on a daily basis, but rather only provides electric energy when it is needed most. Bear Swamp generates energy approximately 10% of the year; the remaining time it is idle.

9. Because the Project is located on navigable waters of the United States, it was built and is operated under a license (FERC No. 2669) issued by the Federal Energy Regulatory Commission (“FERC”) in 1970 pursuant to Part I of the Federal Power Act (“FPA”). Under Part I of the FPA, FERC licenses and regulates non-federal hydroelectric projects located on the navigable waters of the United States. In addition to operating the Bear Swamp Project on the Deerfield River, the Debtor operates 4 facilities upstream and 3 facilities downstream from the Project. The Debtor coordinates the operation of these facilities along the Deerfield River in order to

ensure that it meets certain flow requirements for fishery and recreational boating as mandated by the FERC licenses.

10. The Debtor sells all of the output of its generating facilities, including that of the Project, through two types of transactions. In neither case is the specific output of a generating facility sold to a specific customer. Instead, the Debtor satisfies its supply obligations through its portfolio of electric generating facilities.

11. The first type of transactions are contracts between the Debtor and various third parties to deliver electricity. The cost of electricity is negotiated between the Debtor and its counter-parties. In all cases, these counter-parties are wholesale buyers of electricity who resell that electricity to their customers (e.g. homeowners or industrial facilities). The standard offer service agreement with Massachusetts Electric Company referenced in paragraph 19 below is an example of such a transaction.

12. The second type of transactions are daily auctions. Each day the Debtor bids the available output of the Project into the wholesale electricity market. Those with customers to serve (i.e., load) purchase electricity based on a clearing price that reflects the differences in the cost to operate different generating facilities. For example, large coal and nuclear plants (“base load units”) are relatively inexpensive to operate so they operate all of the time. Peaking plants, like the Bear Swamp Project, that operate only when demand is high, are more expensive to operate. The more electricity a buyer needs, the greater the price it will pay as the output of base load units is used up and the more expensive peaking units are called upon to provide electricity. As supply and demand is matched-up by the ISO (defined below), the Debtor receives a price for

the electric energy each day based on the amount it bid and the demand for electricity in the market.

13. This auction market is run by the Independent System Operation (“ISO”), who is responsible for coordinating both the production of electricity from all generating facilities in the New England market and delivery of that electricity to its users. The ISO is managed and reports to the New England Power Pool (“NEPOOL”). Like all other generating facilities located in New England, the Project is operated in accordance with the guidelines of NEPOOL, including rules governing when the Project can and cannot operate. In addition, the rules contemplate that the ISO be physically able to turn on and turn off (i.e., dispatch) generating facilities in its area of control, depending on supply and demand.

14. Rates charged for electricity sold at wholesale by private companies are regulated by FERC pursuant to Part II of the FPA. FERC sets those rates based on a seller’s cost of service in the case of traditional utility monopolies or by assuring that markets are workably competitive and that a particular seller does not exercise market power. In the latter case, FERC issues a tariff to the seller authorizing it to enter into market-based sales (i.e., either through an auction process or through negotiated agreements). The Debtor is authorized to enter into and has always entered into market-based sales. This rate regulation takes place regardless of whether a particular generating facility is regulated under Part I of the FPA.

15. In 1998, the Debtor entered into a transaction with the Trusts, whereby the Debtor sold the Bear Swamp Project (but not the land on which it is located) for \$479 million to the Trusts and simultaneously entered into the Bear Swamp Leases to lease the Project back from the Trusts so that the Debtor could operate the Project in the NEPOOL market. The Bear Swamp Leases

run through the year 2047, with an option to renew. Under the Facility Leases, the Debtor is obligated to make future annualized payments - \$45 million in 2004, escalating to \$60 million per year in 2011 through 2019 and then declining for the remaining lease term.

16. The Debtor retained ownership of the underlying ground on which the Bear Swamp Project is located and leased the ground to the Trusts pursuant to the Site Leases⁴ and then, so that the Debtor could operate the Project, the Debtor entered into the Site Subleases. The Debtor structured the transaction, in part, in order to fund operations and to repay certain debt incurred to purchase, in addition to the Project, the other generating facilities it bought at the same time from NEP.

17. The Trusts (as Owner Lessors of the Project) funded the acquisition of the Project from an equity contribution from the Owner Participant and through the issuance and sale of promissory notes (the "Lessor Notes") to two Bear Swamp 1998 Pass Through Trusts (the "Pass Through Trusts") that offered, issued and sold pass through certificates (the "Certificates") in an offering (the "Offering") qualifying under Rule 144A under the Securities Exchange Act of 1933, as amended.

18. The transactions in essence provide for the Debtor to lease the Bear Swamp Project from the Trusts and the Trusts to repay their obligations to the Pass Through Trusts and ultimately the Certificate holders from the Facility Lease payments. The Facility Leases were structured very deliberately as "leases" for all purposes. In fact, in the confidential offering circular used for the Offering, prospective Certificate holders were advised that if USGen became a debtor under

chapter 11, the Bear Swamp Leases could be rejected under Section 365 of the Bankruptcy Code and the rejection damages treated as an unsecured claim subject to the limitations of Section 502(b)(6).⁵

19. Since the term of the Leases began, the New England electric energy market has deteriorated. There is now a significant oversupply of electricity in New England and energy prices are substantially lower than anticipated. In addition, as stated in the Affidavit of Ernest K. Hauser filed in Support of First-Day Motions and Applications (the "Hauser Affidavit") (Docket No. 3), the Debtor's financial condition and prospects for the future have deteriorated as a result of a number of factors, including, without limitation: the Debtor has had to use substantial working capital to prepay its fuel requirements as a result of its deteriorating credit situation; the standard offer service agreement ("SOA") with Massachusetts Electric Company and Nantucket Electric Company (collectively, "MECO"). -- the Debtor's largest sales contract and revenue source -- will expire at the end of 2004, exposing the Debtor to market volatility at a time when generating capacity is expected to greatly exceed demand, potentially resulting in further depressed prices; the Debtor must continue to pay the above-market costs relating to its power purchase agreements ("PPAs"), the Gas Transportation Arrangements and other agreements; the

⁴ The Site Leases between the Debtor as Owner/Ground Lessor and the Trusts as Ground Lessee are not being rejected and will remain in place following entry of the proposed Order granting the relief requested in this Motion.

⁵ The Debtor anticipates that the Trusts and the Indenture Trustees and the Pass Through Trustees may attempt to seek recharacterization of the Facility Leases. The offering circular includes a disclosure to prospective Certificate holders that a court may determine that the leases are "financing leases" but acknowledges that such a determination would be subject to the court's analysis of the facts and circumstances surrounding the lease transactions. The Debtor submits that based on all of the relevant documents, the facts, and the parties' intent and expectations, the economic realities of the transaction will support the Debtor's position that the leases are executory contracts subject to rejection under Section 365 of the Bankruptcy Code.

Debtor is unable to repay the approximately \$88 million expected to come due under the Credit Facility⁶ at the end of August, 2003; and the Debtor owes significant sums to PGET related to the SOA hedges. In addition, the Debtor may be required to make substantial capital investments at its Brayton Point and Salem Harbor plants in order to meet new state and federal environmental requirements with respect to increasingly stringent air emission and water discharge regulations.

20. This confluence of events – the unanticipated overcapacity in the market, the dramatic decrease in electric energy and capacity prices, the maturity of the revolving credit facility requiring an \$88 million payment at the end of August, 2003, the proposed capital expenses to comply with the environmental regulations estimated at over \$400 million over the next 3 years, with work to begin in 2004, and the Facility Lease obligations of \$45 million in 2004 - have made it imperative that the Debtor reduce expenses and accomplish a financial restructuring through the chapter 11 process. Rejection of the Bear Swamp Leases and the Participation Agreements is a critical step in that process.

21. In order to try and manage its financial condition, the Debtor sought during 2002 to sell its assets. In July 2002, the Debtor received an offer to sublease the Bear Swamp Project for 17 years. However, because the Facility Leases are significantly above market, the sublease offer was for substantially reduced lease payments and subject to consent from the Trusts as lessors, which the Debtor was unable to obtain. Ultimately, the Debtor determined that restructuring of

⁶ Terms not otherwise defined herein shall have the meaning set forth in the Hauser Affidavit.

its obligations could best be achieved through a chapter 11 proceeding and, as part of that process, the rejection of the Bear Swamp Leases and the Participation Agreements.

22. The Debtor believes the rejection of the Bear Swamp Leases and the Participation Agreements is necessary and in the best interests of the Debtor's estate and its creditors. The Debtor has concluded, after a thorough review, that such rejection will not affect the ability of the Debtor to operate its remaining generating plants. In addition, the Debtor has determined that adequate alternative supplies of power are available either from its remaining plants or from the market, such that the Debtor will be able to meet its commitments for the sale of power.

23. Moreover, the Project can continue to be operated by the Debtor's co-licensees, the Trusts or their designated agent. At the time the Debtor entered into the transaction with the Trusts, it secured the approval of FERC to have the Trusts added to the license as co-licensees with the Debtor. In approving this partial transfer of the license to the Trusts, FERC noted that, as co-licensees, the Trusts would be jointly and severally liable with the Debtor for compliance with the license (USGen New England, Inc., 85 FERC ¶ 62,079 (CCH) (1998)).

24. In order to facilitate the transition of the operation of the Bear Swamp Project from the Debtor to the Trusts, the Debtor requests that the Court enter the proposed Order attached hereto, rejecting the Bear Swamp Leases and the Participation Agreements effective as of September 30, 2003, with the understanding that the Debtor will continue operation of the Bear Swamp Project for a transitional period of 90 days post rejection (the "Transition Period") while the Trusts make appropriate arrangements to take over the operation of the Project or to secure a third party to

manage it.⁷ It is expected that the Debtor will be compensated by the Trusts for the costs of operating the Project and for related services during the Transition Period.

25. In order to continue the operation of the Bear Swamp Project following the Transition Period, it is anticipated that the Trusts will need to enter into certain ancillary agreements, including, without limitation: (a) an agreement, or a management agreement with a third party that has an agreement, with NEPOOL and the ISO to bid and dispatch Bear Swamp. To effectuate such bidding and dispatch, the Trusts will need to establish certain computer systems to allow the Trusts to participate in the NEPOOL markets (unless the Trusts contract with a third party to manage the Project); (b) a Continuing Site Interconnection Agreement with NEP for interconnection services to the New England power grid; (c) an agreement with the other owners of the Shared Telecommunications Network that the Debtor is currently a participant in; (d) a Facilities Sharing Agreement between the Trusts and the Debtor to share certain radio and non-radio telecommunications operations; and (f) an agreement regarding the transfer of National Pollutant Discharge Elimination System Permits. In addition, the Trusts will need to file a market-based rate schedule with FERC. The Debtor submits that the Trusts can effectuate these arrangements within the Transition Period to assume full responsibility for operating the Bear Swamp Project.

26. The Debtor presently intends to operate its remaining facilities on the Deerfield River in the same manner in which such facilities have been operated for the past several decades to

⁷ The Bear Swamp Leases provide that when the Leases terminate at the expiration of the Lease Term (or earlier than such dates, if required), the Debtor will surrender the Project to the Trusts and assist the Trusts in obtaining all licenses, permits, approvals and consents that are required in connection with the use, operation and maintenance of the Bear Swamp Project by the Trusts.

ensure that a sufficient flow of water is available at each dam along the river, in satisfaction of the levels mandated by FERC licenses for fishery and recreational boating flows. As stated previously, the operation of the Debtor's other facilities on the Deerfield River has been coordinated with the operation of the Bear Swamp Project, and the Debtor is prepared to enter into a water management agreement with the Trusts that will memorialize and continue those arrangements.

27. During the Transition Period, the Debtor will work cooperatively with the Trusts to transition the operation of the Bear Swamp Project without interruption, including the transfer of necessary licenses, permits or other authorizations that need to be assigned to or procured by the Trusts or their designees, and where such assignment or procurement may be accomplished with the consent of the licensor, counter party or other issuer, by this Motion the Debtor hereby seeks authorization to effectuate such transfer or procurement without further order of this Court. To the extent the Debtor identifies any additional executory contracts that require further court order to assume and assign such contracts to the Trusts to enable the Bear Swamp Project to be operated by the Trusts without interruption, the Debtor will file a motion promptly under Section 365 of the Bankruptcy Code to assume and assign such executory contracts to the Trusts.⁸

APPLICABLE AUTHORITY

28. Section 365 of the Bankruptcy Code provides in pertinent part:

⁸ The Debtor is reviewing its contracts to determine whether there are any executory contracts that will no longer be necessary or beneficial to the estate once the Transition Period expires and the Bear Swamp Project is no longer operated by the Debtor. As those contracts are identified, the Debtor will file appropriate motions to reject.

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

11 U.S.C. § 365(a).

29. 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 (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 Hardie, 100 B.R. 284, 287 (E.D.N.C. 1989). 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 1046–1047.

30. 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 (Bkrcty. D. Md. 1989) (J. Schneider) (citations omitted); In re Harborview Development 1986 Limited Partnership, 152 B.R. 897, 899 (D.S.C. 1993); See also In re Merry-Go-Round Enterprises, 241 B.R. 124, 130 (Bkrcty. D. Md. 1999) (J. Derby) citing Lubrizol, 756 F.2d 1043 at 1046. ("[t]his 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").

31. Courts in other jurisdictions similarly apply the business judgment standard and accord deference to the debtor's business judgment when evaluating a motion to reject a lease or executory contract. Under the business judgment test, the Debtor is required to show only that rejection will benefit the estate. See, e.g., National Labor Relations Board v. Bildisco (In re Bildisco), 682 F.2d 72, 79 (3d Cir. 1982), aff'd, 465 U.S. 513, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984), (the Third Circuit recognized that "[t]he usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the 'business judgment' test."). See also In

re Federated Department Stores, 131 B.R. 808, 813 (S.D. Ohio 1991); In re HQ Global Holdings, Inc., 290 B.R. 507, 511 (D. Del. 2003) (the sole issue to consider when evaluating a motion to reject an executory contract under the business judgment test is whether the rejection will benefit the estate); In re Central Jersey Airport Services, LLC, 282 B.R. 176 (Bankr. D.N.J. 2002).

32. Once the Debtor satisfies the business judgment test, the rejection should be summarily granted by the court; the burden is on the opposing party to affirmatively demonstrate that the decision to reject the executory contract is the result of bad faith, whim or caprice. HQ Global Holdings, Inc., 290 B.R. at 510; In re Trans World Airlines, Inc., 261 B.R. 103, 123 (D.Del. 2001) (a debtor's decision to reject an executory contract should be summarily affirmed unless it is the product of "bad faith, or whim or caprice," citing Wheeling-Pittsburgh Steel Corp. v. W. Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.), 72 B.R. 845, 849-850 (Bankr. W.D. Pa. 1987)); In re Chipwich, Inc. 54 B.R. 427 (Bankr. S.D.N.Y. 1985)(debtor's business judgment should not be interfered with absent showing of bad faith or abuse of business discretion).

33. Upon review and analysis of the Debtor's substantial financial obligations under the Bear Swamp Leases and lack of sufficient benefit to the estate, coupled with the additional economic challenges the Debtor faces – now and prospectively - the Debtor has concluded that it must reject the Bear Swamp Leases and the Participation Agreements as a critical step in its overall reorganization strategy. It is the Debtor's business judgment that such rejection is appropriate and necessary and in the best interests of its estate and its creditors; it will relieve the Debtor of the near term lease obligation of \$45 million to \$60 million annually and will eliminate the continuing losses incurred by the Debtor in connection with the operation of the Bear Swamp Project – a facility that is not essential to the Debtor's continuing operation of its business. In

addition, limiting the Trusts' lease rejection damages claim in accordance with the statutory provisions of Section 502(b)(6) of the Bankruptcy Code will inure to the benefit of all creditors by reducing the Trusts' prepetition unsecured claims substantially.⁹

34. Under section 105(a) of the Bankruptcy Code, the Court has expansive equitable powers to fashion any order or decree that is necessary to carry out the provisions of the Bankruptcy Code. See, e.g., Kestall v. Kestell (In re Kestall), 99 F.3d 146 (4th Cir. 1996) (explaining that section 105 provides “that a court of bankruptcy has authority to issue any order necessary or appropriate to carry out the provisions of the bankruptcy code”); In re Cheeseman, 25 F.3d 356, 360 (6th Cir. 1994) (a court has broad powers to protect debtors). The Debtor submits that under Section 105 of the Bankruptcy Code this Court has the power to authorize the Debtor to continue to operate the Bear Swamp Project during the Transition Period to facilitate a smooth, uninterrupted transfer of the operations to the Trusts.

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

Wherefore, for the reasons set forth herein the Debtor respectfully requests entry of an order pursuant to Sections 105 and 365(a) of the Bankruptcy Code (i) authorizing the Debtor to reject the Bear Swamp Leases and the Participation Agreements as of midnight on

⁹ The Debtor submits that the Bear Swamp Leases are leases of real property and subject to the cap on damages under Section 502(b)(6). The confidential offering circular used in the Offering states that "under Massachusetts law (the Project is located in Massachusetts) it is likely the Leases will be viewed as leases of real, rather than personal, property" and discloses that Section 502(b)(6) will limit the claim for rejection damages. As the description of the Bear Swamp Project in paragraph 7 above makes clear, the leased property is the Project, which is comprised of reservoirs, dikes, reinforced tunnels, the powerhouse - all improvements to the land and unquestionably part of the realty - and some limited equipment affixed to the powerhouse and an integral component of the Project. The Debtor anticipates it will successfully have the Court apply the Section 502(b)(6) cap to the lease rejection claim.

September 30, 2003, (ii) authorizing the Debtor to continue to operate the Bear Swamp Project during the Transition Period, (iii) authorizing the Debtor to transfer licenses, permits and other authorizations, by assignment or procurements, to the Trusts to the extent the licensor, counter party or issuer consents and such transfer is necessary to facilitate the operation of the Bear Swamp Project by the Trusts and (iv) granting such other and further relief as is just and proper.

Dated: August 29, 2003

BLANK ROME LLP

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Counsel for Debtor and Debtor in
Possession

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of August, 2003, a copy of the foregoing Motion Pursuant to Sections 105 and 365 of the Bankruptcy Code for Order Authorizing the Debtor to Reject Certain Executory Contracts Between The Debtor And Bear Swamp Generating Trust No. 1 LLC And The Debtor And Bear Swamp Generating Trust No. 2 LLC was e-mailed to the parties on the Initial Service List [Dkt. No. 139], with a hard copy following by first class, postage prepaid mail.

/s/ John Lucian