

**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
)	

**DEBTOR'S MOTION PURSUANT TO BANKRUPTCY
RULE 9019 TO APPROVE PROPERTY TAX SETTLEMENTS**

USGen New England, Inc., debtor and debtor in possession (the "Debtor"), by and through its undersigned attorneys, files this Motion Pursuant to Bankruptcy Rule 9019 to Approve Property Tax Settlements (the "Motion"), 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 predicate for the relief sought in this Motion is Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

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 in the Debtor's chapter 11 case.

The Debtor and Its Business Operations

The Debtor's Formation and Business

3. 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.

4. 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

5. 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 LITIGATION AND SETTLEMENT AGREEMENTS

Waterford, Vermont Tax Appeal And Settlement Thereof

6. The Town of Waterford, Vermont ("Waterford") has listed the real estate owned by the Debtor in Waterford on its Grand List, effective April 1, 2002, at the total value for tax purposes of \$31,330,829. The Debtor disputed the listed value of this real estate and appealed the listing to the Caledonia Superior Court in Vermont for *de novo* review. The pending appeal bears

Docket No. 265-9-02 Cacv (the "Waterford Appeal"). The State of Vermont ("Vermont") has intervened in the Waterford Appeal.

7. Rather than litigate further the issues presented by the Waterford Appeal, the parties (the Debtor, Waterford and Vermont) have negotiated a settlement thereof, subject to the approval of this Court, embodied in (i) an Agreement and Stipulated Judgment Order between the Debtor, Waterford and Vermont and (ii) a companion Agreement between the Debtor and Waterford addressing specific local issues associated with transitional support that is part of the settlement, which together resolve the Grand List value of all of the Debtor's real estate in Waterford as of April 1, 2002 and as of April 1, 2003 (together, the "Waterford Settlement Agreement").

8. The Waterford Settlement Agreement, a copy of which is annexed hereto as Exhibit "A", provides, in pertinent part, that (i) all of the Debtor's real property in Waterford shall be listed on the Waterford Grand List as of April 1, 2002 and as of April 1, 2003 at a listed value of \$19,987,129 (in contrast to the previously listed value of \$31,330,829); (ii) all of the Debtor's real property in Waterford shall be listed on the Equalized Education Listing certified effective as of January 1, 2003 for Waterford at a fair market value of \$21,148,163; and (iii) the Debtor shall be entitled to a partial refund of \$164,088.01 for 2002 taxes paid to Waterford (which were paid based on a listed value of \$31,330,829), which shall be credited toward the October 2003 property tax payment due to Waterford.

Providence, Rhode Island Tax Litigation And Settlement Thereof

9. The Debtor's Manchester Street Station ("Manchester Street") was the subject of a tax treaty or tax stabilization plan (the "Tax Stabilization Agreement") between the Debtor and the City of Providence, Rhode Island ("Providence"), which ran through June 2003.

10. In a city-wide revaluation of real property as of December 31, 2000, Providence substantially increased the assessment for all Manchester Street property to a sum in excess of \$500,000,000, approximately \$475,000,000 of which related to treaty property (essentially the power plant) and approximately \$25,000,000 of which allegedly related to non-treaty property (*i.e.*, the remainder of the real property not covered by the original treaty). Due to the Tax Stabilization Agreement, the \$475,000,000 increased assessment did not result in an increase in tax payments on treaty property (because the power plant was still subject to the tax treaty), but the \$25,000,000 in assessed value that related to the non-treaty property resulted in an increase to \$866,826 in taxes owed by the Debtor for such property to Providence for fiscal year 2001.

11. Because the Debtor disagreed with the entire \$500,000,000 assessment, the Debtor filed an Application For Abatement of Tax with the City Assessor on November 16, 2001, followed by a tax appeal petition in Superior Court on December 7, 2001 (the "2001 Tax Appeal").

12. In fiscal year 2002, Providence again increased its assessment of non-treaty property to \$27,400,000, which resulted in an increased tax burden of \$984,592 to the Debtor for such property. Again, the Debtor disagreed with the increased assessment. Accordingly, the Debtor filed an Application For Abatement of Tax as well as a companion tax appeal petition in Superior Court on September 11, 2002 and November 4, 2002, respectively (the "2002 Tax Appeal"). The 2001 Tax Appeal and the 2002 Tax Appeal have been consolidated and are pending in an action entitled *USGen*

New England, Inc. v. Thomas Rossi, in his Capacity as Tax Assessor for the City of Providence, P.C. No. 2001-6436 and P.C. No. 2002-6211 (the "Providence Litigation").

13. In connection with the Providence Litigation, the Debtor through its local counsel retained the services of PA Consulting to appraise the fair market value of Manchester Street. Based on its appraisal, PA Consulting valued Manchester Street at \$149,000,000 as of December 31, 2000. Providence retained the services of George E. Sansoucy, P.E., LLC ("Sansoucy") to appraise the fair market value of Manchester Street beyond the end of the current treaty. In a report issued March 2003, Sansoucy valued Manchester Street at \$256,000,000 as of December 31, 2002.

14. Rather than litigate further the issues presented by the Providence Litigation, the parties have negotiated a settlement thereof, subject to the approval of this Court, embodied in (i) an amendment to the Tax Stabilization Agreement, which continues the tax treaty for an additional five years commencing July 1, 2003 and expiring June 30, 2008 (the "Amendment to Tax Stabilization Agreement"), and (ii) a Settlement Agreement and Mutual Release (together with the Amendment to Tax Stabilization Agreement, the "Providence Settlement Agreement").¹

15. The Providence Settlement Agreement, a copy of which is annexed hereto as Exhibit "B",² provides, in pertinent part, that (i) with respect to the tax treaty, the Debtor shall make annual property tax payments of \$6,600,000 for each of fiscal years 2004 (July 1, 2003 – June 30, 2004), 2005 (July 1, 2004 – June 30, 2005), 2006 (July 1, 2005 – June 30, 2006), 2007 (July 1, 2006 – June 30, 2007) and 2008 (July 1, 2007 – June 30, 2008), payable quarterly when tax

¹ It is contemplated that a first vote by the City Council to approve the Amendment to Tax Stabilization Agreement will be held on September 4, 2003 and that a second (and final) vote thereon will be held on September 18, 2003. On August 25, 2003, the City Council's Finance Committee voted unanimously to recommend approval of the Amendment to Tax Stabilization Agreement, as well as the abatement for tax years 2001 and 2002.

payments are ordinarily due; and (ii) with respect to the Providence Litigation, the Debtor shall dismiss the two pending tax appeals with prejudice and in consideration Providence shall pay the Debtor \$1,750,000 as follows: (1) \$1,000,000 payable 20 days before the first quarter tax payment for Tax Year 2004 is due under the tax treaty, (2) \$250,000 payable 20 days before the second quarter tax payment for Tax Year 2004 is due under the tax treaty, (3) \$250,000 payable 20 days before the third quarter tax payment for Tax Year 2004 is due under the tax treaty, and (4) \$250,000 payable 20 days before the fourth quarter tax payment for Tax Year 2004 is due under the tax treaty.³ In addition, the Providence Settlement Agreement addresses the disposition of the tax treaty in the event of a future shutdown of Manchester Street.

RELIEF REQUESTED

16. By this Motion, the Debtor seeks entry of an order, pursuant to Bankruptcy Rule 9019, approving the Waterford Settlement Agreement and the Providence Settlement Agreement (together, the "Settlement Agreements"), each of which the Debtor submits is fair, reasonable and in the best interests of the Debtor, its creditors and its estate.

BASIS FOR RELIEF REQUESTED

17. Bankruptcy Rule 9019 provides, in pertinent part, that "[o]n motion ... and after notice and a hearing, the court may approve a compromise or settlement." *See* Fed. R. Bankr. P. 9019.

18. Settlement agreements are generally favored in a bankruptcy setting. *See In re Bond*, 16 F.3d 408, 1994 WL 20107 at *3 (4th Cir. 1994) (*quoting* Collier on Bankruptcy ¶

² As of the date of the filing of this Motion, the Amendment to Tax Stabilization Agreement had not been finalized by Providence. However, included instead as part of Exhibit "B" hereto is a copy of the Ordinance issued by Providence upon which the Amendment to Tax Stabilization Agreement will be based.

9019.03[1] (15th ed. 1993)) ("to minimize litigation and expedite the administration of a bankruptcy estate, 'compromises are favored in bankruptcy'"). Courts have considered the following standards or factors in determining whether to grant a Bankruptcy Rule 9019 motion to approve a compromise or settlement: (i) the probability of success in the litigation; (ii) the difficulties in collection; (iii) the complexity of the litigation, and the expense, inconvenience, and delay necessarily attending it; and (iv) the paramount interest of the creditors and a proper deference to their reasonable views. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 499, 505-06 (Bankr. S.D.N.Y. 1991); *In re U.S. Airways Group, Inc.*, 2002 WL 31829093 at *1 (Bankr. E.D. Va. 2002).

19. The decision to approve a compromise is within the discretion of the Court and is warranted where the settlement is found to be reasonable and fair in light of the particular circumstances of the case. *See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). The settlement need not be the best that could have been achieved, but need only fall "within the reasonable range of litigation possibilities", *In re Penn Central Transp. Co.*, 596 F.2d 1102, 1114 (3d Cir. 1979), and not "below the lowest point in the range of reasonableness." *U.S. ex rel. Rahman v. Oncology Associates, P.C.*, 269 B.R. 139, 149-50 (D. Md. 2001), *aff'd*, 2003 WL 1735258 (4th Cir. 2003) (*quoting Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied*, 464 U.S. 822 (1983)); *see also In re McLean Industries, Inc.*, 84 B.R. 340, 344 (Bankr. S.D.N.Y. 1988); *In the Matter of Carla Leather, Inc.*, 44 B.R. 457, 465 (Bankr. S.D.N.Y. 1983); *see also W. T. Grant*, 699 F.2d at 608 ("responsibility of the bankruptcy judge ... is not to decide the numerous questions of law and fact

³ The Debtor intends to use these funds to make its tax payments to Providence.

... but rather to canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness'").

20. The Debtor submits that each of the Settlement Agreements represents a fair and reasonable resolution of the respective property tax disputes in Waterford and Providence.

21. As to the Waterford Settlement Agreement, the settlement (i) lowers the current grand list value of the Debtor's real property in Waterford by approximately 36% (from \$31,330,829 to \$19,987,129) with a resulting material reduction in the Debtor's 2003 tax liability from approximately \$580,000 annually to approximately \$450,000 annually; and (ii) refunds to the Debtor \$164,088 of the property tax payment made in October 2002, to be applied as a credit toward the Debtor's October 2003 tax bill.

22. As to the Providence Settlement Agreement, the settlement (i) reduces the Debtor's annual property tax payment to \$6,600,000 for fiscal years 2004 through 2008;⁴ (ii) results in the payment of \$1.75 million to the Debtor to dismiss the Providence Litigation; (iii) provides the Debtor with future tax certainty; and (iv) addresses the disposition of the tax treaty in the event of a future shutdown of Manchester Street.

23. Furthermore, the Settlement Agreements avoid the expense and delay associated with, and the attendant risks of, further litigation, the cost of which would be borne by the Debtor's estate. Although the Debtor believes it likely that it ultimately would have been successful in prevailing, at least in part, in the underlying litigations, the Debtor submits that a simple cost-benefit

⁴ In the absence of the Amendment to Tax Stabilization Agreement, the Debtor would have had to pay approximately \$10,000,000 in annual property taxes based on the \$256,000,000 Sansoucy appraisal and a tax rate of \$39.35 per thousand pending the outcome of litigation. The \$6,600,000 payment corresponds to a property value of 168,000,000 at a tax rate of \$39.35 per thousand. A \$168,000,000 value is much closer to the value of the property ascribed by the Debtor's appraiser (\$149,000,000) than Providence's appraiser (\$256,000,000).

analysis merits approval of the Settlement Agreements. Clearly, the risk of a detrimental outcome in these litigations has been avoided.

24. For the foregoing reasons, the Debtor believes that the Settlement Agreements fall well within the range of reasonableness and are in the best interests of the

Debtor, its creditors and its estate, and requests that this Court approve the Settlement Agreements in all respects.

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

CONCLUSION

WHEREFORE, the Debtor respectfully requests entry of an order (a) approving and authorizing the Debtor to enter into the Settlement Agreements, 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 Pursuant to Bankruptcy Rule 9019 to Approve Property Tax Settlements 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 State Trustee. The Motion was also mailed first class, postage prepaid to the counterparties to the Settlements. 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