

104 FERC ¶ 61,185
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Vermont Public Power Supply Authority

v.

Docket No. EL03-208-000

PG&E Energy Trading - Power, L.P.
and PG&E National Energy Group, Inc.

ORDER DENYING COMPLAINT

(Issued August 1, 2003)

1. In this order, we deny a complaint by Vermont Public Power Supply Authority (VPPSA) against PG&E Energy Trading - Power, L.P. (PGET) and PG&E National Energy Group, Inc. (PGEN).¹ VPPSA alleges that PGET has stopped providing it with service as required under the parties' contract, that PGET has not obtained Commission approval to terminate the contract, and that the Commission should direct PGET to resume providing service to VPPSA under the contract.

2. We will deny the complaint, because the parties' contract provides that it shall automatically terminate if either party is the subject of a bankruptcy proceeding. PGET has filed for Chapter 11 bankruptcy protection. This order benefits customers by clarifying the parties' obligations under their contract.

¹PGET is PGEN's power marketer affiliate.

BACKGROUND

The Parties' Contracts

3. On December 1, 1997, VPPSA entered into an umbrella agreement with USGenPS² (referred to by the parties as the "Enabling Agreement") providing the terms under which the two entities would do business. Individual transactions are evidenced by transaction letters, which, together with the Enabling Agreement, constitute the contract governing that transaction.

4. On January 22, 2002, the parties agreed to a set of amendments to the Enabling Agreement (2002 Amendments). Among other matters, the 2002 Amendments provide for events of default and remedies upon an event of default. Section 8.8 of the 2002 Amendments sets forth specific "events of default." Such events of default include, among other matters, the party being subject to a bankruptcy proceeding.³

5. Section 8.9 of the 2002 Amendments defines "remedies upon an event of default." This provision provides that upon a party being the subject of a bankruptcy proceeding (*i.e.*, "upon the occurrence of any Events of Default listed in item (iv) of Events of Default") "all transactions and this agreement in respect thereof shall automatically terminate, without notice, and without any other action by either party as if an Early Termination Date had been established immediately prior to such event."⁴

6. On January 28, 2002, the parties executed two transaction letters, one for the purchase and sale of 20-25 MW of capacity (25 MW in certain months and 20 MW in other months) and another for the sale of associated energy for five years starting on January 1, 2003. The transactions were made pursuant to the Enabling Agreement and the 2002 Amendments. VPPSA states that these contracts were to provide it with

²PGEN was formerly known as USGenPS. The Commission approved USGenPS's application to operate as a power marketer and make wholesale power sales at market-based rates in USGen Power Services, L.P., 73 FERC ¶ 61,302 (1995) (USGen).

³2002 Amendments, Section 8.8(iv).

⁴In addition, Section 6.5 of the 2002 Amendments provides that, on or before February 8, 2002, PGET shall cause PGEN to provide a \$5 million guarantee covering then outstanding transactions. The 2002 Amendments also allow either party that, on commercially reasonable evidence, deems itself insecure about the other's performance, to require the other to make a payment equaling 2 months payment under the contract, as collateral to guarantee payment.

20-25% of its total energy supply.

VPPSA's Complaint

7. On July 3, 2003, VPPSA filed a complaint with the Commission against PGET and PGEN⁵ alleging that, after providing service under the contract for the first six months of 2003, PGET stopped providing service under the contract. VPPSA also asserts that it is not aware of any force majeure conditions that would justify service interruptions. VPPSA alleges that: (1) PGET did not give it any advance notice that it would no longer be providing service; (2) PGET did not file a notice of termination with the Commission; and (3) PGET did not obtain Commission approval to stop providing service. VPPSA requests that the Commission order PGET to resume service to VPPSA and provide whatever other relief is necessary. VPPSA argues that its complaint should be afforded fast track treatment because it must make arrangements to replace power and energy that PGET is now refusing to supply.

Notice of Filing and Interventions

8. Notice of VPPSA's complaint was published in the Federal Register, 68 Fed. Reg. 41,574 (2003), with comments, protests, and interventions due on or before July 17, 2003. Timely interventions raising no substantive issues were filed by the Vermont Public Service Board (a notice of intervention) and the Vermont Department of Public Service (a motion to intervene). North Hartland LLC, a self-certified qualified facility, filed a motion to intervene opposing the complaint, arguing that VPPSA and PGET should buy power from it. Morgan Stanley Capital Group Inc. and Sempra Energy Resources (collectively Morgan/Sempra) jointly filed a motion to intervene and protest opposing the complaint. On July 18, 2003, the New England Conference of Utility Commissioners (NECPUC) filed an untimely motion to intervene raising no substantive issues.

Morgan/Sempra's Protest

9. Morgan/Sempra argues that this case is important because Commission action on VPPSA's complaint could adversely affect sellers by establishing specific performance as the remedy of choice for a seller's alleged breach of a jurisdictional contract and, thus, implicates broader issues underlying the Commission's market-based rate policies and not just the contract between VPPSA and PGET. Morgan/Sempra argues that VPPSA is confusing contract abrogation or termination with remedies for breach of contract and that

⁵VPPSA explains that it included PGEN in its complaint because, under the 2002 Amendments, PGEN guarantees PGET's performance.

this case involves remedies for a breach of contract and not approval for termination of a contract. Morgan/Sempra argues that, if PGET has breached the contract, VPPSA may pursue monetary damages as provided in the contract, but that it must demonstrate that it lacks an adequate remedy at law before obtaining specific performance as a remedy for any breach of the contract.

10. Morgan/Sempra further argues that the adequacy of money damages as a remedy in this case is supported by the language of the parties' contract, which specifies that the monetary damages specified in the contract are to be the "*sole and exclusive remedy* for any aggrieved party . . . and *all other damages and remedies are waived*. . . ."⁶

11. Finally, Morgan/Sempra argues that the parties to these contracts sought further certainty through the development of standard provisions prescribing the means by which monetary damages are to be calculated. Thus, they argue granting VPPSA's complaint would unsettle the reasonable expectations of the parties to such contracts and undermine the development of competitive power markets.

Motion to Dismiss and Answer

12. On July 23, 2003, PGET and PGEN jointly filed a motion to dismiss and answer to the complaint arguing that the Commission should promptly dismiss VPPSA's complaint. PGET/PGEN (collectively "NEG") argues that the complaint should be dismissed for five reasons. First, the parties' contract explicitly provides that it automatically terminated when PGET filed a petition for reorganization under the Bankruptcy Code (Code) on July 8, 2003. Thus, NEG argues that there is no longer any contract to enforce. NEG further argues that VPPSA's request for specific performance ignores that the contract provides that its "sole and exclusive remedy" under the contract for any non-performance by PGET is a claim for liquidated damages and the contract provides that any other damages are waived. Thus, NEG argues, any damages are the province of the Bankruptcy Court, and not the Commission. Second, NEG argues that dismissal of the case is consistent with the Commission's precedent in Richard Blumenthal, Attorney General of the State of Connecticut, and The Connecticut Department of Public Utility Control v. NRG Power Marketing, Inc., 103 FERC ¶ 61,344 (2003) (NRG), because the contract expired by its own terms when PGET filed its petition for bankruptcy. Third, NEG argues that PGET's bankruptcy filing created an automatic stay under Section 362

⁶Enabling Agreement at § 8.5 (emphasis added).

of the Bankruptcy Code (Code)⁷ and that VPPSA needs the approval of the Bankruptcy Court to pursue its claim. NEG further argues that Section 556 of the Code,⁸ gives the Bankruptcy Court the responsibility of determining damages under the contract, if any, and that the Commission must defer to the Bankruptcy Court in matters related to the rejection of executory contracts under Section 365(a) of the Code.⁹ Fourth, NEG argues that VPPSA's complaint fails to satisfy the public interest standard to amend a contract to provide specific performance because it has neither alleged, nor shown, that contract modification is needed to protect the public interest. Finally, NEG argues that VPPSA fails to state a claim against PGEN. NEG argues that even though PGEN provided a \$5 million guarantee, as provided in the contract, that guarantee does not obligate PGEN to perform PGET's obligations if PGET fails to do so. Thus, NEG argues that the claims against PGEN should be dismissed.

DISCUSSION

13. As a preliminary matter, the timely unopposed notice of intervention and motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d), 18 C.F.R. § 385.214(d) (2003), we will grant NECPUC's late intervention, given the early stage of the proceeding, the absence of any undue prejudice or delay, and movant's interest in the proceeding.

14. VPPSA alleges that PGET stopped providing service under the contract without giving it any advance notice, without filing a notice of termination with the Commission, and without obtaining Commission approval to stop providing service. VPPSA argues that a public utility does not have the right to refuse to provide service under the terms of FERC-jurisdictional agreements. If a FERC-jurisdictional agreement specifies the circumstances when service may be interrupted, then service may not be interrupted on any other ground. VPPSA further argues that PGET's nonperformance is not excused by any of the circumstances enumerated in the parties' force majeure provision (Article 10 of the Enabling Agreement). Finally, VPPSA argues that the contracts are subject to prospective modification under a "public interest" standard via FPA § 206. However, VPPSA argues that this option excludes PGET's recourse to "self-help" by simply suspending service without Commission authorization. Thus, VPPSA argues, the Commission should order PGET to resume providing service to VPPSA.

⁷11 U.S.C. § 362(a)(1) (2000).

⁸11 U.S.C. § 556 (2000).

⁹11 U.S.C. § 365(a) (2000).

15. VPPSA further argues that these principles were recently affirmed by the Commission in NRG, where the Commission required a power marketer to continue sales to Connecticut Power & Light Company even though the marketer declared bankruptcy. VPPSA argues the cases are alike because PGET's sales are FERC-jurisdictional, PGET has no right to unilaterally terminate its contract, and no right to suspend performance other than in circumstances of force majeure that are not present here. Thus, VPPSA argues, the Commission should direct PGET to resume providing service to VPPSA.

Commission Finding

16. We note that at the time that VPPSA filed its complaint, PGET had not yet filed for bankruptcy. However, at this time, we will reject VPPSA's complaint because, among other matters, the contract explicitly provides that it automatically terminates upon either of the parties becoming the subject of a bankruptcy proceeding.¹⁰ Thus, when PGET filed for Chapter 11 bankruptcy protection, the contract between VPPSA and PGET automatically terminated, without notice, and without either party needing to make a filing with the Commission to effectuate it.¹¹ This being the case, we find without merit VPPSA's contention that we should direct PGET to resume deliveries under the contract.

17. We also reject VPPSA's contention that PGET may only avoid making deliveries under the contract when a force majeure event arises. Force Majeure is not the only authority for non-delivery. As discussed above, the contract explicitly states that bankruptcy automatically terminates the contract and thus voids any requirement for deliveries to be made under the contract, irrespective of force majeure.¹²

18. We also find unpersuasive VPPSA's argument that requiring PGET to resume making power deliveries is required by our precedent in NRG. In NRG, 103 FERC at PP 46-47, we held that a bankruptcy court's approval of a power marketer's request to reject

¹⁰2002 Amendments, Sections 8.8(iv) and 8.9.

¹¹The effectiveness of Section 8.9 of the 2002 Amendments, which provides that the contract is automatically terminated if either party is the subject of a bankruptcy proceeding, is not affected by Section 365(e)(1) of the Bankruptcy Code, 11 U.S.C. § 365(e)(1), which generally bars the enforcement of such termination provisions. The "Safe Harbor" provision of Section 556 of the Bankruptcy Code, 11 U.S.C. § 556, expressly permits such termination of "forward contracts" notwithstanding the provisions of Section 365(e)(1). This agreement meets the definition of "forward contract" set forth in Section 101(25) of the Bankruptcy Code, 11 U.S.C. § 101(25).

¹²2002 Amendments, Sections 8.8(iv) and 8.9.

an agreement between it and a traditional public utility did not preclude the Commission from making an independent determination as to whether the power marketer must continue to provide service to the traditional public utility. In contrast to the contract before us here, the contract in NRG did not provide that it would automatically terminate upon one of the parties to the contract becoming the subject of a bankruptcy proceeding. Thus, we see no inconsistency between our action here and our decision in NRG.

19. VPPSA also objects that PGET failed to give it advance notice before it stopped making power deliveries and objects that PGET did not file a notice of termination with the Commission or obtain Commission approval to stop making deliveries. In this regard, we note that, as in Southern Company Energy Marketing, L.P., et al.,¹³ the contract between PGET and VPPSA was a market-based power sales transaction that was "neither on file with the Commission nor subject to any filed umbrella agreements, but . . . made pursuant to an umbrella tariff on file." We held in Southern Company that as "a discretionary power sale under an umbrella service agreement or a power marketer's tariff is not 'a rate schedule required to be on file' with the Commission, notice of termination of such a discretionary power sale does not have to be filed."¹⁴ Under the terms of the parties' contract here,¹⁵ once PGET filed for bankruptcy, this constituted an event of default and, consistent with our precedent in Southern Company, the contract was automatically terminated without notice and without any other action by either party.¹⁶

20. To the extent that PGET failed to make any required power deliveries to VPPSA prior to the automatic termination of the contract (upon PGET's filing for bankruptcy), VPPSA may pursue its contractual entitlement to compensation in an appropriate court.

21. For all these reasons, we see no basis under the parties' contract to order PGET to resume making power deliveries. Thus, we will deny VPPSA's complaint.¹⁷

¹³84 FERC ¶ 61,199 (1998) (Southern Company), reh'g denied, 86 FERC ¶ 61,131 at 61,455 (1999), aff'd, The Power Company of America, L.P., Petitioner v. FERC, 245 F.3d 839 (2001).

¹⁴86 FERC at 61,457.

¹⁵2002 Amendments, §§ 8.8(iv), 8.9(a)(ii).

¹⁶See 103 FERC ¶ 61,344 at P 59.

¹⁷Because we are rejecting VPPSA's complaint on the basis of PGET's bankruptcy
(continued...)

The Commission orders:

VPPSA's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁷(...continued)
filing terminating the contract, we need not reach the merits of Morgan/Sempra's and NEG's arguments that VPPSA's complaint should be denied for other reasons.