**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF MARYLAND**
**Greenbelt Division**

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| **In re:** | § | |
| | § | **Case No. 03-30459 (PJM)** |
| **NATIONAL ENERGY & GAS TRANSMISSION, *et al.*,** | § | **(Jointly Administered)** |
| | § | |
| | § | **Chapter 11** |
| **Debtors.** | § | |

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF NEGT ENERGY TRADING – POWER, L.P. FOR SUMMARY JUDGMENT**

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## I. PRELIMINARY STATEMENT

The objection raised by NEGT Energy Trading-Power, L.P. ("ET Power") to the subrogation claim asserted by National Energy & Gas Transmission, Inc. ("NEGT") presents a simple matter of enforcement of clear and unambiguous contractual provisions. The contracts at issue are a pair of guaranties issued by NEGT and Gas Transmission Northwest Corporation ("GTN") in connection with a tolling agreement between ET Power and Liberty Electric Power, LLC ("Liberty").

In the NEGT Guaranty (as defined below), NEGT clearly and specifically waived any right to the benefit of any guaranty issued to Liberty other than the NEGT Guaranty. NEGT has asserted that it is subrogated to Liberty's claim against ET Power – but rather than asserting such rights under the NEGT Guaranty, the guaranty it issued to Liberty, NEGT seeks to have the benefit of the GTN Guaranty (defined below). NEGT's claim has no merit. By the plain contractual language of the guaranty NEGT issued to Liberty, NEGT waived the right to obtain any benefit from the GTN Guaranty. The GTN Guaranty is the only guaranty that could provide subrogation rights against ET Power because GTN, not NEGT, has been deemed by this Court to have made a payment to Liberty.

No genuine issue exists with regard to any material fact. The plain meaning of the language in the NEGT and GTN Guaranties makes it clear that ET Power is entitled to judgment as a matter of law. Accordingly, the Court should enter summary judgment in favor of ET Power.

## II. SUMMARY JUDGMENT MOTION AND EVIDENCE

ET Power relies upon the Declaration of Charles Goldstein (the "Goldstein Declaration") and the exhibits thereto, including the NEGT Guaranty and the GTN Guaranty, filed

contemporaneously with this Motion for Summary Judgment.

## III. FACTUAL BACKGROUND

### A. The Parties

ET Power[1] is a former indirect subsidiary of NEGT.[2] (Goldstein Declaration, ¶ 2.) On July 8, 2003, NEGT, ET Power and several of their affiliates filed voluntary petitions for protection under chapter 11 of the Bankruptcy Code. (Goldstein Declaration, ¶ 4.) Until the entry of the Sale Order (defined below), GTN was a non-debtor affiliate of NEGT and ET Power. (Goldstein Declaration, ¶ 5.) PG&E Corporation ("PGE") was the ultimate parent of NEGT and ET Power until NEGT's plan of reorganization became effective on October 29, 2004. (Goldstein Declaration, ¶ 6.)

### B. The Tolling Agreement and the Guaranties

ET Power and Liberty were parties to a Tolling Agreement (the "Tolling Agreement") dated April 14, 2000. (Goldstein Declaration, ¶ 9, Exh. A.) Under the Tolling Agreement, ET Power could provide fuel to operate Liberty's generation facility, in which case Liberty would deliver the electricity generated from that fuel to ET Power. (Goldstein Declaration, Exh. A, §§ 3.1, 4.1.) In exchange for converting ET Power's fuel into electricity, Liberty was paid a "tolling fee" based upon a contractually predetermined price. (Goldstein Declaration, Exh. A, § 6.1.)

As part of the consideration for the overall transaction embodied in the Tolling Agreement, ET Power and Liberty agreed to provide third-party guaranties of their payment obligations to each other. On April 24, 2000, PGE provided a guaranty (the "PGE Guaranty") of ET Power's payment obligations to Liberty. (Goldstein Declaration, ¶ 10, Exh. B.) On April 24, 2000, Columbia Energy Group, then the parent company of Liberty, provided a guaranty (the

[1] Until October 2, 2003, ET Power was known as PG&E Energy Trading – Power, L.P.
[2] Until October 2, 2003, NEGT was known as PG&E National Energy Group, Inc.

"Columbia Guaranty") of Liberty's obligations to ET Power. (Goldstein Declaration, ¶ 11, Exh. C.)

On February 6, 2001, NEGT and GTN each furnished a guaranty of ET Power's payment obligations to Liberty ("the NEGT Guaranty" and "GTN Guaranty," respectively). (Goldstein Declaration, ¶ 12, Exhs. D, E.) The obligations of NEGT and GTN to Liberty were not unlimited, however. The combined liability of NEGT and GTN under the two guaranties was capped, originally at $150 million. (Goldstein Declaration, Exh. D, § 2; Exh. E, § 2.) The combined liabilities of NEGT and GTN were reduced annually and, as a result, the liability was capped at $140 million at all times relevant to this dispute. (Goldstein Declaration, Exh. A, § 8.1(b).)

**C. The Waiver**

Section 4 of the NEGT Guaranty, which Liberty accepted as part of the contractual arrangement with ET Power, states that NEGT "… unconditionally agrees that it hereby waives (i) any and all rights… to have the benefit of any other guaranty… now or hereafter held by [Liberty] for the obligations guaranteed by [NEGT] hereunder…" (Goldstein Declaration, Exh. D, § 4.)

**D. The Liberty Litigation and the GTN Sale**

After it filed its petition under Chapter 11 of the Bankruptcy Code, ET Power engaged in litigation with Liberty concerning ET Power's rejection of the Tolling Agreement and Liberty's resulting claims for damages arising from the breach. An arbitration proceeding resulted in an award for Liberty against ET Power in the amount of $162,725,436.59 (the "Arbitral Award"). (Goldstein Declaration, ¶ 13.) In a Memorandum of Decision dated June 27, 2005 and an Order

dated August 10, 2005, the Court confirmed the Arbitral Award and entered judgment against ET Power in that amount.

On May 13, 2004, before the conclusion of the Liberty litigation, the Court entered its Order (the "Sale Order") authorizing the sale of GTN (the "GTN Sale") by NEGT and GTN Holdings LLC (the "Seller Parties") to TransCanada American Investments Ltd. ("TransCanada"). As part of the GTN Sale, the Seller Parties, TransCanada and GTN entered into a Post-Closing Escrow Agreement with JP Morgan Chase Bank as escrow agent (the "Escrow Agent"), and TransCanada transferred a portion of the purchase price ($241 million) to the Escrow Agent on November 1, 2004. (Goldstein Declaration, ¶ 14, Exh. F.) Subsequently, the Escrow Agent paid Liberty $140 million. (Goldstein Declaration, ¶ 15.)

## IV. PROCEDURAL BACKGROUND

On March 9, 2009, NEGT filed its Motion to Enforce Subrogation Rights against NEGT Energy Trading Power, L.P. on Account of Guarantee Payment to Liberty Electric Power LLC (the "Subrogation Motion") (docket no. 4161). On April 20, 2009, ET filed its Objection to Motion to Enforce Subrogation Rights against NEGT Energy Trading Power, L.P. on Account of Guarantee Payment to Liberty Electric Power LLC (the "Objection") (docket no. 4184).[3] In the present motion, ET Power asks the Court to grant summary judgment in its favor, overruling the Subrogation Motion.

## V. ARGUMENT

ET Power moves for summary judgment in its favor pursuant to Rule 56(b) of the Federal Rules of Civil Procedure (the "FRCP"), as made applicable to these proceedings by Rules 7056

[3] On January 15, 2010, having learned that the Court had entered an Order directing that the payment made by the Escrow Agent be deemed as having been made by GTN, ET Power filed a Notice of Partial Withdrawal, in which it withdrew the arguments asserted in the Objection that NEGT and/or GTN was not the party that paid Liberty (docket no. 4216).

and 9104 of the Federal Rules of Bankruptcy Procedure. Rule 56(b) of the FRCP provides: "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Fed. R. Civ. P. 56(b).

Summary judgment is appropriate "if the pleadings … together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Upon the filing of a properly supported summary judgment motion, "the non-moving party must establish a genuine issue of material fact in order to preclude a grant of summary judgment." *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525 (2d Cir. 1994) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986)). *See also Anderson v. Green*, 2009 WL 2711885, *1 (D. Md. Aug. 24 2009). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Liberty Lobby*, 477 U.S. at 247-48 (emphasis in original).

**A. <u>There Is No Genuine Issue of Material Fact</u>**

In this case, there is no genuine issue as to any material fact with respect to NEGT's waiver of subrogation rights in the NEGT Guaranty. The undisputed evidence establishes every fact necessary to prove the defenses asserted herein by ET Power.

**B. <u>The Contractual Language Is Clear and Unambiguous</u>**

It is a bedrock principle of American jurisprudence that "a court should not resort to extrinsic evidence to interpret a contract when the contract's language is plain and unambiguous." *National Am. Ins. Co. v. Ruppert Landscaping Co.*, 2001 WL 1649204, *4 (4th Cir. Dec. 26 2001) (quoting *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 624 (4th Cir.

1999)). "A court must give plain and unambiguous contract language its "legal effect according to [its] plain, ordinary and popular meaning." *Ruppert*, 2001 WL 1649204 at *4 (quoting *Florom v. Elliott Mfg.*, 867 F.2d 570, 575 (10th Cir. 1989)).

"It is the primary rule of construction of contracts that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation of the language employed and the parties' reasonable expectations." *In re Criimi Mae, Inc.*, 251 B.R. 796, 801-02 (Bankr. D. Md. 2000) (quoting *Slamow v. Del Col*, 174 A.D.2d 725, 726, 571 N.Y.S.2d 335 (N.Y. 1991)). Therefore, under the principle articulated by this Court in *Criimi Mae*, any discussion of the parties' intentions in entering into a contract must begin and end with the language found in the contract.

The contractual language at issue in this matter is clear and unambiguous. Although quoted elsewhere in this Memorandum, the relevant provision is as follows:

> "[NEGT] unconditionally agrees that it hereby waives (i) any and all rights… to have the benefit of any other guaranty… now or hereafter held by [Liberty] for the obligations guaranteed by [NEGT] hereunder…"

(Goldstein Declaration, Exh. D, § 4.)

There is no portion of the contractual provision quoted above that is unclear or ambiguous. In plain language, the clause provides for NEGT's waiver of its rights to obtain a benefit flowing from any guaranty held by Liberty, other than the guaranty executed by NEGT.

Because the relevant contractual language is clear and unambiguous, the Court must exclude any extrinsic evidence. *See Criimi Mae*, 251 B.R. at 801 (stating "[w]here the document is unambiguous, its meaning is an issue of law which the court should determine upon a motion for summary judgment"). Rather, the meaning of the provision may be determined by reference

only to the text of the NEGT Guaranty.

### C. The Clear and Unambiguous Language Waives the Right to Proceed Under the GTN Guaranty

NEGT did not pay Liberty and thus does not assert subrogation rights arising out of its own guaranty. Instead, NEGT's claim is based on NEGT's assertion of subrogation rights under the *GTN Guaranty*, the rights under which were assigned to NEGT.

There is a crucial flaw in NEGT's theory, however. Because NEGT asserts subrogation rights under the GTN Guaranty, NEGT's claim is subject to NEGT's unambiguous waiver in Section 4 of the NEGT Guaranty of any right it might otherwise have to assert a claim based on another guaranty. (*See* Goldstein Declaration, Exh. D., § 4)

> "[NEGT] unconditionally agrees that it hereby waives (i) any and all rights… to have the benefit of any other guaranty… now or hereafter held by [Liberty] for the obligations guaranteed by [NEGT] hereunder…"

*Id.*

Thus, NEGT has waived any and all rights to benefits flowing from any other guaranty held by Liberty for the obligations covered by the NEGT Guaranty. The GTN Guaranty is an "other guaranty" – meaning a guaranty other than the NEGT Guaranty – that was held by Liberty. Therefore, the question becomes simply whether the GTN Guaranty was held by Liberty "for the obligations guaranteed by NEGT" in the NEGT Guaranty.

Little analysis is required to demonstrate that it was. The obligations covered by the NEGT Guaranty are "the prompt payment when due, in accordance with the terms of the [Tolling] Agreement, of all amounts payable by [ET Power] under the [Tolling] Agreement and any amendments thereto." (Goldstein Declaration, Exh. D, § 1.) The obligations covered by the GTN Guaranty are identical: "the prompt payment when due, in accordance with the terms of the [Tolling] Agreement, of all amounts payable by [ET Power] under the [Tolling] Agreement

and any amendments thereto." (Goldstein Declaration, Exh. E, § 1.) Therefore, there can be no question that the NEGT Guaranty and the GTN Guaranty served to guaranty the same payment obligations by ET Power to Liberty.

As a result, it is clear beyond dispute that the waiver contained in Section 4 of the NEGT Guaranty applies to the subrogation claim asserted by NEGT. NEGT waived its right to have the benefit of the GTN Guaranty, and with it, the right to assert the claim that is the subject of its motion.

## VI. CONCLUSION

Based on the foregoing, there are no genuine issues of material fact with respect to NEGT's waiver of the benefit of any guaranty other than the NEGT Guaranty. Likewise, ET Power is entitled to judgment as a matter of law on the waiver by NEGT of the subrogation rights asserted by NEGT in its motion. The Court therefore should grant summary judgment in ET Power's favor and overrule NEGT's Subrogation Motion.

Dated: February 5, 2010
Washington, DC

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By: /s/ Richard G. Murphy, Jr.

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