

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

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

**RESPONSE TO MOTION OF NATIONAL ENERGY & GAS TRANSMISSION, INC.
FOR SUMMARY JUDGMENT ON (1) ITS MOTION TO ENFORCE SUBROGATION
RIGHTS AGAINST NEGT ENERGY TRADING – POWER, L.P. ON ACCOUNT
OF GUARANTEE PAYMENT TO LIBERTY ELECTRIC POWER LLC; AND
(2) OBJECTIONS OF NEGT ENERGY TRADING – POWER, L.P. THERETO**

NEGT Energy Trading – Power, L.P. (“ET Power”) files this Response to Motion of National Energy & Gas Transmission, Inc. for Summary Judgment on (1) its Motion to Enforce Subrogation Rights against NEGT Energy Trading – Power, L.P. on Account of Guarantee Payment to Liberty Electric Power LLC; and (2) Objections of NEGT Energy Trading – Power, L.P. Thereto, and in support thereof, states as follows:

Procedural History

1. On March 9, 2009, National Energy & Gas Transmission, Inc. (“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).

2. 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 “Subrogation Objection”) (docket no. 4184).

3. On February 5, 2010, NEGT filed its Motion for Summary Judgment on (1) its

Motion to Enforce Subrogation Rights against NEGT Energy Trading – Power, L.P. on Account of Guarantee Payment to Liberty Electric Power LLC; and (2) Objections of NEGT Energy Trading – Power, L.P. Thereto (collectively with the supporting brief, the “NEGT Summary Judgment Motion”) (docket no. 4223).

4. Also on February 5, 2010, ET Power filed a cross-motion for summary judgment (collectively with the supporting brief, the “ET Power Summary Judgment Motion”) (docket no. 4220).

Argument

5. 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). The movant bears the preliminary burden of demonstrating the absence of a genuine issue of material fact. *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 519 (4th Cir. 2003).

6. A factual issue is genuine if it can be resolved only by a trier of fact because it may be resolved in favor of either party. *New Par v. City of Saginaw*, 301 F.3d 390, 394 (6th Cir. 2002). A fact is material if it is one that can affect the outcome of the suit under the governing substantive law. *Anderson*, 477 U.S. at 248. In determining a summary judgment motion, “courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the ... motion.” *Cloaninger ex rel. Estate of Cloaninger v. McDevitt*, 555 F.3d 324, 331 (4th Cir. 2009) (quoting *Scott v. Harris*, 127 S.Ct. 1769, 1774 (2007)).

7. Because NEGT’s case depends on numerous factual assertions that ET Power

disputes and that could be resolved in favor of either party, there are a number of genuine issues of material facts. As a result, NEGТ has not met its initial burden of demonstrating the absence of material factual issues and the NEGТ Summary Judgment Motion should be denied.

8. Even if it were not for the many factual questions raised by the NEGТ Summary Judgment Motion, NEGТ is not entitled to judgment as a matter of law for a variety of reasons. The primary reason is simply that NEGТ has waived the subrogation rights that it now seeks to assert. Although NEGТ makes a variety of creative arguments as to why those subrogation rights should somehow be preserved, none of NEGТ's arguments avoid the plain and unambiguous waivers in the NEGТ Guaranty¹ and the GTN Guaranty.²

9. NEGТ's waivers come in two forms: (a) the waiver of NEGТ's rights to subrogation under any guaranty other than the NEGТ Guaranty, and (b) the waiver of NEGТ's rights to subrogation until all ET Power obligations to Liberty Electric Power LLC ("Liberty") are fully and indefeasibly paid.

A. NEGТ Has Waived the Right to Subrogation under Any Guaranty Other than the NEGТ Guaranty

10. As discussed at length in the ET Power Summary Judgment Motion, NEGТ did not pay Liberty and therefore does not assert subrogation rights arising out of its own guaranty. Instead, NEGТ's claim is based on NEGТ's assertion of subrogation rights under the GTN Guaranty, the rights under which were assigned to NEGТ.

11. Because NEGТ asserts subrogation rights under the GTN Guaranty, NEGТ's claim is subject to its unambiguous waiver (the "Section 4 Waiver") in Section 4 of the NEGТ

¹ The "NEGТ Guaranty" means that certain Guarantee by and between NEGТ and Liberty, dated as of February 6, 2001. A copy of the NEGТ Guaranty is attached as Exhibit A.

² The "GTN Guaranty" means that certain Guarantee, by and between GTN and Liberty, dated as of February 6, 2001. A copy of the GTN Guaranty is attached as Exhibit B. The GTN Guaranty and the NEGТ Guaranty are referred to collectively as the "Guaranties."

Guaranty of any right it might otherwise have to assert under other guaranties. NEG T Guaranty, § 4.

“[NEG T] 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 [NEG T] hereunder...”

Id.

12. Under the foregoing contractual language, NEG T has waived any and all rights to benefits flowing from any other guaranty held by Liberty for the obligations covered by the NEG T Guaranty. First, the GTN Guaranty is an “other guaranty” – meaning a guaranty other than the NEG T Guaranty. Second, the GTN Guaranty was held by Liberty.

13. Finally, the GTN Guaranty was held by Liberty “for the obligations guaranteed by NEG T” in the NEG T Guaranty. *Id.* The obligations covered by the NEG T 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.” NEG T Guaranty, § 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.” GTN Guaranty, § 1. Therefore, there can be no question that the NEG T Guaranty and the GTN Guaranty served to guaranty the same obligations owed by ET Power to Liberty.

14. As a result, the Section 4 Waiver in the NEG T Guaranty applies to the subrogation claim asserted by NEG T. NEG T 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 Subrogation Motion.

B. NEG T Has Waived the Right to Any Subrogation Rights until All ET Power “Obligations” Are Fully and Indefeasibly Paid

15. The second form of waiver (the “Section 9 Waiver”) arises in Section 9 of both

the NEGТ Guaranty and the GTN Guaranty. Section 9 of each provides that NEGТ or GTN, as applicable, "...waives any rights of subrogation or reimbursement from [ET Power] with respect to the payment of any Obligation ... to [Liberty] ... until the time that all Obligations owing to [Liberty] are fully and indefeasibly paid to [Liberty]." NEGТ Guaranty, § 9; GTN Guaranty, § 9.

16. The term "Obligations" is defined in the NEGТ Guaranty and the GTN Guaranty to mean "... all amounts payable by [ET Power] under the [Tolling] Agreement ..., including without limitation, Tolling Fees, Termination Payment, liquidated damages, indemnity obligations, and damages awards arising by reason of [ET Power's] breach of its performance obligations under the [Tolling] Agreement, or otherwise...." NEGТ Guaranty, § 1; GTN Guaranty, § 1. Essentially, "Obligations" means all payment obligations of ET Power to Liberty arising out of the Tolling Agreement.³

17. The effect of the Section 9 Waiver is to create a condition precedent to the exercise of any subrogation rights that might otherwise exist after a payment pursuant to the NEGТ Guaranty or the GTN Guaranty. The condition precedent is the payment in full of all payment obligations of ET Power to Liberty under the Tolling Agreement. Until that condition is satisfied, neither NEGТ nor GTN can assert Liberty's claim against ET Power by way of subrogation.

18. The condition precedent is not satisfied now, nor will it ever be. The amount of the arbitral award in favor of Liberty (and the amount of the corresponding judgment against ET Power, entered by this Court) was \$162,725,436.59. Liberty has been paid \$145,156,643. As detailed below, over \$17.5 million of ET Power's "Obligations" to Liberty remain unpaid.

³ The "Tolling Agreement" means that certain Tolling Agreement by and between ET Power and Liberty, dated as of April 14, 2000.

<i>ET Power Obligations to Liberty</i>	<i>Payments to Liberty</i>	<i>Remaining Obligations</i>
\$162,725,436.59 (Arbitral Award)		\$162,725,436.59
	\$140,000,000.00 (Escrow Payment)	22,725,436.59
	5,136,643.70 (Settlement Payment)	17,588,792.89

19. NEGТ asserts that because Liberty has obtained everything it can recover related to the Tolling Agreement, then it must have received full payment of all “Obligations” under the Tolling Agreement. That argument has no merit. Although Liberty received a significant amount of its claim, the chart above demonstrates that there is a significant portion that Liberty has not received. The amount remaining is indubitably part of ET Power’s “Obligations” to Liberty, defined as “... all amounts payable by [ET Power] under the [Tolling] Agreement ...”. NEGТ Guaranty, §1; GTN Guaranty, §1. Because NEGТ and ET Power have each discharged Liberty’s claims in their confirmed plans, that unpaid amount will never be paid. The fact that Liberty can receive nothing further has no relevance to the question of whether all of ET Power’s “Obligations” to Liberty were paid in full.

20. NEGТ cites to *Aetna Cas. & Surety Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 94 F.3d 772 (2d Cir. 1996), to stand for the proposition that a court-approved settlement must discharge all obligations to Liberty. NEGТ’s interpretation of the *Chateaugay* decision is far too broad. The holding of *Chateaugay* – a Second Circuit case with no analog in any court within the Fourth Circuit – was limited to its own facts. *See Chateaugay*, 94 F.3d at 780 (“Under the circumstances, we understand the acceptance of the settlement to constitute the requisite ‘full payment’”) (emphasis added). Moreover, even if *Chateaugay* stands for a broader

application to other facts, it would extend only to the settlement of amounts in dispute on a discrete issue. NEGT cites to no case law that treats a general release provision as reducing the amount that must be paid in order to reach “payment in full.” Finally, even if the Court were to give *Chateaugay* the broadest reading possible, it applies only to the legal requirements under section 509(a). There is no legal authority that extends any such expansive interpretation of the concept of “payment in full” to the contractual waiver language in the Guaranties.

21. By the plain language of the Section 9 Waiver, NEGT and GTN have waived “any rights of subrogation ... from [ET Power].” By virtue of that contractual language, NEGT is not entitled to the subrogation rights asserted in the Subrogation Motion.

C. NEGT Cannot Support Its Estoppel Argument

22. After exhausting its efforts to find a way around the fact that it waived whatever subrogation rights it might otherwise have had, NEGT turns to the equitable doctrine of estoppel, implicitly acknowledging the strength of ET Power’s defenses by arguing that ET Power should not be allowed to assert those defenses. It is in this context that NEGT alleges that ET Power is executing a “secret plan.”

23. As discussed more fully below, ET Power disputes a number of factual assertions that underlie the “secret plan” argument. In fact, ET Power never had any such “secret plan” and NEGT provides no evidence that such a plan existed.

24. But even if one were to assume that NEGT’s allegations about a “secret plan” were all true, NEGT would still have failed to establish that ET Power should be estopped to argue that NEGT waived the right to assert its subrogation claim. New York’s highest state

court,⁴ the New York Court of Appeals, has held that a party asserting estoppel must show: (i) a false representation, (ii) reasonable reliance on that representation and (iii) a detrimental change of position. *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175, 451 N.Y.S.2d 663, 436 N.E.2d 1265, 1269 (1982). NEGT has made no showing of a false representation by ET Power – nor, for that matter, of reasonable reliance or a detrimental change of position. Accordingly, NEGT cannot establish the elements of estoppel under New York law.

25. NEGT attempts to avoid the false representation requirement by suggesting a different standard for estoppel under New York law – one that substitutes knowledge of a fact not known to the other party instead of a false representation. NEGT’s argument would fail under that standard as well, but the law is clear that a false representation is a required showing under New York law. In *Mesa Air Group, Inc. v. Delta Air Lines, Inc.*, 571 F.3d 1124, 1129 (11th Cir. 2009), the court noted that different standards were employed by various lower state courts in New York. *Mesa Air Group*, 571 F.3d at 1129 n.6 (stating “On the test that the First Department has adopted, estoppel requires merely lack of knowledge by the party claiming estoppel, rather than an actual false representation by the party to be estopped”). After commenting that the distinction did not make much difference under the facts of that case, the *Mesa Air Group* court went on to conclude that the *Erie* doctrine required it to employ the law articulated by the highest court in the state, which was the standard articulated by *Nassau Trust*. *Mesa Air Group*, 571 F.3d at 1129 n.6 (citing *Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938); *Nassau Trust*, 436 N.E.2d at 1269).

26. Accordingly, the proper standard for estoppel under New York law requires proof of a false representation – under the standard employed by the *Nassau Trust* court. NEGT has

⁴ Each of the Guaranties contained choice of law provisions that selected New York law. See Ex. A, § 12; Ex. B, § 12.

not made any such showing. Moreover, because the entirety of NEGТ's "secret plan" argument is riddled with defects and questions of fact, NEGТ would struggle to make *any* showing on this argument.

27. Underlying NEGТ's "secret plan" argument is the implied assertion that ET Power had an obligation to notify NEGТ earlier that it would contest NEGТ's subrogation rights. That implication is flawed for at least two reasons. First, NEGТ and ET Power deliberately delayed addressing intercompany issues until the end of the administration of the bankruptcy estates. *See* NEGТ Summary Judgment Brief, Ex. 16, Goldstein Dep. at 111:14-112:10.

28. Second, it is unclear why ET Power would need to provide the first notice when NEGТ is the claimant. NEGТ implies that ET Power had some duty to disclose its opinions about NEGТ's subrogation claims, but NEGТ has failed to provide any explanation of from whence the impliedly alleged duty to disclose comes. Without any duty to disclose its opinions about NEGТ's subrogation claim, the question of whether ET Power had a "secret plan" is completely irrelevant.

29. The "secret plan" argument also contains numerous instances of NEGТ's reliance on asserted facts for which there is no evidence or that ET Power disputes. In paragraph 30 of the NEGТ Summary Judgment Brief, NEGТ states: "ET Power's own lawyers, who also represented NEGТ, testified that it was assumed that ET Power would ultimately be responsible for any payment made by either NEGТ or GTN under their respective Guarantees." NEGТ Summary Judgment Brief, ¶ 30. NEGТ deposed two of ET Power's lawyers. One of them, Mr. Feldman, provided testimony as characterized. But the other, Steven Wilamowsky, declined to

do so, despite repeated questions to the same effect.⁵ *See* NEGТ Summary Judgment Brief, Ex. 18, Wilamowsky Dep. at 25:18-25, 59:15-63:14.

30. That same paragraph continues: “Moreover, ET Power’s current Plan Administrator, who previously advised the Unsecured Creditor’s Committee, acknowledged that he and the Committee had a role in preparing the ET Power Disclosure Statement.” NEGТ Summary Judgment Brief, ¶ 30. The nature and extent of that role, however, constitute another disputed factual question. NEGТ implies that Charles Goldstein – presently the ET Power Plan Administrator and formerly a financial advisor to the Official Committee of Unsecured Creditors (the “Committee”) – was responsible for the content of the Disclosure Statement.⁶ The summary judgment evidence demonstrates that he was not.⁷ *See* NEGТ Summary Judgment Brief, Ex. 16, Goldstein Dep. at 52:19-53:5 (“We were not involved in the preparation other than working with the company and working with the creditors committee counsel to bring issues up as to, you know, what the creditors’ thoughts were. I mean, we didn’t draft it. This wasn’t our document. This was a debtor document”).

31. Again in the very next sentence, NEGТ returns to unsupported allegations that ET Power disputes. Paragraph 31 of the NEGТ Summary Judgment Brief reads: “Although ET Power had publicly acknowledged through its Disclosure Statement that it expected to be responsible for the Liberty obligation, it now claims that it had secretly concluded that it would challenge future exercise of NEGТ’s subrogation rights.” NEGТ Summary Judgment Brief, ¶ 31. *See also* NEGТ Summary Judgment Brief, ¶ 32 (“ET Power had early on formed its

⁵ Willkie Farr & Gallagher LLP represented all of the debtors, including NEGТ and ET Power. Within the scope of that representation, however, Mr. Feldman’s role included far more involvement with NEGТ than ET Power. Mr. Wilamowsky was the Willkie lawyer who was primarily assigned to ET Power.

⁶ The “Disclosure Statement” means the Disclosure Statement for the First Amended Joint Plan of Liquidation for the Energy Trading Debtors and the Quantum Debtors, filed March 3, 2005 (docket no. 2798).

⁷ The financial advisor to ET Power was Alvarez & Marsal, the same entity that is now responsible for overseeing the administration of NEGТ’s case.

conclusions about NEGТ’s subrogation rights....”). NEGТ provides no citation for the assertion that “ET Power ... publicly acknowledged... that it expected to be responsible for the Liberty obligation.” In fact, ET Power denies that its Disclosure Statement acknowledged responsibility of the Liberty obligation. NEGТ cites to the deposition testimony of Matthew A. Feldman, but Mr. Feldman was deposed as a fact witness, not as an expert. His opinion of how to interpret ET Power’s Disclosure Statement is not a proper evidentiary basis for the assertion quoted above. Nowhere in its Disclosure Statement did ET Power specifically represent that it would ultimately be responsible for subrogation claims. To the extent NEGТ relies on some interpretation of the Disclosure Statement beyond the plain language of the document itself (which contains no such acknowledgement), then it is an open issue what that interpretation should be. Moreover, NEGТ provides no evidence that ET Power “now claims that it had secretly concluded that it would challenge” NEGТ’s subrogation rights. ET Power denies that any such “secret plan” ever existed, or that it had any early conclusion about NEGТ’s subrogation rights.

32. In support of its “secret plan” allegation, NEGТ points to the statements of Charles Goldstein that he concluded at an early juncture (*i.e.*, before confirmation of the ET Plan) that NEGТ should not have subrogation rights. There are several flaws in NEGТ’s argument, which underscore the disputed facts on which NEGТ’s motion is based. The most striking is that, even though the lynchpin of NEGТ’s theory is Mr. Goldstein’s pre-confirmation opinions, Mr. Goldstein was not an ET Power representative during the relevant time period. Before confirmation of the ET Plan,⁸ Mr. Goldstein was engaged as a financial advisor to the Committee. His knowledge or conclusions during the period of his service to the Committee cannot be imputed to ET Power. Mr. Goldstein’s pre-confirmation views on the question of

⁸ The “ET Plan” means the First Amended Plan of Liquidation for the ET Debtors and the Quantum Debtors, dated March 3, 2005 (docket no. 2799).

whether NEGТ would be successful in an attempted subrogation to Liberty’s claim against ET Power are simply irrelevant to the question of whether ET Power should be permitted to assert its defenses to NEGТ’s claim.

33. On the other hand, even if Mr. Goldstein had been an ET Power representative during the relevant time period, his pre-confirmation opinions would still be irrelevant. The statements by Mr. Goldstein on which NEGТ relies do not suggest anything about a “secret plan.” Instead, they simply reflect the fact that there were “discussions at the creditor committee level” that led the Committee to question whether NEGТ could successfully assert subrogation rights. See NEGТ Summary Judgment Brief, Ex. 16, Goldstein Dep. at 46:13-23. Discussions that occurred among the members of and advisors to the Committee are several steps away from the creation or execution of a plan. NEGТ has shown nothing to demonstrate those additional steps. In short, even if NEGТ has accurately described Mr. Goldstein’s opinion during his time of service to the Committee, that opinion has no evidentiary value in support of the alleged “secret plan” –because (a) Mr. Goldstein was not a representative of ET Power at the time, and (b) more than “discussions” and opinions are necessary to establish any sort of plan. Moreover, even if there were such a “secret plan,” NEGТ has failed to demonstrate why its existence would prevent ET Power from asserting defenses to NEGТ’s claim.

34. Finally, in several of the above examples, NEGТ expects the court to draw inferences in a manner that would benefit NEGТ’s case. That expectation, however, is contrary to the standard articulated in *Cloaninger*, which requires the court to draw inferences in the light most favorable to the non-moving party. *Cloaninger*, 555 F.3d at 331.

D. NEGТ’s Reliance on Section 509(a) and Equitable Subrogation Is Misplaced and Irrelevant

35. NEGТ attempts to circumvent the contractual waivers by focusing only on whether it would be entitled to subrogation rights under either Section 509(a) of the Bankruptcy Code or principles of equitable subrogation. For a number of reasons, NEGТ’s arguments are hopelessly misplaced.

36. First, as discussed above, ET Power’s focus is on the specific waiver language in the Guaranties. The question of whether NEGТ would qualify for subrogation rights under the Bankruptcy Code or traditional equity jurisprudence is unnecessary, because NEGТ has unequivocally waived those rights. Said another way, NEGТ must first demonstrate that it has not waived its subrogation rights before it is entitled to subrogation under section 509(a) or equitable principles. Because NEGТ waived its rights, any rights it might otherwise have under the Bankruptcy Code or in equity are irrelevant.

37. For that same reason, the case law on standing and the Restatement provisions cited by NEGТ have no bearing on the key issue in this case: whether NEGТ waived any right it might otherwise have (or obtain) to be subrogated to Liberty’s claim against ET Power. Regardless of the merits of NEGТ’s rights under section 509(a) of the Bankruptcy Code or equitable subrogation principles, NEGТ has waived its ability to assert those rights.

38. Even if the question of standing were relevant, ET Power is a third-party beneficiary to the Guaranties. Under New York law, a third-party beneficiary “must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental.” *Edge Management Consulting v. Blank*, 807 N.Y.S.2d 353, 358 (N.Y. App. Div. 2006). The Guaranties are valid

and binding contracts that were intended to benefit ET Power directly by allowing it to enter into transactions with Liberty. Therefore, ET Power is a third-party beneficiary and is entitled to standing under New York law. *See, e.g., 243-249 Holding Co. v. Infante*, 771 N.Y.S.2d 651, 652 (N.Y. App. Div. 2004).

39. Second, even if NEGТ had not waived its subrogation rights, it is incorrect about their application. Under section 509(c) of the Bankruptcy Code, NEGТ's claim would be subordinated until Liberty is paid in full. *See* 11 U.S.C. § 509(c). Under the ET Plan, subordinated claims receive no distribution.

40. Third, the doctrine of equitable subrogation requires that the primary creditor first be paid in full.⁹ Across jurisdictions, case law on equitable subrogation consistently employs a similar five-part test: “(1) the claimant must have made payment to protect his own interests; (2) the claimant must not have been a volunteer; (3) the payment must satisfy a debt for which the claimant was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not cause injustice to the rights of others.” *Mar-Kay Plastics, Inc. v. Reid Plastics, Inc. (In re Mar-Kay Plastics, Inc.)*, 234 B.R. 473, 483 (Bankr. W.D. Mo. 1999) (citing *In re Hagen*, 147 B.R. 166, 168 (Bankr. N.D. Iowa 1992).

41. Here, the entire debt has not been paid. As detailed above, over \$17 million of the “Obligations” to Liberty remains unpaid. That fact prevents NEGТ from being entitled to equitable subrogation, just as it results in the subordination of any subrogation claim NEGТ might have under section 509 of the Bankruptcy Code.

⁹ ET Power reserves all rights with regard to its argument that the doctrine of equitable subrogation has been codified by section 509(a) of the Bankruptcy Code. *See* Subrogation Objection, ¶ 36.

E. NEGТ Is Bound by the Section 4 Waiver, Even When It Asserts Rights Under the GTN Guaranty

42. NEGТ argues that “any defenses that might be applicable to NEGТ in its individual capacity and pursuant to the NEGТ Guarantee cannot be asserted against NEGТ in its capacity as assignee asserting *GTN’s* rights under the GTN Guarantee.” NEGТ Summary Judgment Brief, ¶ 24 (emphasis in original). In support, NEGТ cites to a case that does not address subrogation at all. *See In re Bogdan*, 414 F.3d 507 (4th Cir. 2005). Rather, *Bogdan* stands for the non-controversial principle that a trustee filing a suit as assignee of mortgage lenders is subject to all defenses that could have been raised against the assignor mortgage lenders. *Id.* at 514. The *Bogdan* case is irrelevant to the issues under consideration by this Court.

43. Moreover, NEGТ’s proposed treatment of the waiver language would render Section 4 of the NEGТ Guaranty completely meaningless. As detailed elsewhere in this objection, the Section 4 Waiver provides that NEGТ “waives any and all rights ... to have the benefit of any ... other guaranty.” NEGТ Guaranty, § 4. The only circumstances in which this waiver could become relevant are when NEGТ asserts subrogation rights under a guaranty other than the NEGТ Guaranty. By NEGТ’s argument, however, the Section 4 Waiver could never be raised under those exact same circumstances – when NEGТ asserts subrogation rights under a guaranty other than the NEGТ Guaranty.

44. The ensuing circularity reveals the absurdity of NEGТ’s argument. Unless Section 4 of the Guaranties is to have no meaning whatsoever, NEGТ’s proposal must be denied – particularly given that NEGТ has provided no legal support for its proposition.

F. The NEGТ Guaranty Has Not Been Discharged

45. In its next attempt to avoid the effect of the plain language of the Guaranties, NEGТ argues that the NEGТ Guaranty has been discharged by virtue of the \$140 million payment to Liberty. Once again, however, NEGТ's argument ignores the plain language of the NEGТ Guaranty.

46. Pursuant to Section 4 of the NEGТ Guaranty, NEGТ agreed:

that none of the following acts, omissions or occurrences shall diminish or impair the liability of [NEGТ] in any respect...: (i) any ... settlement ... of the [Tolling] Agreement, (ii) the discharge or release of any obligations of [ET Power] ... by reason of bankruptcy...; [or] (iii) the acceptance or release by [Liberty] of any collateral security or other guaranty or any settlement, compromise or extension with respect to any collateral security or other guaranty (including the GTN Guarantee). NEGТ Guaranty, § 4.

47. The quoted language (the "Survivability Clause") makes clear that the NEGТ Guaranty survives any number of occurrences, specifically including a payment to Liberty under the GTN Guaranty. Therefore, notwithstanding the \$140 million payment to Liberty, the NEGТ Guaranty was not discharged and NEGТ remains bound by its contractual obligations thereunder.

48. In fact, the Survivability Clause undermines other NEGТ arguments as well. Liberty has not received – and will not receive – payment of all "Obligations" under the Tolling Agreement, as a result of the combination of the Liberty/ET Power settlement and the bankruptcy cases of NEGТ and ET Power. NEGТ contends that the court should nevertheless deem all "Obligations" to have been paid fully and indefeasibly. Under the Survivability Clause, however, NEGТ agreed that any settlement on the Tolling Agreement or bankruptcy discharge of Liberty claims would have no effect on NEGТ's contractual obligations under the NEGТ Guaranty. Therefore, the waiver language, specifically including the Section 9 Waiver that is

predicated on the full payment of all “Obligations,” continues to bind NEGТ.

G. The Court Cannot Consider the Extrinsic Evidence of the Parties’ Intent, Even If There Were Any

49. Because the contractual language in the Guaranties is problematic for NEGТ, it is left to speculate about the parties’ intent when they agreed to the Section 4 Waiver. *See* NEGТ Summary Judgment Brief, ¶ 26. NEGТ provides no evidence to support its speculation, but even if there were any such evidence, case law is clear that courts cannot consider the parties’ intent if the contractual language is clear and unambiguous. *See, e.g., 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) (“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”)).

50. Both the Section 4 Waiver and the Section 9 Waiver are clear and unambiguous. Accordingly, evidence of the parties’ intentions in entering into the Guaranties would be extrinsic evidence that could not be considered by the Court even if such evidence were in the record.

H. NEGТ Never Even Addresses the Specific Waiver Language, Because It Cannot Dispute the Plain Meaning

51. It is noteworthy that nowhere in the NEGТ Summary Judgment Motion does NEGТ offer an alternative interpretation of the Section 4 Waiver or the Section 9 Waiver. Because the interpretation of those provisions is the essence of this case, NEGТ’s failure to address such key issues demonstrates that NEGТ is not entitled to judgment as a matter of law.

52. Among the arguments that comes closest to addressing the contractual language is

NEGT's assertion that "ET Power cannot offer any rational explanation for why the parties would have agreed to such a bizarre limitation." NEGТ Summary Judgment Brief, ¶ 27. The burden is not on ET Power to offer explanations for the provisions, however. Rather, if such an inquiry were proper, the burden would be on NEGТ, and it has provided no such evidence. IN any case, because the contractual language is clear and unambiguous, such an inquiry would be out of bounds. *See, e.g., Criimi Mae*, 251 B.R. at 801-02.

53. NEGТ then attempts to devise an argument that the Guaranties cannot be interpreted in a manner consistent with their plain reading because doing so would produce an absurd result. The asserted absurdity is that NEGТ cannot exercise subrogation rights, but it could transfer those rights to any other party and that transferee could exercise the subrogation rights. Again, this argument does not withstand scrutiny. Because NEGТ has waived its subrogation rights, it would have no rights to transfer. As a result, there is no absurd result and no reason for a court to adopt any interpretation other than the plain reading of the Guaranties.

54. Finally, in paragraph 27 of the NEGТ Summary Judgment Brief, NEGТ states: "ET Power acknowledges that, GTN, as the deemed payor under the GTN Guarantee, would have been entitled to assert subrogation rights against ET Power pursuant to Paragraph 9 of the GTN Guarantee." NEGТ Summary Judgment Brief, ¶ 27. This represents yet another factual assertion that ET Power disputes. ET Power has made no such acknowledgement. NEGТ cites to paragraph 19 of the Subrogation Objection, but nothing contained therein contains any such concession by ET Power. To the contrary, ET Power asserts that GTN would not be entitled to assert subrogation rights against ET Power until such time as Liberty is paid in full.

Conclusion

55. Quite simply, NEGТ wishes to exercise subrogation rights that it waived in the

NEGT Guaranty. The NEGТ Summary Judgment Motion represents a series of attempts to circumvent the plain and unambiguous contractual language in the Guaranties. Those attempts branch out to various people's opinions of NEGТ's subrogation rights and a wide range of other extrinsic evidence. Ultimately, NEGТ fails to find any alternative that is grounded in fact and law – in large part, because the evidence on which NEGТ relies is irrelevant to the core of this case: the interpretation of the Guaranties.

56. The standard for summary judgment is well known to this Court. With regard to the NEGТ Summary Judgment Motion, NEGТ bears the initial burden of demonstrating an absence of any genuine issue as to material facts. NEGТ has failed to meet that burden, because many of the factual allegations upon which it relies are either unsupported or contested by ET Power. Even if NEGТ did not rely on faulty factual allegations, it has not demonstrated that it is entitled to judgment as a matter of law. As discussed above, ET Power can and would demonstrate at trial that it would prevail on the legal issues underlying the Subrogation Motion and the Subrogation Objection. The Court should therefore deny the NEGТ Summary Judgment Motion.

WHEREFORE, ET Power respectfully requests that the Court (a) deny the NEGТ Summary Judgment Motion, and (b) grant ET Power such further relief as the Court deems just.

Dated: February 19, 2010
Washington, DC

SUTHERLAND ASBILL & BRENNAN LLP

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

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COUNSEL FOR NEGТ ENERGY
TRADING –POWER, L.P.

Certificate of Service

I hereby certify that on this 19th day of February, 2010, I caused a true and correct copy of the foregoing *Response to Motion of National Energy & Gas Transmission, Inc. for Summary Judgment on (1) its Motion to Enforce Subrogation Rights against NEGT Energy Trading – Power, L.P. on Account of Guarantee Payment to Liberty Electric Power LLC; and (2) Objections of NEGT Energy Trading – Power, L.P. Thereto* to be served upon all parties in interest, in accordance with the Local and Federal Rules of Civil Procedure, including by electronic mail upon counsel for National Energy & Gas Transmission, Inc.

/s/ Mark Sherrill
Mark D. Sherrill

GUARANTEE

GUARANTEE dated as of February 6, 2001 by PG&E National Energy Group, Inc., a Delaware corporation (the "NEG Guarantor"), in favor of Liberty Electric Power, LLC, a Delaware limited liability company (hereafter the "Guaranteed Party").

WHEREAS, Guaranteed Party and PG&E Energy Trading - Power, L.P., a Delaware limited partnership and a wholly-owned indirect subsidiary of the NEG Guarantor ("Subsidiary"), have entered into that certain Tolling Agreement dated April 14, 2000 (as amended, the "Agreement");

WHEREAS, pursuant to the terms of the Agreement, PG&E Corporation (the "Original Guarantor"), a parent company of the Subsidiary, provided a guarantee (the "Original Guarantee") for the benefit of the Guaranteed Party on April 24, 2000;

WHEREAS, Subsidiary desires (i) to provide a guarantee of the NEG Guarantor and a guarantee of PG&E Gas Transmission, Northwest Corporation (the "GTN Guarantor") for the benefit of the Guaranteed Party and (ii) to obtain the release and discharge of the Original Guarantor from the Original Guarantee;

WHEREAS, concurrently with the execution and delivery of this Guarantee, (i) the GTN Guarantor and the Guaranteed Party are executing and delivering a guarantee of the GTN Guarantor for the benefit of the Guaranteed Party (the "GTN Guarantee") and (ii) the Guaranteed Party is releasing and discharging the Original Guarantor from any and all liabilities and obligations under the Original Guarantee.

NOW, THEREFORE, NEG Guarantor agrees as follows:

1. Guarantee. Subject to the terms herein, the NEG Guarantor absolutely, unconditionally and irrevocably guarantees to the Guaranteed Party, its successors and assigns, as primary obligor and not merely as surety, the prompt payment when due, in accordance with the terms of the Agreement, of all amounts payable by Subsidiary under the Agreement and any amendments thereto, including without limitation, Tolling Fees, Termination Payment, liquidated damages, indemnity obligations, and damage awards arising by reason of Subsidiary's breach of its performance obligations under the Agreement or otherwise (collectively, the "Obligations"). The obligation to make payments under this Guarantee is a guarantee of payment and not of collection. If Subsidiary fails to pay any Obligation, NEG Guarantor will pay such Obligation directly for Guaranteed Party's benefit within five (5) Business Days from Guaranteed Party's demand therefor in accordance with the provisions hereof. Capitalized terms used and not defined herein shall have meaning given such terms in the Agreement.

2. Extent of Liability & Term. NEG Guarantor's liability under this Guarantee is limited to the aggregate of US\$150,000,000, as reduced (i) pursuant to Section 8.1(b) of the Agreement and (ii) by any amounts paid by the GTN Guarantor pursuant to the GTN Guarantee and not returned to the GTN Guarantor by or on behalf of the Guaranteed Party (the "Guarantee Cap"). NEG Guarantor shall not be obligated to monitor the amount of Subsidiary's Obligations to Guaranteed Party, and Guaranteed

Party will bear the risk that the aggregate amount of the Obligations exceeds the Guarantee Cap and only payments made by NEG Guarantor pursuant to a demand for payment in accordance with Section 7 hereof shall reduce the amount of the Guarantee Cap. No payments will be made hereunder unless and until a Payment Demand has been issued by the Guaranteed Party in accordance with Section 7 hereof. Except as the same comprise Obligations under the Agreement, NEG Guarantor shall not be liable hereunder for special, consequential, exemplary, tort or other damages. NEG Guarantor agrees to pay all out-of-pocket expenses (including the reasonable fees and expenses of Guaranteed Party's counsel) incurred for the enforcement of the rights of Guaranteed Party hereunder; provided, that NEG Guarantor shall not be liable for any such expenses if no payment under this Guarantee is due and such payments shall be subject to the Guarantee Cap.

3. Nature of Guarantee. The NEG Guarantor's obligations hereunder with respect to any Obligation shall not be affected by the existence, validity, enforceability, perfection, or extent of any collateral for such Obligations. The Guaranteed Party shall not be obligated to file any claim relating to the Obligations owing to it if Subsidiary becomes subject to a bankruptcy, reorganization or similar proceeding and the failure of the Guaranteed Party to so file shall not affect the NEG Guarantor's obligations hereunder. If any payment to the Guaranteed Party with respect to any Obligations is rescinded or must otherwise be returned for any reason whatsoever, the NEG Guarantor shall remain liable hereunder with respect to such Obligations as if such payment had not been made. The Guaranteed Party agrees that the NEG Guarantor shall not be in default hereunder, and the Guaranteed Party shall have no remedies against the NEG Guarantor hereunder, if (a) a Payment Demand (as defined below) has been made hereunder and has not been satisfied, (b) a Payment Demand (as defined in the GTN Guarantee) has been made under the GTN Guarantee in respect of such unsatisfied Payment Demand hereunder, and (c) the GTN Guarantor has satisfied in full such Payment Demand under the GTN Guarantee.

4. Enforcement. The NEG Guarantor hereby agrees that this Guarantee may be enforced by the Guaranteed Party (or its assigns) without first resorting to any action against the Subsidiary, or exhausting any other remedies against the Subsidiary, and without protest, presentment, notice or demand whatsoever. NEG Guarantor hereby waives any rights it may have to require any such prior protest, presentment, notice, demand, enforcement or exhaustion of remedies. Without limiting the generality of the foregoing, NEG Guarantor unconditionally agrees that it hereby waives (i) any and all rights to be subrogated to the position of Subsidiary or to have the benefit of any lien, security interest or other guaranty, if any, now or hereafter held by the Guaranteed Party for the obligations guaranteed by NEG Guarantor hereunder or to enforce any remedy which the Guaranteed Party now has or hereafter may have against Subsidiary, GTN Guarantor or any other person, (ii) any acceptance of this Guarantee, (iii) any set-offs or counterclaims against the Guaranteed Party which would otherwise impair the Guaranteed Party's rights against Subsidiary, (iv) any notice of the disposition of any collateral security, if any, and any right to object to the commercial reasonableness of the disposition of any such collateral security, if any, and (v) any requirement of diligence on the part of anyone. NEG Guarantor further agrees that none of the following acts, omissions or occurrences shall diminish or impair the liability of NEG Guarantor in any

respect (all of which acts, omissions or occurrences may be done without notice to NEG Guarantor of any kind): (i) any extension, modification, indulgence, compromise, settlement or variation of any of the terms of the Agreement, (ii) the discharge or release of any obligations of Subsidiary or GTN Guarantor by reason of bankruptcy or insolvency laws, (iii) the acceptance or release by the Guaranteed Party of any collateral security or other guaranty or any settlement, compromise or extension with respect to any collateral security or other guaranty (including the GTN Guarantee), and (iv) to the extent permitted by law, any release or discharge, by operation of law, of NEG Guarantor from the performance or observance of any obligation, covenant or agreement contained in this Guarantee.

5. NEG Guarantor to Maintain its Corporate Existence. The NEG Guarantor agrees that during the term of this Guarantee, it will not dissolve or otherwise dispose of all or substantially all of its assets and will not consolidate with or merge into another corporation or permit one or more corporations (other than one or more subsidiaries of the NEG Guarantor) to consolidate with or merge into it; provided, that the NEG Guarantor may, without violating the agreement contained in this Section, consolidate with or merge into another corporation, or permit one or more corporations to consolidate with or merge into it (other than one or more subsidiaries of the NEG Guarantor), or sell or otherwise transfer to another corporation all or substantially all of its assets as an entirety, provided, (a) the surviving, resulting or transferee corporation, as the case may be, (i) is subject to service of process in the State of Pennsylvania and (ii), if not the NEG Guarantor, assumes in writing all of the obligations of the NEG Guarantor under this Guarantee; (b) such substitute guarantor executes a guarantee agreement in substantially the form of this Guarantee and provides the Guaranteed Party with an opinion of counsel to the substitute guarantor addressed and reasonably acceptable to the Guaranteed Party to the effect that such corporate guarantee agreement has been duly authorized by such substitute guarantor and constitutes the legal, valid and binding obligation of such substitute guarantor, enforceable against such substitute guarantor in accordance with its terms (subject to limitations on the enforcement thereof by bankruptcy, insolvency and other similar laws affecting the rights of creditors generally and to the application of principles of equity); and (c) the senior unsecured long term debt rating of such substitute guarantor is rated not less than Baa2 (or its then equivalent) by Moody's or BBB (or its then equivalent) by S&P or such substitute guarantor is acceptable to the Guaranteed Party. Upon satisfaction of the requirements set forth in this Section 5, this Guarantee shall be deemed automatically and immediately released by the Guaranteed Party.

6. Substitutions of Guarantee. In addition to the rights of substitution provided for in Section 5 hereof, the NEG Guarantor may at any time substitute as the NEG Guarantor for all or a portion of the Guarantee Cap an irrevocable letter of credit and in form and substance satisfactory to the Guaranteed Party issued by United States Bank or United States Branch of a foreign bank that is and remains rated "A" or better by Moody's and S&P. Upon the satisfaction of the requirements set forth in this Section 6, the NEG Guarantor's obligations with respect to that portion of the Guarantee Cap assumed by a substitute guarantor or letter of credit provider shall be deemed automatically and immediately released by the Guaranteed Party.

7. **Demands and Notice.** If Subsidiary fails to pay any Obligations, and Guaranteed Party elects to exercise its rights under this Guarantee, Guaranteed Party shall make a written demand on NEG Guarantor (a "Payment Demand"). A Payment Demand shall identify the amount and the basis of the demand and shall contain a statement that Guaranteed Party is calling upon NEG Guarantor under this Guarantee. A Payment Demand conforming to the foregoing requirements shall be sufficient notice to NEG Guarantor to pay under this Guarantee. Notices under this Guarantee shall be deemed received if sent to the address specified below: (i) on the day received if served by overnight express delivery, (ii) on the next business day if served by facsimile transmission when sender has machine confirmation that facsimile was transmitted to the correct fax number listed below, and (iii) four business days after mailing if sent by certified, first class mail, return receipt requested. Any party may change its address to which notice is given hereunder by providing notice of same in accordance with this Section 7.

To NEG Guarantor:
PG&E National Energy Group, Inc.
7500 Old Georgetown Rd.
Bethesda, MD 20814-6161
Attn.: General Counsel
Fax: 301-280-6900

To Subsidiary:
PG&E Energy Trading-Power, L.P.
7500 Old Georgetown Road
Bethesda, MD 20814-6161
Attn.: Chief Financial Officer
Fax: 301-280-6900

To Guaranteed Party:
Liberty Electric Power, LLC
c/o Orion Power Holdings, Inc.
7 East Redwood Street, 10th Floor
Baltimore, Maryland 21202
Attention: General Counsel
Fax: (410) 234-0994

8. **Consent to Modifications, Waivers.** The Guaranteed Party and Subsidiary may mutually agree to modify the Agreement, extend the time of payment or otherwise modify the terms of payment of any of the Obligations, without in any way impairing or affecting this Guarantee. The Guaranteed Party may resort to the NEG Guarantor for payment of any of the Obligations, whether or not the Guaranteed Party shall have resorted to any collateral security, or shall have proceeded against Subsidiary, GTN Guarantor or any other obligor principally or secondarily obligated with respect to any of the Obligations. NEG Guarantor hereby waives notice of acceptance of this Guarantee, and also presentment, protest and notice of protest or dishonor of any evidences of indebtedness hereby guaranteed.

9. **Subrogation.** NEG Guarantor waives any rights of subrogation or reimbursement from Subsidiary or GTN Guarantor that may accrue to NEG Guarantor with respect to the payment of any Obligation by NEG Guarantor to Guaranteed Party under this Guarantee until the time that all Obligations owing to the Guaranteed Party are fully and indefeasibly paid to Guaranteed Party. Upon such full and indefeasible payment of all the Obligations owing to the Guaranteed Party, NEG Guarantor shall be

subrogated to the rights of the Guaranteed Party against Subsidiary, and the Guaranteed Party agrees to take at NEG Guarantor's expense such steps as NEG Guarantor may reasonably request to implement such subrogation.


10. Consent to Collateral Assignment. NEG Guarantor acknowledges that Guaranteed Party may borrow funds from one or more Lenders for the development, construction, operation or maintenance of the Facility and hereby consents to Guaranteed Party's assignment of this Guarantee to Liberty Electric PA, LLC, the sole member of Liberty Electric Power, LLC and to any Lender as security for Guaranteed Party's obligations to the Lender(s). In addition, NEG Guarantor consents to assignment by such Lender(s) of this Guarantee in connection with the exercise of remedies available to such Lender(s) under its agreements for financing with Guaranteed Party. Except as provided in this Section 10, this Guarantee may not be assigned without the prior written consent of the other party, and any purported assignment without such consent shall be null and void.

11. Representations and Warranties. NEG Guarantor hereby represents and warrants that, as of the date hereof, (i) it is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation, (ii) the execution, delivery and performance by NEG Guarantor of this Guarantee are within its corporate powers, have been duly authorized by all necessary corporate action and do not violate NEG Guarantor's charter or by-laws or any law, order or contractual restriction binding on NEG Guarantor, (iii) this Guarantee constitutes NEG Guarantor's legal, valid and binding obligation, enforceable against it in accordance with its terms (except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws, affecting enforcement of creditors' rights in general and general principles of equity), and (iv) after giving effect to this Agreement and the transactions contemplated hereby, (a) it is not insolvent or will not be rendered insolvent, as such term is used and defined in the United States Bankruptcy Code and other applicable laws, (b) it will not have unreasonably small capital to engage in its business, and (c) it is able to pay its debts and other liabilities, contingent obligations and other commitments as they mature.

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12. Miscellaneous. No provision of this Guarantee may be amended or waived except by a written instrument executed by NEG Guarantor and Guaranteed Party. This Guarantee shall bind and benefit the successors and permitted assigns of NEG Guarantor and Guaranteed Party. This Guarantee shall be construed in accordance with the laws of the State of New York, excluding its choice of law provisions.

PG&E NATIONAL ENERGY GROUP, INC.

By: 
Name: John R. Cooper
Title: Senior Vice President

Agreed and Accepted:

LIBERTY ELECTRIC POWER, LLC

By: Liberty Electric PA, LLC, its sole Member

By: Mid-Atlantic Liberty Corporation,
a Member Manager

By: _____
Name:
Title:

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12. Miscellaneous. No provision of this Guarantee may be amended or waived except by a written instrument executed by NEG Guarantor and Guaranteed Party. This Guarantee shall bind and benefit the successors and permitted assigns of NEG Guarantor and Guaranteed Party. This Guarantee shall be construed in accordance with the laws of the State of New York, excluding its choice of law provisions.

PG&E NATIONAL ENERGY GROUP, INC.

By: _____
Name:
Title:

Agreed and Accepted:

LIBERTY ELECTRIC POWER, LLC

By: Liberty Electric PA, LLC, its sole Member

By: Mid-Atlantic Liberty Corporation,
a Member Manager

By: Jack A. Fusco
Name: Jack A. Fusco
Title: President & CEO

GUARANTEE

GUARANTEE dated as of February 6, 2001 by PG&E Gas Transmission, Northwest Corporation, a California corporation (the "GTN Guarantor"), in favor of Liberty Electric Power, LLC, a Delaware limited liability company (hereafter the "Guaranteed Party").

WHEREAS, Guaranteed Party and PG&E Energy Trading - Power, L.P., a Delaware limited partnership and an affiliate of the GTN Guarantor ("Affiliate"), have entered into that certain Tolling Agreement dated April 14, 2000 (as amended, the "Agreement");

WHEREAS, pursuant to the terms of the Agreement, PG&E Corporation (the "Original Guarantor"), a parent company of the Affiliate, provided a guarantee (the "Original Guarantee") for the benefit of the Guaranteed Party on April 24, 2000;

WHEREAS, Affiliate desires (i) to provide a guarantee of the GTN Guarantor and a guarantee of PG&E National Energy Group, Inc. (the "NEG Guarantor") for the benefit of the Guaranteed Party and (ii) to obtain the release and discharge of the Original Guarantor from the Original Guarantee;

WHEREAS, concurrently with the execution and delivery of this Guarantee, (i) the NEG Guarantor and the Guaranteed Party are executing and delivering a guarantee of the NEG Guarantor for the benefit of the Guaranteed Party (the "NEG Guarantee") and (ii) the Guaranteed Party is releasing and discharging the Original Guarantor from any and all liabilities and obligations under the Original Guarantee.

NOW, THEREFORE, GTN Guarantor agrees as follows:

1. Guarantee. Subject to the terms herein, the GTN Guarantor absolutely, unconditionally and irrevocably guarantees to the Guaranteed Party, its successors and assigns, as primary obligor and not merely as surety, the prompt payment when due, in accordance with the terms of the Agreement, of all amounts payable by Affiliate under the Agreement and any amendments thereto, including without limitation, Tolling Fees, Termination Payment, liquidated damages, indemnity obligations, and damage awards arising by reason of Affiliate's breach of its performance obligations under the Agreement or otherwise (collectively, the "Obligations"). The obligation to make payments under this Guarantee is a guarantee of payment and not of collection. If Affiliate fails to pay any Obligation, GTN Guarantor will pay such Obligation directly for Guaranteed Party's benefit on the terms and subject to the conditions set forth in Section 7. Capitalized terms used and not defined herein shall have meaning given such terms in the Agreement.

2. Extent of Liability & Term. GTN Guarantor's liability under this Guarantee is limited to the aggregate of US\$150,000,000, as reduced (i) pursuant to Section 8.1(b) of the Agreement and (ii) by any amounts paid by the NEG Guarantor pursuant to the NEG Guarantee and not returned to the NEG Guarantor by or on behalf of

the Guaranteed Party (the "Guarantee Cap"). GTN Guarantor shall not be obligated to monitor the amount of Affiliate's Obligations to Guaranteed Party, and Guaranteed Party will bear the risk that the aggregate amount of the Obligations exceeds the Guarantee Cap and only payments made by GTN Guarantor pursuant to a demand for payment in accordance with Section 7 hereof shall reduce the amount of the Guarantee Cap. No payments will be made hereunder unless and until a Payment Demand has been issued by the Guaranteed Party in accordance with Section 7 hereof. Except as the same comprise Obligations under the Agreement, GTN Guarantor shall not be liable hereunder for special, consequential, exemplary, tort or other damages. GTN Guarantor agrees to pay all out-of-pocket expenses (including the reasonable fees and expenses of Guaranteed Party's counsel) incurred for the enforcement of the rights of Guaranteed Party hereunder, provided, that GTN Guarantor shall not be liable for any such expenses if no payment under this Guarantee is due and such payments shall be subject to the Guarantee Cap.

3. Nature of Guarantee. The GTN Guarantor's obligations hereunder with respect to any Obligation shall not be affected by the existence, validity, enforceability, perfection, or extent of any collateral for such Obligations. The Guaranteed Party shall not be obligated to file any claim relating to the Obligations owing to it if Affiliate becomes subject to a bankruptcy, reorganization or similar proceeding and the failure of the Guaranteed Party to so file shall not affect the GTN Guarantor's obligations hereunder. If any payment to the Guaranteed Party with respect to any Obligations is rescinded or must otherwise be returned for any reason whatsoever, the GTN Guarantor shall remain liable hereunder with respect to such Obligations as if such payment had not been made.

4. Enforcement. Except as expressly provided in Section 7, the GTN Guarantor hereby agrees that this Guarantee may be enforced by the Guaranteed Party (or its assigns) without first resorting to any action against the Affiliate or NEG Guarantor, or exhausting any other remedies against the Affiliate or NEG Guarantor, and without protest, presentment, notice or demand whatsoever. The GTN Guarantor hereby waives any rights it may have to require any such prior protest, presentment, notice, demand, enforcement or exhaustion of remedies. Without limiting the generality of the foregoing, GTN Guarantor unconditionally agrees that it hereby waives (i) any and all rights to be subrogated to the position of Affiliate or to have the benefit of any lien, security interest or other guaranty, if any, now or hereafter held by the Guaranteed Party for the obligations guaranteed by GTN Guarantor hereunder or to enforce any remedy which the Guaranteed Party now has or hereafter may have against Affiliate, NEG Guarantor or any other person, (ii) any acceptance of this Guarantee, (iii) any set-offs or counterclaims against the Guaranteed Party which would otherwise impair the Guaranteed Party's rights against Affiliate, (iv) any notice of the disposition of any collateral security, if any, and any right to object to the commercial reasonableness of the disposition of any such collateral security, if any, and (v) any requirement of diligence on the part of anyone. GTN Guarantor further agrees that none of the following acts, omissions or occurrences shall diminish or impair the liability of GTN Guarantor in any respect (all of which acts, omissions or occurrences may be done without notice to GTN Guarantor of any kind): (i) any extension, modification, indulgence, compromise, settlement or variation of any of the terms of the Agreement, (ii) the discharge or release of any obligations of Affiliate or

NEG Guarantor by reason of bankruptcy or insolvency laws, (iii) the acceptance or release by the Guaranteed Party of any collateral security or other guaranty or any settlement, compromise or extension with respect to any collateral security or other guaranty (including the NEG Guarantee), and (iv) to the extent permitted by law, any release or discharge, by operation of law, of GTN Guarantor from the performance or observance of any obligation, covenant or agreement contained in this Guarantee.

5. GTN Guarantor to Maintain its Corporate Existence. The GTN Guarantor agrees that during the term of this Guarantee, it will not dissolve or otherwise dispose of all or substantially all of its assets and will not consolidate with or merge into another corporation or permit one or more corporations (other than one or more subsidiaries of the GTN Guarantor) to consolidate with or merge into it; provided, that the GTN Guarantor may, without violating the agreement contained in this Section, consolidate with or merge into another corporation, or permit one or more corporations to consolidate with or merge into it (other than one or more subsidiaries of the GTN Guarantor), or sell or otherwise transfer to another corporation all or substantially all of its assets as an entirety, provided, (a) the surviving, resulting or transferee corporation, as the case may be, (i) is subject to service of process in the State of Pennsylvania and (ii), if not the GTN Guarantor, assumes in writing all of the obligations of the GTN Guarantor under this Guarantee; (b) such substitute guarantor executes a guarantee agreement in substantially the form of this Guarantee and provides the Guaranteed Party with an opinion of counsel to the substitute guarantor addressed and reasonably acceptable to the Guaranteed Party to the effect that such corporate guarantee agreement has been duly authorized by such substitute guarantor and constitutes the legal, valid and binding obligation of such substitute guarantor, enforceable against such substitute guarantor in accordance with its terms (subject to limitations on the enforcement thereof by bankruptcy, insolvency and other similar laws affecting the rights of creditors generally and to the application of principles of equity); and (c) the senior unsecured long term debt rating of such substitute guarantor is rated not less than Baa2 (or its then equivalent) by Moody's or BBB (or its then equivalent) by S&P or such substitute guarantor is acceptable to the Guaranteed Party. Upon satisfaction of the requirements set forth in this Section 5, this Guarantee shall be deemed automatically and immediately released by the Guaranteed Party.

6. Substitutions of Guarantee. In addition to the rights of substitution provided for in Section 5 hereof, the GTN Guarantor may at any time substitute as the GTN Guarantor for all or a portion of the Guarantee Cap an irrevocable letter of credit and in form and substance satisfactory to the Guaranteed Party issued by United States Bank or United States Branch of a foreign bank that is and remains rated "A" or better by Moody's and S&P. Upon the satisfaction of the requirements set forth in this Section 6, the GTN Guarantor's obligations with respect to that portion of the Guarantee Cap assumed by a substitute guarantor or letter of credit provider shall be deemed automatically and immediately released by the Guaranteed Party.

7. Demands and Notice. If Affiliate fails to pay any Obligations and Guaranteed Party elects to exercise its rights under this Guarantee, Guaranteed Party shall make a written demand on GTN Guarantor (a "Payment Demand"); provided that the

Guaranteed Party may exercise its rights under this Guarantee without having made a Payment Demand on NEG Guarantor if the Guaranteed Party is unable to make such Payment Demand under the NEG Guarantee as a result of any order or decree of a court of competent jurisdiction in connection with a bankruptcy or similar proceeding with respect to the NEG Guarantor. Subject to the proviso in the preceding sentence, a Payment Demand under this Guarantee may not be made before, and the GTN Guarantor's obligation to make payment hereunder shall only become due on the first Business Day after, the date which is five Business Days after Guaranteed Party shall have made a Payment Demand on NEG Guarantor under the NEG Guarantee, provided that the Guaranteed Party shall have simultaneously therewith submitted a copy of such Payment Demand under the NEG Guarantee to the GTN Guarantor. For purposes of this Guarantee, "Business Day" means any day on which Federal Reserve member banks in New York City, New York are open for business. A Payment Demand shall identify the amount and the basis of the demand and shall contain a statement that (i) Guaranteed Party is calling upon GTN Guarantor under this Guarantee, (ii) at least five Business Days have elapsed since Guaranteed Party made a Payment Demand on NEG Guarantor under the NEG Guarantee, unless the Guaranteed Party is unable to make a Payment Demand under the NEG Guarantee as described above, and (iii) the Payment Demand under the NEG Guarantee remains unpaid and setting forth the amount unpaid, unless the Guaranteed Party is unable to make a Payment Demand under the NEG Guarantee as described above. A Payment Demand conforming to the foregoing requirements shall be sufficient notice to GTN Guarantor to pay under this Guarantee. Notices under this Guarantee shall be deemed received if sent to the address specified below: (i) on the day received if served by overnight express delivery, (ii) on the next business day if served by facsimile transmission when sender has machine confirmation that facsimile was transmitted to the correct fax number listed below, and (iii) four business days after mailing if sent by certified, first class mail, return receipt requested. Any party may change its address to which notice is given hereunder by providing notice of same in accordance with this Section 7.

To GTN Guarantor:
 PG&E Gas Transmission, Northwest Corporation
 7500 Old Georgetown Road
 Bethesda, MD 20814-6161
 Attn.: General Counsel
 Fax: 301-280-6900

To Affiliate:
 PG&E Energy Trading-Power, L.P.
 7500 Old Georgetown Road
 Bethesda, MD 20814-6161
 Attn.: Chief Financial Officer
 Fax: 301-280-6900

To Guaranteed Party:
 Liberty Electric Power, LLC
 c/o Orion Power Holdings, Inc.
 7 East Redwood Street, 10th Floor
 Baltimore, Maryland 21202
 Attention: General Counsel
 Fax: (410) 234-0994

8. Consent to Modifications, Waivers. The Guaranteed Party and Affiliate may mutually agree to modify the Agreement, extend the time of payment or otherwise

modify the terms of payment of any of the Obligations, without in any way impairing or affecting this Guarantee. The Guaranteed Party may resort to the GTN Guarantor for payment of any of the Obligations, whether or not the Guaranteed Party shall have resorted to any collateral security, or shall have proceeded against Affiliate or any other obligor principally or secondarily obligated with respect to any of the Obligations. GTN Guarantor hereby waives notice of acceptance of this Guarantee, and also presentment, protest and notice of protest or dishonor of any evidences of indebtedness hereby guaranteed.

9. Subrogation. GTN Guarantor waives any rights of subrogation or reimbursement from Affiliate or NEG Guarantor that may accrue to GTN Guarantor with respect to the payment of any Obligation by GTN Guarantor to Guaranteed Party under this Guarantee until the time that all Obligations owing to the Guaranteed Party are fully and indefeasibly paid to Guaranteed Party. Upon such full and indefeasible payment of all the Obligations owing to the Guaranteed Party, GTN Guarantor shall be subrogated to the rights of the Guaranteed Party against Affiliate or NEG Guarantor, and the Guaranteed Party agrees to take at GTN Guarantor's expense such steps as GTN Guarantor may reasonably request to implement such subrogation.

10. Consent to Collateral Assignment. GTN Guarantor acknowledges that Guaranteed Party may borrow funds from one or more Lenders for the development, construction, operation or maintenance of the Facility and hereby consents to Guaranteed Party's assignment of this Guarantee to Liberty Electric PA, LLC, the sole member of Liberty Electric Power, LLC and to any Lender as security for Guaranteed Party's obligations to the Lender(s). In addition, GTN Guarantor consents to assignment by such Lender(s) of this Guarantee in connection with the exercise of remedies available to such Lender(s) under its agreements for financing with Guaranteed Party. Except as provided in this Section 10, this Guarantee may not be assigned without the prior written consent of the other party, and any purported assignment without such consent shall be null and void.


11. Representations and Warranties. GTN Guarantor hereby represents and warrants that, as of the date hereof, (i) it is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation, (ii) the execution, delivery and performance by GTN Guarantor of this Guarantee are within its corporate powers, have been duly authorized by all necessary corporate action and do not violate GTN Guarantor's charter or by-laws or any law, order or contractual restriction binding on GTN Guarantor, (iii) this Guarantee constitutes GTN Guarantor's legal, valid and binding obligation, enforceable against it in accordance with its terms (except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws, affecting enforcement of creditors' rights in general and general principles of equity), (iv) Affiliate has paid, or caused the payment of, certain fees to the GTN Guarantor, constituting reasonably equivalent value, in exchange for the issuance of this Guarantee and (v) after giving effect to this Agreement and the transactions contemplated hereby, (a) it is not insolvent or will not be rendered insolvent, as such term is used and defined in the United States Bankruptcy Code and other applicable laws, (b) it will not

have unreasonably small capital to engage in its business, and (c) it is able to pay its debts and other liabilities, contingent obligations and other commitments as they mature.

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12. Miscellaneous. No provision of this Guarantee may be amended or waived except by a written instrument executed by GTN Guarantor and Guaranteed Party. This Guarantee shall bind and benefit the successors and permitted assigns of GTN Guarantor and Guaranteed Party. This Guarantee shall be construed in accordance with the laws of the State of New York, excluding its choice of law provisions.

PG&E GAS TRANSMISSION, NORTHWEST CORPORATION

By: 
Name: John R. Cooper
Title: Chief Financial Officer
and Treasurer

Agreed and Accepted:

LIBERTY ELECTRIC POWER, LLC

By: Liberty Electric PA, LLC, its sole member

By: Mid-Atlantic Liberty Corporation,
a Member Manager

By: _____
Name: _____
Title: _____

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12. Miscellaneous. No provision of this Guarantee may be amended or waived except by a written instrument executed by GTN Guarantor and Guaranteed Party. This Guarantee shall bind and benefit the successors and permitted assigns of GTN Guarantor and Guaranteed Party. This Guarantee shall be construed in accordance with the laws of the State of New York, excluding its choice of law provisions.

PG&E GAS TRANSMISSION, NORTHWEST CORPORATION

By: _____
Name:
Title:

Agreed and Accepted:

LIBERTY ELECTRIC POWER, LLC

By: Liberty Electric PA, LLC, its sole member

By: Mid-Atlantic Liberty Corporation,
a Member Manager

By: Jack A. Fusco
Name: Jack A. Fusco
Title: President & CEO