

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
Justice

PART 60

ENTERGY NUCLEAR INDIAN POINT 3, LLC and,
ENTERGY NUCLEAR FITZPATRICK, LLC,

FBEM

INDEX NO. 603949-2006

Petitioners,

MOTION DATE _____

-against-

MOTION SEQ. NO. 001

POWER AUTHORITY OF THE STATE OF NEW YORK
and AMERICAN ARBITRATION ASSOCIATION, INC.

Respondents.

NYS SUPREME COURT
REVIEWED
FEB 28 2007
MOTION CALL NO. 107
E-FILE DEPT

The following papers, numbered 1 to _____ were read on this motion for _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavit — Exhibits ...
Answering Affidavit — Exhibits
Replying Affidavit

PAGES NUMBERED

Cross-Motion: Yes No

FILED
FEB 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that:

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE
ATTACHED MEMORANDUM DECISION.

Dated: 2/8/07

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

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FRIED, J.:

On November 14, 2006, Petitioners Entergy Nuclear Indian Point 3, LLC ("Entergy IP3") and Entergy Nuclear Fitzpatrick, LLC ("Entergy Fitzpatrick") (collectively, the "Entergy Petitioners") filed an order to show cause why, pursuant to CPLR 7503, the arbitration initiated by Respondent Power Authority of the State of New York ("NYPA") against the Entergy Petitioners should not be stayed. The Entergy Petitioners also sought a temporary restraining order ("TRO").

NYPA, a corporate municipal instrumentality and political subdivision of New York State, is "a non-profit public power authority that generates and transmits low-cost electric energy throughout New York State using its own facilities and also purchas[ing] electric energy from other generating companies to serve its customers." (Respondent's M.O.L. at

p. 2; Clemente Aff. ¶2).¹ NYPA formerly owned two large nuclear power generating facilities, including the 1,000 Megawatt ("MW") Indian Point 3 generator in Westchester County, and the 825-MW James A. FitzPatrick ("JAF") generator in Oswego County. (Clemente Aff. ¶2). In November of 2000, NYPA offered to sell the nuclear plants, and, after a competitive process, accepted an offer from Entergy Corporation ("Entergy"), through its subsidiaries Entergy IP3 and Entergy Fitzpatrick. The consideration Entergy offered to NYPA included a cash payment, a Power Purchase Agreement under which NYPA would purchase all energy produced by the facilities through the end of 2004, and a number of other agreements, including two Value Sharing Agreements ("VSAs") now at issue. The VSAs were incorporated by reference into the Purchase and Sale Agreement at the time of its execution and provided for Entergy to make deferred or contingent payments to NYPA for the plants. (Clemente Aff. ¶3 and ¶5).²

The VSAs provide generally that certain revenues would be shared between Entergy

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NYPA's customers include The City of New York, the Metropolitan Transportation Authority, the Port Authority of New York and New Jersey, the New York City Health and Hospitals Corporation, and the New York City Housing Authority. It owns and operates "large hydroelectric generating facilities on the Niagara River and the St. Lawrence River, pump storage generating facilities, thermal generating facilities in New York City and on Long Island, and the principal east-west and north-south components of the New York electric transmission system." (Clemente Aff. ¶2). Carmine Clemente, Esq. is the Deputy Counsel for NYPA.

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The Affidavit of Thomas G. Wagner, the Assistant General Counsel for Entergy Services, Inc., (an affiliate of Entergy IP3 and Entergy Fitzpatrick), states that on March 28, 2000, NYPA entered a contract to sell its interests in the Indian Point 3 nuclear electric generating station ("IP3") to Entergy IP3 and to sell its interests in the James A. Fitzpatrick nuclear electric generating station ("JAP") to Entergy Fitzpatrick, and that the sale closed on November 21, 2000.

IP3 and Entergy Fitzpatrick on the one hand, and NYPA on the other, if “Actual Market Prices” for electricity exceed certain specified levels (“strike prices”) in the Agreements during the ten-year period including 2005 through 2014. (Petitioners’ M.O.L at p. 1). Each VSA provides that if the average price per Megawatt Hour (“MWh”) for actual sales of energy produced by the relevant plant during each year between 2005 through 2014 are higher than certain agreed “Set Market Prices” listed in the Agreement, that the relevant Entergy entity must pay NYPA, as deferred compensation for the plants, one-half the difference between such average actual price per MWh and the Set Market Price, multiplied by the total number of MWh sold from such plant during such year. (Clemente Aff. ¶6).

The VSAs require that these Value Sharing Amounts be calculated annually and that payment of any amounts owed to NYPA be calculated pursuant to a defined arithmetical formula (Clemente Aff. ¶6). Pursuant to §2.1 of each VSA, Entergy IP3 and Entergy Fitzpatrick each must provide NYPA a calculation of the applicable Value Sharing Amount under their respective Agreements within 45 days after the end of each calendar year. (Exhibits 2 and 3 to Wagner Affidavit, Value Sharing Agreement (IP3) §2.1 and Value Sharing Agreement (Fitzpatrick) at §2.1). If the Value Sharing Amount for a particular year is a positive number, *i.e.*, if the average actual energy sale price per MWh for that year is higher than the agreed Set Market Price for that year, then the Entergy Petitioners must make payment to NYPA within 15 days following timely delivery of the annual calculations; however, if the Value Sharing Amount is negative, *i.e.*, if the average actual energy sale price is less than the applicable Set Market Price, then the Entergy entities would owe no payment to NYPA for that year. (Clemente Aff. ¶8).

§15 of each VSA sets forth, in identical language, the resolution procedure to be followed between the parties for disputes “arising as to the Value Sharing Amount.” In each agreement, this section, (the “Arbitration Clause), provides that, prior to instituting any litigation or alternative dispute resolution mechanism, that the parties attempt in good faith to resolve the dispute or claim promptly by referring the matter to their respective chief executive officers for resolution. Next, it provides that any party may give the other written notice of any dispute or claim and that, within thirty days after delivery of that notice, the executives shall meet at a mutually acceptable time and place and shall meet thereafter as often as necessary to exchange information and attempt to resolve the dispute. Finally, and in pertinent part, the agreement states that:

“In the event any dispute arising as to any Value Sharing Amount, or the amount of any payment due to Buyer, if the parties are not able to resolve such dispute as provided [above], the matter shall be submitted to a single arbitrator, who shall be a certified public accountant from a national practice firm, appointed pursuant to the Commercial Rules of the American Arbitration Association, for resolution in a proceeding to be held in accordance with such Rules.” (Exhibits 2 and 3 to Wagner Affidavit, Value Sharing Agreement (IP3) §15 and Value Sharing Agreement (Fitzpatrick) §15).

2005 is the first calendar year for which Value Sharing Amounts were to be calculated and paid. On February 13, 2006, Entergy wrote NYPA, advising it that the 2005 Value Sharing Amounts for both the IP3 and the JAF power stations were below zero and that no payments were due to NYPA. (Exhibit C to NYPA’s Demand for Arbitration at Exhibit 1 to Entergy IP3 and Entergy Fitzpatrick’s Petition for Stay of Arbitration).

NYPA claims that, by its calculations, the Entergy Petitioners owe NYPA at least \$90,545,238 for 2005. (Clemente Aff. ¶11). Between February and October of 2006, the

Entergy Petitioners and NYPA attempted to resolve disputes as to this amount through correspondence, discussions, several meetings at Entergy's offices and a meeting between the parties' chief executive officers on October 31, 2006. (Clemente Aff. ¶11).

On or about November 1, 2006, NYPA filed a demand for arbitration with the American Arbitration Association ("AAA") asserting claims arising under the two Value Sharing Agreements "VSAs." (Petitioners' M.O.L. at p. 1)

This dispute is before me because ¶12 of each VSA provides that each of the parties consents to the nonexclusive jurisdiction of any local, state or federal court located within the City of New York, New York County, State of New York for adjudication of "any suit, claim action or other proceeding at law or in equity relating to this Agreement." (Exhibits 2 and 3 to Wagner Affidavit, Value Sharing Agreement (IP3) §12 and Value Sharing Agreement (Fitzpatrick) at §12).

In accordance with CPLR 7502(c), NYPA served a notice of intention to arbitrate on Entergy, specifying the agreements pursuant to which it sought arbitration (the VSAs) and the name and address of the party serving the notice. On November 14, 2006, the Entergy Petitioners applied to stay arbitration pursuant to §7503(b). (Demand for Arbitration, p. 1-2 at Exhibit 1 to Order to Show Cause). NYPA opposed the application for a stay.

On November 14, 2006, I granted a TRO enjoining NYPA from proceeding with the arbitration, pending further action. On December 6, 2006, I heard argument on whether the stay should be granted.

The Entergy Petitioners argue that I should stay the arbitration because the arbitration provision in the VSAs covers only a limited subset of disputes arising under the parties'

agreements and does not include the dispute raised by the NYPA, because resolution of that dispute allegedly requires contractual interpretation and is thus outside the scope of the defined Arbitration Clause in the agreements.

NYPA contends first, that plain language of the arbitration agreement provides that all disputes arising as to Value Sharing Amounts under the VSAs be arbitrated, and that there is no basis to deviate from the plain language of the arbitration agreement. It is further asserted that the dispute at issue is, in any event, "straightforward," because the arbitration provision fully defines all terms necessary for calculation of the Value Sharing Amounts. Moreover, it is argued that the parties have agreed, without limitation, to submit disputes such as this to arbitration by a CPA and, furthermore, that it is standard for a CPA to arbitrate the full range of issues encompassed in an arbitration clause.

The Entergy Petitioners repeat the argument that the parties to the VSAs did not agree to arbitrate all disputes arising under the agreement, arguing that this is analogous to *Joseph Davis, Inc. v. Merritt-Chapman & Scott Corporation* (27 A.D.2d 114 [4th Dept 1967]), where the Fourth Department held that, the court, rather than an engineer appointed as a neutral, had exclusive authority to resolve questions of contractual intent and interpretation and that the parties intended to restrict arbitral authority as they clearly may choose to do. (*supra* at 118; *See also Maross Construction, Inc. v. Central New York Regional Transportation Authority* (66 N.Y.2d 341, 347 [1985]).

Second, they contend that NYPA's interpretation of the Arbitration Clause ignores and renders meaningless key provisions of the VSAs, contrary to the well-established principle of contract interpretation that the court should avoid construing a contract in a way

that would leave certain clauses meaningless. (*Two Guys from Harrison-N.Y., v. S.F.R. Realty Assoc.*, 63 N.Y.2d 396, 403 [1984]). The argument is that the NYPA's position would give no effect to the language in §12 of each VSA, which confers to the court, jurisdiction to adjudicate "any suit claim or other proceeding at law or in equity relating to this Agreement," or to the portion of §15 which requires good faith negotiations before the institution of any litigation or alternative dispute resolution. They do not, however, give sufficient reason why these provisions cannot be read harmoniously. (Petitioners' Reply M.O.L., at p. 3). They further allege that the parties intended their designation of a CPA to restrict the neutral's authority, citing *Davis (supra)* and *Maross (supra)*; *See also* Tr., p. 25).

Third, the Entergy Petitioners argue that interpreting the contract in a way that would vest a CPA with authority to decide legal issues would lead to an unreasonable result.

Fourth, they insist that because the parties have agreed to arbitrate a limited subset of disputes, instead of all disputes between the parties, that the arbitration provision in the VSAs should be read by me conservatively. (*Trump v. Refco* 194 A.D.2d 70, 74 [1st Dept 1993], *quoting Gangel v. DeGroot* 41 N.Y.2d 840, 841 [1977]).

Finally, The Entergy Petitioners claim that they do not seek to have the dispute resolved in the courts rather than in arbitration for any untoward purpose.

While the parties consented to the nonexclusive jurisdiction of New York courts for adjudication of "any suit, claim, or action or other proceeding at law or in equity relating to this Agreement" in §12 of the VSAs, they also agreed to resolve a broad subclass of those

disputes through arbitration by contracting to do so in §15. (Respondents' M.O.L at p. 8).³ And although §15 does not provide for arbitration of all disputes arising out of the agreement between the parties, the plain language of the agreement clearly states that "any dispute arising as to any Value Sharing Amount or the amount of any payment due to Buyer" be submitted to arbitration, if the parties are unable to resolve the dispute between themselves.

As a general rule, "a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties." (*Weinrott v. Carp* 32 N.Y.2d 190, 199 [1973]). Moreover, when parties to an agreement include a broad arbitration clause, "to exclude a substantive issue from arbitration...generally requires specific enumeration in the arbitration clause itself of the subjects intended to be put beyond the arbitrator's reach." (*Matter of Silverman [Benmor Coats]* 61 N.Y.2d 299 [1984]). This is true not only when an arbitration clause calls for arbitration of all disputes arising out of a contract, but also when it provides for "arbitration in some other broadly worded formulation." (*Id.* at 307).

The parties could easily have chosen to limit the arbitrator's authority; instead they vested a CPA arbitrator with authority to resolve the full range of disputes that could arise as to the VSA amounts. Unlike in the *Davis* case, cited by The Entergy Petitioners and discussed in *Maross*, the parties employed no language limiting the arbitrator's role to one of determining issues requiring technical expertise. As in *Davis*, where the contract between

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NYPA argues in the alternative that, even if I construe the arbitration clause as "narrow" rather than "broad," the plain language of the arbitration clause encompasses precisely what, if any VSA amount is due NYPA. I need not reach this argument, however, because the Arbitration Clause uses broad language.

the parties specified that ambiguity in specific items, *i.e.*, the plans, specifications or maps would be resolved by the binding decision of certain engineers, these parties could have enumerated a narrow list of disputes to be arbitrated. They did not. Absent any indication in the language of the agreement that the parties intended to limit the arbitrator's authority to discrete factual issues, there is no reason to read such a limitation into the provision.

When determining arbitrability of a particular matter, it must be first determined whether the parties have agreed to submit their disputes to arbitration, and, if so, whether the disputes generally come within the scope of their arbitration agreement. (*Sisters of St. John the Baptist, Providence Rest Convent v. Geraghty Constructor*, 67 N.Y.2d 997, 999 [1986].) Where, as here, the contract contains a broadly worded arbitration clause, and where the "requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate," interpretation of contract must then be left to the arbitrators. (*Id.* at 999).

The dispute NYPA seeks to arbitrate is whether the VSA amount for 2005 is properly calculated below zero for both plants so no payments are required or whether the VSA amounts due to NYPA exceed \$90 million. (Clemente Aff. ¶¶ 10, 11). Such dispute falls within the plain language and subject matter of the Arbitration Clause. The fact that the arbitrator is to be a CPA does not change this result.

Indeed, arbitrators routinely determine legal as well as factual issues. (*Matter of Exercycle v. Maratta* 9 N.Y.2d 329, 336 [1961]). As the Court of Appeals, held in *Exercycle*, "[t]he arbitrator is a judge appointed by the parties; he is by their consent invested with judicial functions." (*Id.* at 336). That the arbitrator might be called upon to determine

legal issues is not a bar to the CPA arbitrator, designated by these parties, making such a determination. “[A]rbitrators, unlike judges, are not required to possess legal expertise.” (*City of Newark v. Law Department of the City of New York et. al.* 194 Misc.2d 246, 248 [2002]).

Moreover, there is nothing unusual about a CPA acting as arbitrator: the AAA’s Guide to Dispute Resolution, states that mediators and arbitrators on the National Panel of Professional Accounting and Related Services Disputes include “corporate financial and accounting officers - practicing and retired - CPAs, lawyers, former judges and business people who have met the qualification criteria and who have been trained by the AAA in arbitration and/or mediation techniques.” (*Resolving Professional Accounting and Related Services Disputes - A Guide to Alternative Dispute Resolution*, <http://www.adr.org/sp.asp?id=22021> [accessed February 1, 2007]). Certainly, this supports my conclusion that the parties intended that “any dispute arising as to any Value Sharing Amount” be arbitrated, and designated a CPA as the type of arbitrator to decide those disputes, without limitation.

For the reasons set forth above, it is:

ORDERED that petitioner’s request for a stay of arbitration pursuant to CPLR 7503 is DENIED and the petition is DISMISSED; and it is further:

ORDERED that the temporary restraining order enjoining respondents from proceeding with arbitration pending further action is VACATED.

Dated: 2/8/07

ENTER



J.S.C.

BERNARD J. FRIED
J.S.C.

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