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**SYSTEMS COMPANY, LIMITED
PARTNERSHIP**

*

CIRCUIT COURT

Plaintiff

*

FOR

And

*

BALTIMORE CITY

**NORTHEAST MARYLAND WASTE
DISPOSAL AUTHORITY**

*

Plaintiff-Intervenor

*

Part 20

*

v.

*

Case No.: 24-C-01-000234

**BALTIMORE GAS AND ELECTRIC
COMPANY**

*

Defendant

*

MEMORANDUM AND OPINION

This case, in which plaintiff and defendant assert claims for declaratory relief and breach of contract, requires the Court to interpret an Electric Power Purchase Agreement dated June 3, 1982 and a Modification to that agreement dated July 1, 1988.¹

¹ Plaintiff-Intervenor Northeast Maryland Waste Disposal Authority (the "Authority") is also a party to the agreement in question.

Plaintiff Baltimore Refuse Energy Systems Company, Limited Partnership (“BRESCO”) owns and operates a solid-waste processing/energy recovery facility, commonly referred to as a resource recovery facility, on Russell Street in Baltimore City.² Through the combustion of solid waste, the facility produces steam that may either be sold directly as steam or converted by turbine generator and sold as electric energy. Defendant Baltimore Gas and Electric Company (“BGE”) is a public utility company engaged in the business of generating and physically transmitting, distributing and selling electricity at retail to businesses and residents in Baltimore and in ten central Maryland counties pursuant to regulation by the Maryland Public Service Commission (the “PSC”).

In 1982 the Authority and BRESCO entered into agreements for the design, construction, ownership and operation of the Russell Street facility. Operations began in 1984. Pursuant to the June 3, 1982 agreement entered into by WESI Baltimore, Inc., BGE and the Authority, WESI Baltimore, Inc. (and later BRESCO) was entitled to sell up to all of the energy produced at the Russell Street facility to BGE, at the discretion of BRESCO. The 1988 modification altered this arrangement, permitting BGE, on thirty minutes notice, to purchase up to all the energy produced by the facility in exchange for fixed capacity payments to BRESCO, subject to enumerated conditions.

By letter dated August 31, 2000, Constellation Power Source (“Constellation”), acting as agent of and on behalf of BGE, notified BRESCO that BRESCO should provide BGE with 57 MW of energy, effectively the demonstrated net capability of the BRESCO facility, until further notice.

² The general partner of BRESCO is WESI Baltimore, Inc., a Delaware corporation with its principal place of business located in New Hampshire. WESI Baltimore, Inc. was a signatory to the June 3, 1982 agreement with the Authority and BGE. On November 5, 1982 WESI Baltimore, Inc. assigned all of its right, title and interest in, to and under the 1982 agreement to BRESCO.

BRESCO refused to comply and, accordingly, BGE has assessed penalties against plaintiff for each month that it has not provided the full energy output of the Russell Street facility to BGE.

In its Motion for Partial Summary Judgment BGE asserts that the terms of the Agreement and, more particularly, the 1988 Modification to the agreement, are clear and unambiguous, thereby precluding any genuine issues of material fact, and that it is entitled to summary judgment as a matter of law on Count I of plaintiff's complaint. Count I requests³ the Court to declare that: (1) BGE wrongfully issued the demand of August 31, 2000; (2) BRESCO is not required to deliver electric energy to BGE at demonstrated net capability at all times for an indefinite period of time; and (3) BGE's discretionary authority is limited to emergency or near emergency conditions on the PJM Interconnection System.⁴

BGE also seeks summary judgment on Count III of the complaint, which contends that BGE's appointment of Constellation as its agent for purposes of this Agreement constitutes, in effect, an assignment of its rights under the 1982 Agreement, as modified, without BRESCO's consent, in violation of the terms of the agreement. Because defendant's "agency" agreement with Constellation retains certain rights for BGE under the 1982 Agreement, as modified, BGE contends that it is merely an agency agreement, not an assignment, and that defendant is entitled to summary judgment on this count as a matter of law as well.

COUNT I

The focus of the parties' dispute under Count I of the complaint is new Section 4.B contained

³ Count I also seeks monetary damages.

⁴ This refers to an umbrella organization responsible for the operation and control of the electric power system throughout major portions of the five Mid-Atlantic States and the District of Columbia. As a member of PJM, BGE is required to maintain a minimum capacity reserve margin which varies from time to time. BRESCO now contends that its full capacity is necessary for defendant to meet its PJM capacity obligation.

in the Modification to the Agreement dated July 1, 1988. More particularly, Part 1.c of the new section reads as follows:

Bresco shall deliver energy at its Demonstrated Net Capability to the Company within 30 minutes of notification by the Company, the timing of such notification shall be at the Company's sole discretion. Bresco's failure to deliver such energy shall result in a reduction in payment for the month in which such failure occurred, proportional to the average megawatt reduction from Demonstrated Net Capability experienced during the month. . . .

The above provision appears to contradict, or at least to be in conflict with, other remaining provisions of the 1982 Agreement,⁵ such as Section 4.A, which vests discretion in BRESCO for the amount of electric energy the facility is capable of generating on a net basis, all of which BGE agrees to accept and for which it agrees to pay plaintiff.

Defendant here contends that the 1988 Modification to the Agreement eliminated BRESCO's discretion as to the amount of energy to be delivered to BGE (now to its agent Constellation) and placed in BGE's sole discretion the timing of any demand therefor. According to defendant, when the modified Section 4.B is read in conjunction with modified Section 3, BRESCO is required to deliver energy at its Demonstrated Net Capability on thirty minutes notice through the end of the initial term of the agreement (June 30, 2013). BRESCO adamantly disputes this interpretation of the modification and asserts that the failure of the Agreement, as modified, to state the duration of BRESCO's obligation to deliver energy to BGE at its Demonstrated Net Capability on thirty minutes notice creates an ambiguity in the terms of the Agreement which cannot be resolved without the

⁵ In its Memorandum in Opposition to BGE's Motion for Partial Summary Judgment BRESCO sets forth other provisions of the Agreement, as modified, which it contends further demonstrate the now conflicting terms of the Agreement and create an ambiguity to be resolved by the Court following an evidentiary hearing.

introduction of parole evidence to assist the Court in its interpretation.

The Court of Appeals of Maryland has noted that “the law of contracts . . . permits the use of extrinsic evidence only if the contract is ambiguous on its face.” *Kasten Constr. Co. v. Rod Enterprises, Inc.*, 268 Md. 318, 329 (1973). Because the “intention of the parties must be garnered from the terms of the contract considered as a whole, and not from the clauses considered separately,” the conflicting provisions of the 1982 Agreement, as modified in 1988, create in this Court’s judgment an ambiguity further complicated by the failure of the 1988 modification to establish a specific duration for the generation of electrical energy upon thirty minutes demand under new Section 4.B. *Id.* at 329 (citations omitted).

Other cases have taught us that:

Under the objective law of contracts, a court, in construing an agreement, must first determine from the language of the agreement itself, what a reasonable person in the position of the parties would have meant at the time it was effectuated.

Anne Arundel County v. Crofton Corp., 286 Md. 666, 673 (1980) (citations omitted).

Where the language is ambiguous, the court must then determine the intent and purpose of the parties at the time the contract was made, which is a question of fact. It must therefore consider the circumstances and conditions affecting the parties at that time, and their subsequent conduct and construction of the contract. In the absence of an express time for performance, a reasonable time will be implied.

Id. at 673 (citations omitted).

Maryland courts should examine the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution.

In so doing, we accord words their ordinary and accepted meanings. The test is what meaning a reasonably prudent layperson would attach to the term. . . .

Courts may construe unambiguous contracts as a matter of law. . . .

If the extrinsic evidence presents disputed factual issues, construction of the ambiguous contract is for the jury.⁶

Pacific Indem. v. Interstate Fire & Cas. Co., 302 Md. 383, 388-89 (1985) (citations omitted).

Besides the conflict established by the terms of the 1982 Agreement, as modified in 1988, BRESCO points to an illustration (in Appendix B to the 1988 Modification), to the parties' course of performance over the past twelve years and to representations made to the PSC, as evidence in support of its interpretation of the pivotal provision upon which the parties seek the Court's interpretation in Count I.

Because the Court believes that there is relevant evidence available to it, which can assist the Court in gleaning the intention of the parties at the time that the Agreement was modified in 1988, the Court will permit the parties to introduce parole evidence at the trial of this matter and, accordingly, defendant's motion for partial summary judgment with respect to Count I is **DENIED**, there being material factual issues in dispute.

COUNT III

BGE asks the Court to declare that the Power Purchase and Sale Agreement executed between defendant and Constellation on June 14, 2000 establishes a mere agency relationship rather than an assignment of BGE's rights under the 1982 Agreement, as modified, and, therefore, is not violative of any of the terms of the Agreement between plaintiff and defendant. BRESCO disputes this interpretation, asserting that the Power Purchase and Sale Agreement constitutes an assignment of BGE's rights obtained without prior written consent of BRESCO as required by the terms of the 1982 Agreement, as modified.

⁶ The Court will act as finder of fact in this case because the parties have elected a bench trial.

According to the Restatement (Second) of the law of Agency,

Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

An assignment, by contrast, is defined as follows:

An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.

RESTATEMENT (SECOND) OF CONTRACTS § 317 (1981).

Reviewing all the materials submitted by counsel for the respective parties in connection with defendant's motion for partial summary judgment, the Court is unable to conclude as a matter of law whether the Agreement between BGE and Constellation constitutes an agency relationship or an assignment. Under these circumstances, the Court of Appeals has concluded that "[w]hen legally sufficient evidence is produced of an agency relationship, the question of the existence of the agency relationship is a factual matter and must be submitted to the jury."⁷ *Green v. H & R Block, Inc.*, 355 Md. 488, 504 (1999). The *Green* Court also noted that "where only one inference may be drawn from the evidence, it is proper for the court to find the existence of an agency relationship as a matter of law." *Id.* at 505. In the case *sub judice*, however, there is more than a single inference to be drawn from the Power Purchase Contract between BGE and Constellation. The determination of this question, therefore, hinges on the intent of the parties in forming such a relationship.⁸ The question

⁷ See *supra* note 6.

⁸ "The creation of an agency relationship ultimately turns on the parties' *intentions* as manifested by their agreements or actions." *Green v. H & R Block, Inc.*, 355 Md. 488, 503 (1999) (emphasis added) (citations omitted). In addition, the "assignment of a right is a manifestation of the assignor's *intention* to transfer it" RESTATEMENT (SECOND) OF CONTRACTS § 317 (1981) (emphasis added).

of whether an agency relationship exists between defendant and Constellation, or whether defendant assigned its rights to Constellation, is a question of fact to be decided by the trier of fact after trial. Because a genuine dispute exists as to material facts on Count III as well, defendant's motion for summary judgment on that Count is **DENIED**.

ALBERT J. MATRICCIANI, JR.
Judge

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