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WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ENERGY LOUISIANA, INC.,
ENERGY GULF STATES, INC., AND
CLECO POWER LLC

CIVIL ACTION NO. CV05-1174

JUDGE HICKS

VERSUS

MAGISTRATE HORNSBY

SABINE RIVER AUTHORITY, STATE
OF LOUISIANA; KENNETH
FREEMAN; RONALD STEED;
DANIEL CUPIT; NORMAN
ARBUCKLE; JOHN DEBARGE;
CARLTON GIBSON; LARRY KELLY;
DONALD LEMIEUX; THERMAN
NASH; ESTELLA SCOTT; BOB
THRASHER; KERMIE VALENTINE,
AND STANLEY VIDRINE

**MEMORANDUM IN SUPPORT OF JOINT MOTION
TO ADOPT CONSENT DECREE**

Plaintiffs, defendants the Sabine River Authority, State of Louisiana ("SRAL") and intervenor the Sabine River Authority of Texas ("SRAT") have jointly moved to adopt a Consent Decree that would resolve this matter. This memorandum is submitted in support of the motion.

Movers seek to resolve this litigation through a Consent Decree pursuant to which the Court would retain jurisdiction to interpret and enforce its terms. This memorandum is offered in support of the propriety of the Consent Decree and the settlement it embodies.

I. BACKGROUND

This case involves a hydroelectric power facility operated at the Toledo Bend Reservoir. Plaintiffs Entergy Louisiana, Inc. ("ELI") and Entergy Gulf States, Inc. ("EGS") are the lessees and operators of the facility, which is licensed and regulated by the Federal Energy Regulatory Commission ("FERC"). ELI, EGS, and plaintiff CLECO Power LLC ("CLECO") are long term purchasers of hydroelectric power produced by the facility.

In 1962, defendant SRAL and intervenor SRAT applied to FERC for the license to construct the Toledo Bend Project. A series of FERC Orders (which constitute the “FERC License”) resulted, regulating numerous aspects of the planning, construction, operation, and maintenance of the Project.¹ On February 1, 1964, SRAL and SRAT, as joint holders of the FERC License, entered into a contract in the form of a Power Sales Agreement with Louisiana Power & Light Company (former name of ELI), Gulf States Utility Company (former name of EGS), and Central Louisiana Electric Company, Inc. (CLECO’s predecessor), wherein these entities would lease and operate the Project facilities, oversee the generation of power, and then purchase the entire output of generated power, all in accordance with the FERC License.² Full production began in 1969. The agreement between the parties is in full force and effect and is not due to expire until 2018.

The FERC License states: “The reservoir includes a surface area of about 181,600 acres at (elevation 172.0 feet, U.S.G.S. datum), the top of the power pool. The maximum drawdown is to elevation 162.2 feet.”³ The Power Sales Agreement provides similarly.⁴ In 2003, however, the Louisiana Legislature enacted a provision that affects the minimum reservoir level of 162.2 feet. The legislature amended La. R.S. 38:2325(A) to preclude SRAL from using reservoir water for power generation when the reservoir is below 168 feet.⁵ The statutory provision reads, in pertinent part:

(11)(b) Notwithstanding any other provision of law to the contrary, the Authority [SRAL] shall not utilize or sell the use of the waters of the Toledo Bend Reservoir for the generation or production of hydroelectric power if the mean sea level of the reservoir is below one hundred sixty-eight [168] feet...

¹ The Orders are attached as Exhibits A - C to Plaintiffs’ Application for Preliminary Injunction with Incorporated Memorandum of Law (“the Application”).

² The Power Sales Agreement is attached as Exhibit D to the Application.

³ See, e.g., Exhibit C to the Application.

⁴ See Exhibit D to the Application, Section 1.17, pp. 6 and 26.

⁵ La. Acts 2003, No. 295, § 1, effective May 1, 2004.

On June 30, 2005, plaintiffs filed their Complaint for Declaratory and Injunctive Relief and their corresponding Application. The Complaint seeks (a) a declaration that federal preemption and other constitutional infirmities render La. R.S. 38:2325(A)(11)(b) void, and (b) the issuance of preliminary and permanent injunctions enjoining the defendants from enforcing or complying with La. R.S. 38:2325(A)(11)(b) and requiring the defendants to fully comply with the terms and conditions of the FERC License. Named defendants are SRAL and the thirteen members of its Board of Commissioners in their official capacities. SRAT subsequently intervened, seeking a declaration regarding whether La. R.S. 38:2325(A)(11)(b) is preempted by federal law and whether the defendants are precluded from enforcing or complying with it.

At the time plaintiffs filed their Complaint and Application, the reservoir level was at approximately 168.1 feet msl, and was expected to and subsequently did drop below 168.0 feet msl.

No discovery has taken place, and the Application has not been set for hearing. The Court advised the parties to maintain the status quo, and to alert it should any party take steps to enforce the statute. Through a series of status conferences, the parties notified the Court of their interest in exploring the possibility of reaching an amicable resolution of this matter. The attached Consent Decree resulted. There is no separate settlement agreement, and any settlement is contingent upon entry of the attached Consent Decree.

II. THE CONSENT DECREE

The terms are straightforward, as is the authority of the Court and the parties to enter into the settlement and corresponding Consent Decree.

A. Terms of the Consent Decree

The heart of the settlement and the Consent Decree is the defendants' agreement not to enforce the provisions of La. R.S. 38:2325(A)(11)(b) against plaintiffs ELI, EGS, and CLECO insofar as it pertains to ELI's, EGS's, and CLECO's Power Sales Agreement with SRAL. This

agreement is reasonable and appropriate inasmuch as the statute calls for a minimum reservoir level above that called for by the FERC License and the Power Sales Agreement. The defendants do not concede that, as plaintiffs contend, the statute is unconstitutional as preempted by the Federal Power Act (16 U.S.C. § 791, *et seq.*) and the FERC License pursuant to the Supremacy Clause of the United States Constitution, and as violating the Contract Clause and the Takings Clauses of the United States and Louisiana Constitutions. The parties to the Consent Decree do agree, however, that there is a substantial evidentiary and legal basis for the claim that retroactive application of the statute to the Power Sales Agreement would be unconstitutional, and that plaintiffs have established a *prima facie* case with respect to that claim. In exchange for SRAL's agreement not to enforce the statute against the Power Sales Agreement, plaintiffs agree to forego prosecution of this litigation, which could otherwise lead to a judicial declaration that the statute is unconstitutional. Plaintiffs further agree to dismiss the individual defendants/members of SRAL's Board of Commissioners.

B. Authority for the Consent Decree

The parties' authority to compromise pending litigation and the Court's corresponding power to enter a Consent Decree that embodies the settlement would ordinarily be beyond question. The issue warrants treatment, however, because of considerations created by what amounts to enjoining enforcement of a state statute in federal court. In this context, the parties draw guidance from the United States Supreme Court's opinion in *Lawyer v. Dept. of Justice*, 117 S. Ct. 2186, 521 U.S. 567, 138 L. Ed. 2d 669 (1997).

In *Lawyer*, a non-settling party challenged the validity of a federal consent decree that violated a provision of the Florida State Constitution, arguing that a federal court lacked the power to enter such a consent decree absent a formal adjudication or finding that the state provision violated the United States Constitution. In settling the case and agreeing to a redrawing of the legislative district at issue, the Florida Attorney General arguably violated

provisions of the Florida State Constitution vesting power in the legislature to redraw a district. The District Court and the Supreme Court nevertheless found the Consent Decree valid and enforceable without a formal finding of unconstitutionality. There was, however, “a substantial evidentiary and legal basis” for the plaintiff’s claim of a federal constitutional violation.⁶ The parties also agreed that the plaintiffs established a *prima facie* case of unconstitutionality.

As in *Lawyer*, the Consent Decree does not contain a formal finding of unconstitutionality (nor do the parties seek such a finding in connection with the Consent Decree), but the parties agree that there is a substantial evidentiary and legal basis for plaintiffs’ claim that retroactive application of the statute to the plaintiffs’ Power Sales Agreement would be unconstitutional, and plaintiffs have established a *prima facie* case with respect to that claim.

The basis of plaintiffs’ claim is as follows. The Federal Power Act vests FERC with exclusive authority to issue licenses for hydroelectric power facilities in navigable waters and to regulate such facilities. 16 U.S.C. § 791, *et. seq.* The federal government’s authority, through FERC, to issue such licenses and to regulate hydroelectric projects springs from the Commerce Clause of the United States Constitution.⁷ Any particular project license issued by FERC contains specific operating provisions, such as minimum flows and elevation levels which control energy capacity. As further addressed in plaintiffs’ Application, the United States Supreme Court and lower federal courts have consistently held that the Federal Power Act, and FERC licenses issued thereunder, preempt state law.⁸

While the Defendants do not concede all of these allegations, there is no dispute that the state law at issue specifying a minimum reservoir level of 168 feet msl may conflict with the minimum reservoir level of 162.2 feet msl referred to by the contract and various other

⁶ *Lawyer v. Dep’t. of Justice*, 117 S. Ct. at 2191.

⁷ *California v. FERC*, 495 U.S. 490, 506, 110 S.Ct 2024, 2033, 99 L.Ed.2d 1215 (1990).

⁸ *California v. FERC*, *supra*; *First Iowa Hydro-Electric Cooperative v. FPC*, 66 S.Ct. 906, 328 U.S. 152 (1946); *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (9th Cir. 1993); *Wisconsin Valley Improvement Co. v. Meyer*, 910 F.Supp. 1375 (W.D. Wis. 1996).

documents issued pursuant to the FERC License. Accordingly, plaintiffs have established a substantial evidentiary and legal basis for their claim that the retroactive application of the statute to their Power Sales Agreement would be unconstitutional.

SRAL does not concede that the statute is unconstitutional, but does agree that based on the above authorities, the attached Consent Decree is valid and enforceable.

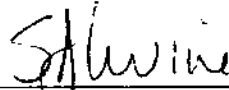
III. CONCLUSION

For the foregoing reasons, movers request that this Court enter the attached Consent Decree as a final judgment, resolving this matter.

Respectfully submitted,

PHELPS DUNBAR LLP

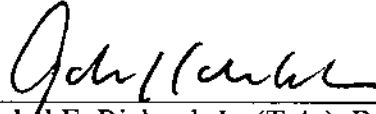
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by First Class, United States Mail, properly addressed and postage prepaid, this 29th day of
Dec., 2005.

