

COMMONWEALTH OF PENNSYLVANIA

CHAIN DAM HYDROELECTRIC CORPORATION	:	BEFORE THE BOARD OF CLAIMS
	:	
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	DOCKET NO. 1983

FINDINGS OF FACT

1. Claimant is Chain Dam Hydroelectric Corporation (“CDHC”), a Pennsylvania corporation. (Pleadings)
2. Pedro Boone, an attorney, is President of CDHC. (N.T. 21)
3. Chain Dam Hydroelectric Associates (“CDHA”) is a Pennsylvania limited partnership; CDHC formerly was the general partner of CDHA. (Pleadings)
4. Alternate Energy Hydro Inc., is a Delaware corporation registered to do business in Pennsylvania; and is now the general managing partner of CDHA and is a wholly owned subsidiary of Ingersoll-Rand. (Pleadings)
5. Energy Hydro Inc., is a Delaware corporation registered to do business in Pennsylvania and is a wholly owned subsidiary of Ingersoll-Rand. (Pleadings)
6. CDHA and Energy Hydro Inc., entered into a joint venture as to Chain Dam on October 22, 1986. (N.T. 189)
7. Defendant is the Commonwealth of Pennsylvania, Department of Environmental Protection. (Pleadings)
8. After October 22, 1986, CDHC had no further direct involvement with Defendant regarding Chain Dam. (N.T. 218)
9. Defendant owned and was responsible for Chain Dam and somewhere between seventy-seven (77) and one hundred (100) other dams in Pennsylvania. (N.T. 112, 262, 268)
10. The City of Easton (“Easton”) owns the lands of the Lehigh Canal that are associated with the abutments to the Chain Dam. (N.T. 268)

11. Tim Weston was the Associate Deputy Secretary for Resources Management for the Department from 1979 to 1987. (N.T. 255-256)
12. William Rybak was a state representative from 1967-72 and from 1981-1990. (N.T. 62)
13. The Chain Dam is a run of the river dam located on the Lehigh river within Easton and was owned and operated by Defendant. (Pleadings)
14. Chain Dam was reconstructed twice in the early 1970's. (N.T. 272-273)
15. On June 6, 1969, Easton and Defendant entered into Articles of Agreement to cooperate in the study and planning of potential hydroelectric development at Chain Dam. (N.T. 30)
16. The Defendant determined that it should control its own dams in terms of licensing and operation to ensure that the multiple uses of the state's investment were carried out and that by controlling the license the Commonwealth would be able to control the terms in which those dams were operated. (N.T. 257-259)
17. Under the Administrative Code at 71 P.S. §510-4, the Defendant is authorized to study its water resources for the development of projects for generation of hydroelectric power. (N.T. 260)
18. Pursuant to restrictions in the Administrative Code, Defendant did not believe it had specific statutory authority to lease those properties absent legislative action by the general assembly. (N.T. 261-262)
19. The Defendant attempted to obtain legislation which would have given authority to Defendant to engage in development of hydroelectric power on its dams and to lease those dams. (N.T. 42)
20. Prior to Claimant's applying for a preliminary permit for Chain Dam, Defendant had made a general policy decision that the Department was going to obtain the preliminary permits for any projects involving state dams. (N.T. 362)
21. The Federal Energy Regulatory Commission ("FERC") issues preliminary permits to perform feasibility studies and to submit applications for licenses to develop hydroelectric facilities. (N.T. 270)
22. The holder of such a preliminary permit obtains a first right on the site which locks out all other potential developers. (N.T. 270)
23. On April 23, 1980, CDHC filed an application for a preliminary permit with FERC for Chain Dam. (Complaint, Para. 2)

24. On August 5, 1980, Defendant and Easton filed with FERC a petition to intervene in CDHC's application. (Joint Exhibit A)
25. On October 2, 1980, Defendant and Easton filed with FERC a competing application. (Joint Exhibit A)
26. On September 28, 1981, FERC issued the permit to Defendant and Easton and denied CDHC's application. (N.T. 114-115)
27. On October 28, 1981, CDHC filed an appeal with FERC. (N.T. 116)
28. On February 22, 1983, FERC denied the appeal. (N.T. 117-118)
29. In denying the appeal, FERC held that allegations concerning Defendant's lack of statutory authority to develop hydroelectric power were not relevant in determining whether an applicant could receive a preliminary permit which would allow the permittee to maintain priority while it took steps to make itself a qualified license applicant. (N.T. 238-239)
30. There were advantages available to Claimant in developing hydroelectric power such as tax incentives, forced purchase of output by public utilities and loans for feasibility studies through the Department of Energy ("DOE"). (N.T. 22-24)
31. Applying for a preliminary permit from FERC was a prerequisite to applying for a loan from DOE. (N.T. 24)
32. Claimant received a loan of \$22,250 from DOE to perform the feasibility study at Chain Dam. (N.T. 34)
33. The feasibility study cost Claimant \$58,000. (N.T. 34)
34. Representatives of Claimant and Defendant met on June 3, 1980 to discuss their differences in regard to Chain Dam. (N.T. 101)
35. On July 29, 1981, Defendant asked DOE to forbear on Claimant's loan because the parties were negotiating an agreement. (N.T. 280)
36. On June 2, 1982, Defendant, Easton and CDHC acting as general partner of CDHA entered into a memorandum of agreement ("MOA") concerning Chain Dam which provided, among other things, that Claimant withdraw its preliminary permit application and its appeal, that CDHA would conduct a hydroelectric feasibility study, and that should Easton and Defendant determine hydroelectric development is feasible, CDHA would have a right of first refusal to match any bid to develop the hydroelectric project. (Joint Exhibit A, Para. 8; N.T. 116-117)

37. Claimant apparently failed to withdraw its appeal with FERC. (N.T. 118)
38. CDHA was allowed to exercise its right of first refusal under the MOA. (N.T. 177)
39. The feasibility study required under the MOA was conducted by CDHA and provided to Defendant and the City of Easton on January of 1983. (Joint Exhibit A, Para. 9; N.T. 32-33)
40. On September 20, 1983, Claimant asked Defendant to pay \$58,000 for the feasibility study; Defendant responded that it would do so if Claimant gave up its right of first refusal which Claimant in turn declined to do. (N.T. 34-36)
41. Effective December, 1984, site specific legislation was enacted authorizing Defendant to lease Chain Dam to any person. (Pleadings)
42. At the June 3, 1980 meeting, Mr. Weston told Mr. Boone that Defendant had no clear mandate from the legislature to own as well as control and lease the state owned dams, but that there was pending legislation which would give Defendant that power. (N.T. 101, 106, 274)
43. In the proceeding involving the competing applications filed by Defendant and Easton, CDHA asserted that Defendant had no statutory authority to develop water power resources or to construct such facilities. (N.T. 103)
44. CDHA drafted a private placement offering dated November 17, 1981, and in that offering stated that "Pennsylvania statutory law prohibits the Commonwealth of Pennsylvania from leasing the Chain Dam (which is owned by the Commonwealth) to any person or entity without specific approval of the general assembly." (N.T. 105)
45. On March 1, 1983, Defendant applied for a license exemption from FERC and on August 4, 1983, the exemption was granted to Defendant and Easton with eighteen (18) months to commence the work and four (4) years to complete. (N.T. 288-293)
46. On January 23, 1985, Defendant requested an extension of time from FERC for commencement and completion and on March 11, 1985, FERC granted the extension with construction to be commenced by May 4, 1986. (N.T. 322)
47. On November 18, 1983, Mr. Weston sent a letter to Hydro Wire, requesting publication of an official notice in the magazine under the Bid Column of their next issue, which requested interested hydroelectric project developers to submit letters of interest to develop the Chain Dam. (N.T. 300)

48. On December 3, 1983, the Department published a notice in the Pennsylvania Bulletin inviting interested hydroelectric developers to submit letters of interest to develop the Chain Dam to the Department by January 15, 1984. (N.T. 303; Complaint, Para. 114)
49. On January 14, 1985, Defendant sent a draft RFP to Easton for their comments. (N.T. 317)
50. On April 2, 1985, Defendant wrote to Easton inquiring as to where their comments were. (N.T. 319)
51. In April, 1985, Defendant informed CDHA that the project was delayed due to Easton's failing to timely respond with comments concerning the draft RFP. (N.T. 197-198)
52. Defendant sent out the RFP to interested developers and CDHA on May 13, 1985. (N.T. 323-324)
53. After the RFP was sent out, CDHA made inquiry of Defendant as to whether they should be submitting a proposal at that time. (N.T. 325)
54. On July 22, 1985, Defendant sent a letter to CDHA recommending that it consider submitting a proposal by August 1, 1985 to save time so that project construction could begin by May 4, 1986, as required by FERC. (N.T. 326-327)
55. Defendant received only one response to the RFP, from American Hydro Power Co. ("American Hydro"). (N.T. 324)
56. Notice was sent to CDHA, on August 26, 1985, that it was required to match the terms of American Hydro's proposal. (N.T. 123, 330-331)
57. Defendant expressed to Mr. Boone its concern regarding the timeliness of the submission. (N.T. 332)
58. Defendant determined that, in light of the ambiguity in Defendant's letter of August 26, 1985, the date of mailing was the date that it had been submitted to the Department. (N.T. 333).
59. Defendant and Easton brought CDHA and American Hydro in for separate oral presentations. (N.T. 334)
60. On November 19, 1985, Defendant sent a letter to CDHA informing it that it had successfully exercised its right of first refusal. (N.T. 147, 339-340)
61. In the November 19, 1985 letter, CDHA was directed to return the lease and bonds with a value of One Hundred Thousand Dollars (\$100,000) within ten (10) days. (N.T. 147)

62. After receipt of the November 19, 1985 letter, CDHA requested amendments to the proposed lease, which Defendant granted. (N.T. 341)
63. After receiving the amended lease, CDHA submitted a binder in lieu of a fully executed bond. (N.T. 148, 340)
64. Defendant granted CDHA a temporary extension to December 20, 1985, to complete and file an executed lease agreement together with a satisfactory performance bond. (N.T. 341-342)
65. After CDHA was advised to file an executed lease and the appropriate bond, CDHA filed an executed lease but failed to provide a satisfactory performance bond. (N.T. 150-151)
66. CDHA was given until February 27, 1986, to supply a satisfactory performance bond. (N.T. 151, 343-344)
67. CDHA submitted an adequate performance bond and subsequently entered into a lease with Defendant and the City of Easton on March 5, 1986. (N.T. 152, 344)
68. CDHC signed the hydroelectric development lease agreement acting as a corporate general partner for CDHA. (N.T. 344)
69. On April 18, 1986, Defendant represented to FERC that equipment fabrication had commenced, which FERC agreed was adequate to qualify as commencement of construction under the license exemption. (N.T. 346-347)
70. As of late June, 1986, there had been little progress on the project and CDHA did not have financing in place. (N.T. 348)
71. On July 1, 1986, Defendant sent a letter to CDHA noting concern over the lack of progress and the lack of financing. (N.T. 349-350)
72. In the July 1, 1986 letter, Defendant advised CDHA that the continued lack of progress constituted a violation of the lease and unless the problem were promptly cured, Defendant and Easton would consider invoking the termination provisions of Paragraph 2.3 of the lease. (N.T. 349-350)
73. By letter dated July 11, 1986, CDHA responded that it was entering into a joint venture with Ingersoll-Rand for the development of Chain Dam. (N.T. 350-351)
74. After Ingersoll-Rand became involved in the project, the lease was assigned to the Chain Dam and Canal Hydroelectric Joint Venture, a joint venture composed of CDHA and Energy Hydro, Inc., on March 3, 1987. (N.T. 353-354)

75. At the time CDHA entered into the lease, tax credits were still available to it. (N.T. 174)
76. Tax credits were still available when the lease was assigned in March, 1987. (N.T. 174)
77. On January 13, 1988, Defendant wrote warning of a breach of contract if progress were not made within forty-five (45) days. (N.T. 59)
78. On May 13, 1988, Defendant originally filed an action in Commonwealth Court against a number of defendants, including CDHC, arising out of failure to perform under the terms of the lease agreement. CDHC filed a counterclaim seeking compensatory damages as a result of being misled by Defendant. (Pleadings)
79. On June 12, 1995, the Commonwealth Court entered an Order transferring Count 2 of Claimant's Counterclaim to the Board of Claims. (Record)
80. In the instant action before the Board, as alleged in the Counterclaim, Claimant requests reimbursement for the feasibility cost; the remaining claim is for \$1,801,000 in lost revenue and benefits which the facility, if built, allegedly would have produced over twenty (20) years. (N.T. 6-7, 209)

CONCLUSIONS OF LAW

1. Jurisdiction of this claim is in the Board of Claims pursuant to the Act of May 20, 1937 (P.L. 728 No. 193, as amended, 72 P.S. §4651-1, et seq.)
2. Claimant has failed to produce any evidence of misrepresentation of fraud.
3. Claimant has not proven that they were fraudulently induced to enter into any agreement with Defendant.
4. Claimant has not proven that they were damaged as a result of any misrepresentation or fraud.
5. Claimant has failed to present any credible evidence of any nature to support its claim.

OPINION

This matter was called to hearing before the Board of Claims' Panel, composed of Frederick D. Giles, Esquire, Attorney Member, and Conrad E. Kambic, P.E., Engineer Member. The Panel Report has been submitted and reviewed.

In 1980, Claimant filed an application with the Federal Energy Regulatory Commission ("FERC"), for a preliminary permit to study and develop a hydroelectric facility at the Chain Dam site and applied for a loan to perform the feasibility study. However, the Commonwealth had previously decided that it should control its own dams and beginning in the 1970's sought enactment of a law - unsuccessfully as it turns out - to give the Commonwealth authority across-the-board to develop its state dams. Consequently, Defendant and Easton (the dual owner of the project site) intervened and filed a competing application for a preliminary permit.

The contentious parties met in June of 1980 to discuss the matter of development of the facility at Chain Dam. Later that year, Defendant and Easton were awarded the preliminary permit by FERC and although Claimant filed an appeal, these parties entered into a Memorandum of Agreement ("MOA") in June of 1982.

Pursuant to the MOA, Claimant performed the feasibility study which it presented to Defendant in January of 1983 and was given a right of first refusal as to the RFP to develop the dam. According to the MOA, Claimant was also to withdraw its appeal with FERC; apparently this did not happen but FERC acted to deny the appeal in February of 1983.

In August, 1983, Defendant was granted an exemption from licensing for Chain Dam by FERC with deadlines of eighteen (18) months to begin construction and four (4) years to complete.

Prior to and during 1984, Defendant continued to try but failed to get an across-the-board law to enable it to develop and license all the state dams. However, Claimant, through the effort of State Representative Rybak, succeeded in getting a site specific law for Chain Dam, enacted in December of 1984.

Early in 1985, Defendant requested and was granted an extension of deadlines by FERC and sent a proposed RFP to Easton for comments. On May 13, 1985, Defendant sent out the RFP to the public. On November 19, 1985, Claimant was informed that it had successfully exercised that right and in March, 1986, a lease was entered into for Claimant to develop the dam.

Claimant contends that Defendant breached the lease agreement of March 5, 1986. In support of that contention, Claimant appears to rely upon assertions that Defendant did not have authority to enter into the MOA which preceded the lease by nearly 4 years; that Defendant did not have authority to develop a dam or to grant that right to anyone else; that there was a delay in obtaining enactment of a statute authorizing development of the dam; and that Defendant's attitude towards Claimant, before and after the lease, was vexatious, vindictive, obdurate, and lacked good faith and further alleges that Defendant had committed breach.

It is evident that Claimant was aware, prior to the MOA of 1982, that Defendant lacked the authority to lease the Chain Dam site. As early as June 3, 1980, according to Mr. Boone's own meeting synopsis, Mr. Weston had informed Mr. Boone that the Department had "no clear mandate from the state to own as well as control these sites, but there is pending legislation which would give DER this power." (N.T. 101-102) Mr. Boone admitted that the most Mr. Weston ever asserted was the "he was going to get the legislation approved. And it (sic) had never been a need

for it before but now he would get legislation approved so that we could carry on with this project.”
(N.T. 106)

Testimony shows that Defendant tried to have legislation enacted which would authorize Defendant to lease Chain Dam and other dams. Indeed, legislation dealing only with Chain Dam was finally enacted at the end of 1984 with the help of State Representative Rybak, Mr. Boone and the support of Defendant.

Although the Board finds that Defendant did not mislead Claimant as to its authority to lease and did not fail to attempt to gain that authority through legislation, even if that were so, the Board finds no evidence of resulting damages. Once the legislation was enacted, Defendant proceeded in accordance with the MOA to write up an RFP, have it approved by Easton, issue it to the public, receive bids, issue the right of first refusal to Claimant and enter into a lease with Claimant.

According to the Administrative Code at 71 P.S. §510-4, Defendant had the authority to collect information as to the water resources of the Commonwealth and determine the points at which storage reservoirs could be constructed for hydroelectric power. FERC agreed that Defendant had the authority to at least conduct the necessary studies required pursuant to the preliminary permit and thus issued the preliminary permit to Defendant. Defendant made no misrepresentation as to its authority to develop hydroelectric power at the Chain Dam.

There is no evidence of misrepresentation or fraud. For there to be a fraudulent representation, there must be “(1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker to induce the recipient thereby; (4) justifiable reliance by the recipient on the misrepresentation; and (5) damage to the recipient as a proximate result of the misrepresentation.”

Bash v. Bell Telephone Co., 411 Pa. Super, 347, 358, 601 A.2d 825, 831 (1992). The Department did not make a misrepresentation as to its authority to lease the Chain Dam to Pedro Boone, Chain Dam Hydroelectric Corporation or Chain Dam Hydroelectric Associates. There was no fraudulent utterance of a misrepresentation nor was there any intention by the Department or Mr. Weston, to induce Claimant to enter into the Memorandum of Agreement. Claimant cannot say it justifiably relied on any misrepresentation, even if assuming arguendo such misrepresentations were made to Mr. Boone.

Further statements of intention made at the time of contracting are not fraudulent if, when made, such statements represent a person's true state of mind, even though later one changes one's mind. College Watercolor Group, Inc. v. William H. Newbauer, Inc., 468 Pa. 103, 115, 360 A.2d 200, 206 (1976); See also Blose v. Martens, 173 Pa. Super 122, 123, 95 A.2d 340 (1953). At most, the Department hoped to obtain statutory authority from the legislature to develop and lease Commonwealth owned dams. That hope does not constitute fraud.

There is no evidence that Defendant induced Claimant to enter into the MOA or that there was reliance by Claimant upon a misrepresentation by Defendant as to the authority to lease the Chain Dam. Moreover, Claimant could ascertain for itself what authority Defendant did or did not have with respect to the leasing of Commonwealth owned dams. Defendant did not fraudulently misrepresent its position as to its authority to regulate, operate and lease the Chain Dam site.

A complete review of the evidence fails to establish any legal basis for Claimant's allegations. There is no evidence of fraud or misrepresentation nor is there any evidence of loss.

Accordingly, there must be a finding in favor of Defendant.

ORDER

AND NOW, this day of October, 1998, on the basis of the submissions of the parties, it is **ORDERED** and **DECREED** that judgment is entered in favor of Defendant, Commonwealth of Pennsylvania, Department of Environmental Protection, and against the Claimant, Chain Dam Hydroelectric Corporation on Claimant's Counterclaim for damages.

Each party to bear its own costs and attorney's fees.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien, P.E.
Engineer Member

James W. Harris
Citizen Member

Opinion Signed

October 21, 1998