Wind Energy Power Contracts: U.S. District Court Addresses Market Risk Allocation Issues

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The United States District Court for the Northern District of Illinois interpreted in a June 18th decision certain provisions of a wind energy purchase contract ("Contract"). See *Barton Windpower, LLC & Buffalo Ridge I, LLC, v. N. Indiana Public Service Co.,* No. 13-cv-5329, 2018 WL 3022673 (N. D. Ind. June 18, 2018).

The provisions addressed include:

1. Unexcused Failure to Take
2. Voluntary Curtailment by Buyer

Barton Windpower and Buffalo Ridge are two plants that produce wind energy and are owned by Iberdrola Renewables (collectively "Iberdrola"). North Indiana Public Service Company ("NIPSCO") is a public utility serving roughly one million consumers in the state of Indiana. Further, the Midcontinent Independent System Operator ("MISO"), a nonprofit regulated by the Federal Energy Regulatory Commission, manages an electricity grid comprising fifteen states across the Midwest.

On November 7, 2007, NIPSCO contracted with Iberdrola to purchase wind energy. The Contracts required that energy purchased from Iberdrola be on an "as-generated, instantaneous basis for a set price." NIPSCO would sell the energy to MISO at the market rate after obtaining it from Iberdrola.

The Contracts allocated the risk of low prices on NIPSCO. If it sold the energy to MISO when the market rate was higher than its set price with Iberdrola, NIPSCO profited. Alternatively, when the market rate was lower than its set price, NIPSCO lost money.

NIPSCO was contractually required to purchase Iberdrola energy as it became available. However, two provisions permitted it to refuse to purchase available energy.

First, NIPSCO could refuse purchase under the "Unexcused Failure to Take" clause. The provision permitted refusal for any reason other than an Iberdrola default or "Force Majeure Event."

Second, NIPSCO could refuse under the "Voluntary Curtailment by Buyer" clause. It permitted NIPSCO to order Iberdrola to stop producing energy at any time. However, if NIPSCO exercised its power under either of these clauses, it was required to pay Iberdrola's "Cost to Cover" for the period energy was not being produced.

Due to the unpredictable nature of wind, Iberdrola's energy is generated even when consumer demand is insufficient. Therefore, in 2010, MISO implemented regulations to stop overproduction. MISO mandated that NIPSCO set a minimum market price at which it would sell the energy obtained from Iberdrola. As a result, if the market rate fell below NIPSCO's set minimum, MISO would order Iberdrola to halt production. These regulatory changes lead to the parties' contractual dispute.

After the market dipped, and Iberdrola received orders from MISO to halt its production of energy, Iberdrola billed NIPSCO the Cost to Cover for the period it was down. NIPSCO refused to pay. It argued that the Contracts did not require payment.

Both parties moved for summary judgment.

Iberdrola based its motion on two claims:

1. NIPSCO's failure to pay the Cost to Cover breached the express terms of the Contracts, and alternatively,
2. NIPSCO's use of the regulatory change to shift risk to Iberdrola, where the original intent allocated risk to NIPSCO, violated the implied covenant of good faith and fair dealing.

The U.S. District Court ("Court") began its analysis by looking at the Unexcused Failure to Take clause to determine whether it applied to NIPSCO. The Court determined that the intent of the phrase was unambiguous and favored Iberdrola. When NIPSCO set its minimum market rate, it prevented output by Iberdrola anytime the market price fell below that minimum. Therefore, NIPSCO in fact failed to take the energy by itself setting a price that would prevent it from being produced.

Nevertheless, the Court had to further determine whether NIPSCO's refusal was excused under the Contracts by the definition of a "Force Majeure Event." Force Majeure Events encompassed, among others situations, "[a] curtailment by MISO … for any reason" that prevented either party from performing.

NIPSCO first argued that the regulatory change itself was a Force Majeure Event; moreover, the MISO orders to halt production were "a curtailment by MISO." Iberdrola responded that these interpretations shifted to it the risk of low prices. This was argued to be opposite the intent of the Contract. Iberdrola also argues that the MISO orders to halt fall outside the definition of curtailment under the definition of Force Majeure Event. The basis of their argument was because they were based on the NIPSCO minimum price offer (which only NIPSCO could control).

The Court concludes that orders sent to Iberdrola by MISO were not "curtailment by MISO" because NIPSCO dictated whether the orders were sent or not pursuant to its minimum price offer. Regarding the second clause, "Voluntary Curtailment by Buyer," the parties' arguments largely mirrored those of the first, and the Court rejected NIPSCO's motion on similar grounds.

Finally, the Court addressed NIPSCO's argument that the Contracts must be void if it was required to pay the Cost to Cover any time Iberdrola was shut down due to the unfair and significant cost. However, the Court concluded NIPSCO had presented no evidence that it would face a substantially unjust situation if required to pay. Summary judgement was granted for Iberdrola.

A copy of the opinion can be downloaded here.