Power Purchase Agreements/Wind Farms: Federal Appellate Court Addresses Default/Termination

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The United States Eighth Circuit Court of Appeals ("Eighth Circuit") addressed in an August 24th Opinion a dispute involving electric power purchase agreements ("PPAs"). See *Laredo Ridge Wind, LLC, et al. v. Nebraska Public Power District*, No. 20-1956.

The issue involved whether the PPAs could be terminated because the wind farm power producers' parent companies had an ownership change.

Nebraska Public Power District ("NPPD") in 2008 entered into PPAs with four companies that owned and operated their own wind-energy generation facilities which included:

- Elkhorn Ridge Wind, LLC
- Laredo Ridge Wind, LLC
- Broken Bow Wind, LLC
- Crofton Bluffs Wind, LLC (collectively, "Project Entities")

Pursuant to the PPAs NPPD agreed to purchase all the energy produced by the Project Entities for a period of 20 years.

The Eighth Circuit's Opinion states that each of the Project Entities:

. . . sits at the bottom of a multi-tiered ownership structure that includes many subsidiary holding companies.

The Project Entities are stated to have been initially built, owned, operated, and maintained by Edison Mission Energy ("Edison"). Further, they outsourced the performance of their operation and maintenance duties to third parties.

The PPAs contain an identical change-of-control provision requiring NPPD's written consent for each of the Project Entities that transfer a majority of its:

. . . "direct ownership interests" to a non-Edison entity.

Further, the PPAs contain anti-assignment provisions.

Edison filed for bankruptcy in 2012 and was purchased (including affiliates that operate the Project Entities) by NRG Energy, Inc. ("NRG"). Such entities are described as:

. . . "upstream of the Project Entities by many tiers of intermediate ownership."

As a result, the Project Entities became subsidiaries of NRG Energy Gas & Wind Holdings, Inc.

The Project Entities never obtained NPPD's written consent for this transaction.

NRG subsequently sold a subsidiary that was a parent of the Project Entities to another company. These were also upstream of the Project Entities. NPPD consent again was not obtained.

NPPD served notice of default on each Project Entity seeking termination of the PPAs. The NRG acquisition and the subsequent acquisition were cited as events of default.

Three of the Project Entities filed suit against NPPD seeking:

- A declaratory judgment that they did not breach the change-of-control provision
- An injunction preventing NPPD from terminating the PPAs

NPPD filed a third-party petition to bring the fourth Project Entity into the case.

The Project Entities filed a motion for summary judgment which the Court granted concluding that the referenced transactions did not breach the PPAs.

NPPD appealed.

The Eighth Circuit first addresses Nebraska law governing contract interpretation. It describes the PPAs provision addressing "permitted transactions."

NPPD argues that the change-of-control provision was ambiguous because the term "direct ownership interest" is subject to multiple interpretations. The Project Entities responded that such term has a common unambiguous meaning.

The Eighth Circuit concludes that the term is unambiguous stating that it can only be reasonably interpreted to mean ownership of membership units in a limited liability company.

The Eighth Circuit notes that a basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. It further states that:

[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary. . .

As a result, the Eighth Circuit states that the "direct ownership interest" means ownership interest in the Project Entities themselves and that ownership in any of their parent companies constitutes an indirect ownership.

The Eighth Circuit then determines that the Project Entities did not transfer their direct ownership in the previously referenced transactions. Consequently, they did not violate the change-of-control provision of the PPAs.

The Eighth Circuit also addresses the argument regarding the anti-assignment provision noting it does not prohibit the delegation of duties – instead only the assignment of obligations. There is stated to be an absence of evidence that the Project Entities transferred any of their legal obligations under the PPAs.

Referenced is the lower court's recognition that at no point did the Project Entities delegate ultimate responsibility for PPA duties to any third parties. As a result, it finds that they did not violate Section 10.1 or 4.2 by delegating performance of certain duties – because they remain ultimately responsible for their obligations.

The Eighth Circuit therefore upholds the lower court's finding that there was not an event of default.

A copy of the Opinion can be downloaded here.