Renewable Energy Purchase Agreement: 8th Circuit Court of Appeals Addresses Whether Municipality Liable for Curtailed Energy

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The United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") addressed in a May 2nd opinion a dispute between a wind-energy supplier and a municipal electric system. See Smoky Hills Wind Project II, LLC v. City of Independence, Missouri, 2018 WL 2025810.

The dispute involved the wind-energy supplier's allegation that the city's municipal electric system breached the parties' renewable energy purchase agreement ("REPA") by failing to pay for curtailed energy.

Smoky Hills Wind Project II, LLC ("Smoky") operates a wind farm generating wind energy. The energy generated by this facility is supplied to various customers which are denominated "off-takers."

The City of Independence, Missouri ("City") owns and operates Independence Power & Light ("Independence"). Independence is an electric system that distributes electricity to its customers. The utility generates electricity from its own generators but also purchases wholesale energy from suppliers that include Smoky.

Smoky and the City entered into the REPA on August 14, 2008. Terms and conditions for the sale of energy from Smoky II to Independence were contained in the document. Independence is stated to have been one of five off-takers purchasing portions of the wind energy produced and sold by Smoky.

The Smoky wind project is described as only being viable because of the involvement of tax equity investors. Investors are described as being concerned about minimizing risk and, therefore, were "heavily involved in the negotiation of the REPA." The Executive Vice President ("EVP") of the primary start-up developer of Smoky is stated to have testified that his focus:

. . . was to make sure that in that contract that the terms and conditions that we agreed on with our counterpart, he utility, would be found acceptable to the tax equity financiers."

The EVP is stated to have stressed that the investors were not interested in absorbing the risk of curtailment.

The Eighth Circuit opinion describes curtailed energy as:

. . . wind energy that is not actually produced because the producer is directed to reduce production either because: (1) an off-taker like Independence requests that its share of the production be reduced, or (2) because the regional regulator (in this case Southwest Power Pool) directs reduction based on regional market conditions.

Smoky and the City anticipated curtailment. Provisions were placed in the REPA governing the allocation of costs associated with curtailment. The two categories included:

1. Economic Curtailments
2. Emergency Curtailments

The language applicable to each of these curtailment categories is described. The two categories have cost ramifications. Independence could not be invoiced for emergency curtailments. Also described in the opinion is Article 9 of the REPA which governs the parties' billing and payment process.

Energy delivery began in late 2008 or early 2009 but curtailments were not experienced until March 2012. Smoky then began receiving orders from the regional regulator to curtail. It is stated to have been aware of the curtailments at the time they occurred but did not bill for curtailed energy as they occurred.

As the curtailments became more frequent and significant, Smoky contacted the regional regulator to determine whether they were "emergency curtailments" as contemplated by the REPA. Further, Smoky sent Independence a letter stating it had received "an increased number of curtailment directives" and that Independence "may incur some, possible significant, financial obligations."

Smoky subsequently informed Independence that it intended to issue revised invoices for 2012 because it believed the curtailments were not the result of an emergency under the REPA. As a result, it argued that Independence was obligated to pay for the curtailed energy.

The first invoice to Independence for curtailments was issued on March 26, 2013. The amount invoiced was $331,990.91. This invoice, along with 11 subsequent invoices, were then the subject of a breach of contract action.

Smoky brought suit for breach of contract when it did not receive payment from Independence on the invoices related to the curtailed energy. Independence counterclaimed, arguing that the invoices were not "timely billed."

The United States District Court concluded that none of the curtailments at issue constituted an emergency curtailment as defined in the REPA. Therefore, the Court concluded that Independence was liable to Smoky for the timely-billed invoices.

As to the counterclaim for breach of contract for untimely billing, the Court concluded that Section 9.1 did not apply to curtailed energy.

In reviewing the lower court's decision the Eighth Circuit addressed four issues, which included:

1. Timeliness under the REPA (concluding billing appropriate under the REPA's language)
2. Nature of Curtailments – Economic or Emergency (upholding lower court's decision that curtailments were economic)
3. Energy Allocation (rejecting argument that Smoky over-allocated energy to Independence)
4. Substantial Performance (finding "substantial performance" argument waived)

The Eight Circuit affirmed the judgment of the United States District Court.

A copy of the opinion can be downloaded here.