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Renewable Energy Case Law Update

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I.

Introduction

This case law update describes select renewable energy cases of interest from 2014.¹ As in past years, the majority of renewable energy cases contained a typical array of fights over siting, ranging from nuisance claims to environmental and permitting challenges. These suits were primarily focused on contesting the development and construction of wind farms. 2014 also saw decisions in cases involving various renewable energy incentives, including the federal cash grants and the Colorado renewable energy standard. Finally, transactional attorneys can also learn from the analysis of several courts issued in 2014 regarding the drafting of provisions involving power purchase agreements (“PPAs”) and qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (“PURPA”).

II.

Power Contract Interpretation and Drafting

FPL Energy, LLC v. TXU Portfolio Management Co., L.P. (Tex. 2014)

San Diego Gas & Electric Co. v. Gilbert (Mont. 2014)

Exelon Wind 1, LLC v. Nelson (5th Cir. 2014)

Ellis-Hall Consultants, LLC v. PSC of Utah (Utah 2014)

Courts around the country issued opinions this year affecting issues in the negotiation and drafting of Power Purchase Agreements, including risk of transmission incapacity, liquidated damages, and state interpretation of PURPA.

A. Transmission Congestion and Liquidated Damages

FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P., addressed the purchase of both electricity and renewable energy credits (“RECs”) under several PPAs entered into in 2000 pursuant to which TXU Portfolio Management (“TXU”), as assignee of TXU Electric, contracted

* The authors would like to thank Worth Carroll, the research assistant for the forthcoming 2015 edition of *Texas Wind Law*, for his research assistance, which contributed to this paper.

¹ This case law update is not intended to be a comprehensive review of all renewable energy cases over the past year. Rather, it is a discussion of select cases likely to be of interest to renewable energy developers, investors, consultants, and counsel.

to purchase the electricity and RECs from three wind farms owned by FPL Energy, LLC (“**FPL**”). When FPL failed to produce the minimum guaranteed levels of electricity and RECs under the contracts, TXU sued FPL for breach, claiming that it was owed liquidated damages. FPL argued that the grid was too congested for the electricity to be transmitted. This congestion caused ERCOT to issue curtailment orders to FPL to cease production. FPL claimed that TXU was ultimately responsible for ensuring transmission capacity for FPL’s production.

In resolving the dispute, the Texas Supreme Court held that TXU owed no contractual duty to provide transmission capacity. However, the court also held that the liquidated damages clauses in the contracts only applied to RECs, not electricity, and were unenforceable as a penalty.

1. Risk of Transmission Capacity

The dispute regarding transmission capacity centered on Section 2.03(a) of the contracts, titled “Transmission”, and its defined terms:

TXU Electric shall provide, by purchasing or arranging for, all services, including without limitation Transmission Services [and other services] . . . necessary to deliver Net Energy to TXU Electric’s load from the Renewable Resource Facility throughout the Contract Term (“Required Transmission Services”).²

The contracts defined “Net Energy” as “the amount of electric energy in MWh produced by the Renewable Resource Facility *and delivered to the Connecting Entity*.”³ Under the contracts, the Connecting Entity is also the “Delivery Point.”⁴

FPL argued that the contracts required TXU to provide transmission services “without limitation,” as required by the “Transmission” provision. According to FPL, this language meant that TXU had the obligation to provide FPL with the transmission capacity to deliver the electricity from FPL’s Renewable Resource Facility to the consumer. The court disagreed with this argument, finding that TXU’s transmission obligations arose once the electricity reached the Delivery Point. The contract assigned responsibility to TXU for Transmission Services required to deliver Net Energy, and Net Energy is defined as the amount of energy produced by FPL and delivered to the Connecting Entity, so TXU’s obligation arose only after the electricity reached the Connecting Entity (also defined elsewhere in the contracts as the Delivery Point).⁵ Due to ERCOT curtailment orders, FPL never delivered energy to the Delivery Point, so TXU’s obligations never commenced.

The Court also examined the “Uncontrollable Force” provisions of the contracts, which stated that “lack of transmission capacity or availability” is a circumstance out of the parties’ reasonable control.⁶ Because curtailment and congestion affect transmission capacity, the court stated that this section controlled its determination of liability. The court then looked to the provisions of the contracts addressing the effect of Uncontrollable Force events. The provisions

² *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 63 (Tex. 2014).

³ *Id.* (emphasis added).

⁴ *Id.*

⁵ *Id.* at 64.

⁶ *Id.* at 65.

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