

Wind Energy Power Purchase Agreement: Indiana Appellate Court Addresses Whether Costs Are Recoverable from Ratepayers



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

05/31/2018

The Court of Appeals of Indiana (“Court”) addressed in a May 21st opinion whether the Indiana Utility Regulatory Commission (“Commission”) was correct in holding that the utility Duke Energy Indiana, LLC, could recover certain wind energy costs from ratepayers. See 2018 WL 2293647.

Appellants Michael A. Mullett and Patricia N. March (“Appellants”) had intervened in a proceeding before the Commission objecting to Duke’s request to recover such costs.

Duke and Benton County Wind Farm (“Wind Farm”) entered into a Wind Energy Power Purchase Agreement (“PPA”) in 2006. Duke agreed to purchase a portion of the energy generated by the Wind Farm.

The Commission approved the PPA in its entirety, concluding that the terms of the agreement were reasonable. It also determined that Duke’s recovery of all of its PPA costs from ratepayers for the entire 20-year term would further the Commission’s policy of encouraging the development of renewable resources.

Duke and Wind Farm subsequently litigated certain aspects of the PPA. Duke had concluded that it was only required to accept and pay for energy that Wind Farm generated and delivered to Duke. In contrast, Wind Farm believed that Duke had an obligation to pay for lost production in addition to the power delivered to Duke.

Duke’s interpretation prevailed in the United States District Court. However, Wind Farm appealed to the Seventh Circuit Court of Appeals.

The federal appellate court reversed the United States District Court’s ruling, and remanded with instructions for a determination of damages (i.e., how much Duke owed the Wind Farm for lost production). The parties ultimately settled the litigation. Duke agreed to a payment of \$29 million. Duke is stated to have determined this amount was approximately equal to what it would have cost the utility and its ratepayers had the parties agreed with Wind Farm’s PPA interpretation at the outset.

Duke reported to the Commission in its Fuel Cost Adjustment (“FAC”) filing that the matter had been settled. It also stated an intention to recover the lost production costs from ratepayers over a six-month period. The Office of Utility Consumer Counselor did not object to Duke’s recovery of the \$29 million as costs Duke incurred under the PPA. However, it requested that the recovery be spread over a twelve-month period rather than six.

Appellants intervened as ratepayers and filed a:

Brief in Opposition to Approval of Liquidated Damages Payment as an Expense Recoverable through Rates

The Commission subsequently entered a final order approving Duke's rate recovery over a twelve-month period. The Appellants appealed to the Court of Appeals of Indiana.

The Court addressed two Appellant arguments as to why the Commission's order was contrary to law.

The Court first addressed Appellants' argument that the order was contrary to law because the damages were "liquidated" and "hypothetical." In addressing this argument, the Court undertook a review of the Commission's assessment of the PPA and the issues associated with the litigation. It noted that the Commission determined, based on its assessment, that evidence of the record demonstrated that the Wind Farm settlement was in the best interest of the customers and that the costs were reasonable for what is owed to Wind Farm under the Commission-approved PPA.

The Court also stated that Appellants did not cite any cases to support the proposition that the term "liquidated damages" in a contract precludes Duke's recovery from ratepayers. In addition, no authority was found to support the claim that the damages amount was purely hypothetical (and therefore unrecoverable from ratepayers).

The fact that the Seventh Circuit found that Duke was obligated under the PPA to "pay for power not taken" was noted. In addition, the settlement amount was deemed no more than what potentially could have been awarded had a settlement not been reached.

The Court also rejected Appellants' argument that the Commission allowed Duke to recover the cost amounts through retroactive ratemaking. It stated the fact that the damages arose from a past dispute regarding a contract interpretation did not automatically make the order contrary to law (i.e., retroactive rulemaking).

The appeal arose out of an FAC proceeding as opposed to a rate case. In addition, the Court cited prior decisions involving similar disputes and noted the Commission's preference that utilities defer seeking recovery from the ratepayers until the dispute is resolved and the full amount is known.

The judgment of the Commission was affirmed.

A copy of the [opinion](#) can be downloaded here.