Landfill Gas Lease Agreement: New York Court Addresses Renewable Energy Tax Credits

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10/28/2021

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The New York Supreme Court (Albany County) ("Court") addressed in a September 29th Opinion a dispute arising out of a landfill lease agreement between the City of Albany, New York ("Albany") and Albany Energy ("AE"). See *City of Albany, New York v. NEO Albany, et al.,* 2021 WL 4537635.

The issue involved the appropriate allocation of Renewable Energy Tax Credits ("RETCs") between the parties.

Albany entered into a Landfill Gas Lease Agreement ("Gas Lease") with AE and NEO Albany, LLC, in 2008. The Gas Lease allowed AE to extract gas from Albany's landfill to produce renewable energy.

The original agreement provided that Albany would receive a share of any proceeds "derived from government programs intended to promote renewable energy, such as carbon credits, renewable energy certificates, renewable energy tax credits and voluntary emission reduction credits."

The conflict between the parties concerns the contractual significance of RETCs after Congress passed the 2009 American Recovery and Reinvestment Act ("ARRA") "that offered grants for capital investments in renewable energy projects in lieu of the ["RETCs"]." Specifically, by accepting a grant through ARRA, did AE indirectly monetize the RETCs and therefore owe a portion of the funds to the Albany?

Albany argued that the Gas Lease entitled it to fifty percent (50%) of the total grant money. It reasoned that AE's participation in the grant program was to achieve the net effect of monetizing the RETCs without ever having to share any proceeds with Albany. This was premised on the idea that the grant program worked a quasi-sale of the RETCs to the federal government by paying in advance for what would be tax credits.

Consequently, Albany claimed that AE was "able to create and monetize any such ["RETCs"]" by participating in the grant program. Albany concluded that it was owed just over one million dollars of the grant money as compensation for the RETCs that AE would have received. Failure to remit half of the grant was alleged to be a breach of the Gas Lease.

In rejecting Albany's arguments, the Court focused on two points:

- ARRA grants are provided to participants in lieu of tax credits, not in substitution of them.
- RETCs are tied to the production of renewable energy, in contrast to the ARRA grants that are tied to capital investment in renewable energy infrastructure.

Addressing the first point, the Court noted that the concept "Net Monetized Value" contemplates an actual sale of the RETCs to a third-party purchaser. In finding that the ARRA grant was received as an alternative to selling RETCs, AE's receipt of the grant was "not the 'creat[ion] and monetize[ation]' of tax credits within the ordinary meaning of these terms."

The legislative history of the ARRA was deemed to demonstrate that Congress was creating an alternative program, not a substitute, for RETCs. The Court found that Congress intended the grants as temporary assistance to encourage renewable energy investors—not renewable energy producers—during the Great Recession.

Addressing the second point, the Court found that even if the grant was a sale within the meaning of creating and monetizing a tax credit, it would still not meet the Gas Lease's requirement of "a benefit 'derived from producing electric power using a non-conventional fuel source with the meaning of [the RETC tax code section]."

The ARRA grant's specific purpose was encouraging capital investment. Therefore, the Court determined that the grant did not fit the contractual requirement that the actual production of energy is the principal activity that creates the benefit.

Nevertheless, AE was not completely freed from liability because of such findings.

The Gas Lease also required AE to "use commercially reasonable efforts to maximize the Net Monetized Value of any such ["RETCs"]." By pursuing the grant that foreclosed AE's ability to monetizes RETCs, it "disable[ed] itself from performing its contractual duty" to use reasonable efforts to maximize the return to Albany. The Court found that AE's disabling itself from generating RETCs created a question for the jury to decide if Albany was damaged by that action or if participation in the grant program was "commercially reasonable" behavior.

Albany also raised an unjust enrichment claim. It was premised on the theory that AE's receipt of the grant deprived Albany of proceeds from RETC sales. The subject matter (sales of RETCs) was held to be the same as the breach of contract claim. Consequently, the Court concluded the unjust enrichment claim was precluded by the Gas Lease.

The Court dismissed Albany's unjust enrichment claim and denied its Motion for Summary Judgment.

A copy of the Opinion can be downloaded here.