Electric Power Supply/Service Agreements: Federal Court Addresses Procedural Motion in Regards to Electric Cooperatives Challenge to Imposition of Environmental Costs

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Washington-St. Tammany Electric Cooperative, Inc. and other non-profit electric cooperative corporations (collectively "Co-ops") filed a breach of contract action ("Complaint") on June 28th against Louisiana Generating, L.L.C. ("LG") addressing certain power supply and service agreements ("Agreements") pursuant to which they acquired electric power from LG. *See Washington-St. Tammany Electric Cooperative, Inc., et al. v. Louisiana Generating, L.L.C*. 2017 W.L. 5077897.

The action was filed in a United States District Court in Louisiana.

The Co-ops sought a finding that the Agreements were breached by LG's charging them for costs associated with its remedying certain environmental conditions at the Big Cajun II power generating plant ("Plant").

The Co-ops alleged that the charged costs were associated with environmental conditions existing at the Plant before the execution of the Agreements. They allege that LG:

. . . has exclusive responsibility for the costs of complying with Environmental Laws existing prior to June 24, 2002, and also the costs of remediating environmental conditions that existed at the Big Cajun II power generating plant prior to June 24, 2002.

LG filed a Rule 12(e) Motion for More Definite Statement ("Motion") in response to the action.

The Court issued a November 3rd Order addressing the Motion.

In considering the Motion the Court stated that the Co-ops alleged that LG had improperly assessed them with certain remediation costs incurred pursuant to a Consent Decree between LG and both the United States Environmental Agency ("EPA") and Louisiana Department of Environmental Quality. It further noted that the Consent Decree addressed a federal action that had been brought by EPA against LG on February 18, 2009 pursuant to certain sections of the Clean Air Act for injunctive relief and the assessment of civil penalties for violations of the Prevention of Significant Deterioration ("PSD") provisions of the Clean Air Act and corresponding Louisiana PSD regulations of the Louisiana State Implementation Plan. Title V of the Clean Air Act and corresponding Louisiana Title V provisions were also referenced in the Consent Decree.

The EPA action against LG was stated to have resulted in language in the Consent Decree which included:

WHEREAS, the Settling Defendant affirms that a portion of the emissions technology, including related to PM emissions and refueling, under this consent decree, will allow it to comply with the Mercury [and] Air Toxics Rule, a change in environmental law promulgated after the filing of the complaint.

The Co-ops alleged that "in light of the foregoing whereas clause," LG had wrongly characterized remediation costs of past excess emissions of nitrous oxides, sulfur dioxide, and particulate matter as related to the 2011 Mercury and Air Toxics Standards Rule, which was proposed by EPA in 2011, and became effective in 2012, as opposed to environmental laws in effect prior to the execution of the Agreements.

The Co-ops are stated to have further specifically identified five categories of costs that had been allegedly wrongly assessed by LG such as a boiler conversion, etc. They then alleged the improper assessment of $38.1 million between 2016 and 2025 in environmental remediation costs.

LG's Motion contended that the Co-ops actions failed:

. . . to provide any information regarding the disputed ash handling collection systems costs, little to no information regarding the dispute ESP costs, and little information regarding the disputed chemical costs.

LG further argued that because the Co-ops had not specifically identified the "certain costs" related to these three categories it could not prepare a response to the allegations regarding those costs.

The Co-ops responded that they had specifically pled that the "certain costs" alleged in the action were those costs associated with LG's "implementation of its remediation obligations in the Consent Decree or other Environmental Laws enacted before 2002, and not the MATS Rule. y further argued that the only challenged costs were those that LG allegedly mischaracterized as costs incurred to comply with the MATS Rule, and that discovery was required to identify which costs had been mischaracterized. Finally, they asserted that prior to commencing the action an attempt had been made to obtain more information regarding LG's cost calculations and that the information was stated to be confidential.

LG replied that it had attempted to provide the Co-ops with such information but they refused to sign a confidentiality agreement.

The Court concluded in its November 3rd Order that the Complaint is not "so vague or ambiguous" that LG "cannot reasonably prepare a response." It noted that the Co-ops contended that "certain costs" associated with the ash handling collection system, ESP upgrades, and other chemical costs have been wrongly characterized by LG as costs incurred in light of the MATS Rule. Also noted were allegations that such costs were attributable to the Consent Decree or other environmental laws and specifically identified the categories of charges that are improperly characterized. The Court further stated that LG has information bearing upon whether and to what extent such costs have been properly allocated as pertaining to the MATS Rule.

The Court denies LG's Motion.

A copy of the opinion can be downloaded here.