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NJ Utility, Blackstone Energy Unit Had No Contract: Judge

By Jeannie O'Sullivan

Law360, New York (March 7, 2017, 7:11 PM EST) -- A New Jersey state judge on Monday refused to compel a renewable energy company backed by private equity firm Blackstone to arbitrate a dispute over the would-be sale of solar renewable energy credits to a utility, finding that there was no executed contract to enforce.

The decision by Essex County Superior Court Judge Stephanie A. Mitterhoff dealt a blow to Public Service Enterprise Group's Energy Resources & Trade LLC, which sought a ruling that it had entered into a binding agreement with Onyx Renewable Partners LP, which is funded by Blackstone Energy Partners LLC. The purported agreement had called for the parties to proceed to arbitration to resolve their disputes.

Negotiations for PSEG to buy 20,000 renewable energy credits per year — which the utility needed to meet New Jersey's Renewable Portfolio Standards — for \$171 each through 2020 got complicated when the utility demanded a \$15 million letter of credit. A letter of credit in such transactions is designed to ensure the buyer is made whole in the event the seller defaults on its obligation.

After considering the lengthy procedural history of the negotiations between PSEG and Onyx, Judge Mitterhoff found that the lack of an actual signed agreement between the parties was among many factors weighing in the defendants' favor.

"In short, although none of the factors individually might bar a finding of contract formation, cumulatively, the court concludes that these factors ... compel the conclusion that there is no enforceable agreement between PSEG and Onyx," Judge Mitterhoff said in her ruling, adding that her finding precluded the need to analyze the arbitration issue.

The other factors that negated the presence of an enforceable contract included the lack of prior dealings between PSEG and Onyx, the size of the transaction, PSEG's conduct in delaying enforcement of the contract and the failure of PSEG to observe the contract requirements in the event of default, the opinion said.

PSEG also seemed to indicate awareness that the terms called for a signed deal in displaying an "unwavering insistence" on receiving an executed contract and a letter of credit, according to the opinion. Another indicator that PSEG itself seemed to doubt the presence of a binding arrangement was its purchase of solar renewable energy credits from another vendor early last year, without notice to Onyx.

Finally, Judge Mitterhoff noted the lack of "any performance by either party pursuant to the terms of the contract."

The doomed negotiations between PSEG and Onyx began in November 2014, according to the opinion. Although the parties agreed with respect to price, quantity and term, they held off on finalizing the deal to continue negotiations over material economic terms and because they didn't have an established trading relationship.

As contract drafts were exchanged in the following months, Onyx made clear in a draft edit that

neither Blackstone nor a Blackstone affiliate would be providing a parent guaranty or other credit support, the opinion said.

However, despite that clarification, PSEG in April 2015 demanded a \$15 million letter of credit to support the transaction, the opinion said. "Shocked" by the demand, Onyx claimed the unc customary demand made "no commercial sense" and cited the 8 percent per-year cost of funding the letter of credit.

The form and amount of credit support by Onyx continued to be a contentious issue as negotiations went on for the next 13 months, the opinion said.

According to a PSEG energy trader's testimony, Onyx officials during a December 2015 conference call offered to issue to PSEG a \$1.25 million letter of credit as a proposed resolution of the credit security terms for the subject transaction, the opinion said. Onyx requested that PSEG move the agreed-upon delivery date from July to September 2016. Onyx agreed to consummate the transaction and sign all necessary contractual documents if those two conditions were met, according to testimony.

More drafts were exchanged over the next few months, the opinion said. In a January 2016 email, Onyx's chief legal officer requested that PSEG forward a fully executed package of documents for Onyx's president and CEO to sign. PSEG sent executed versions of the master agreement and confirmation letter, but it had not signed the agreements.

The energy trader also certified that PSEG purchased additional SRECs from parties other than Onyx in March, April and June 2016 at prices between \$271 and \$296 per SREC, the opinion said. PSEG had doubts that Onyx would actually supply the promised SRECs in light of Onyx's "evasive conduct," notably its failure to provide the agreed-upon letter of credit or an executed agreement. PSEG likewise wanted to ensure it would have enough SRECs to avoid the \$323 Alternative Compliance Payment for 2016.

A PSEG vice president certified that the utility contacted Onyx on numerous occasions in February, March and April 2016 to ask about when it would receive an executed copy of the agreement, the opinion said.

In contrast to that certification, Onyx's chief legal officer said that after careful consideration, "balancing PSEG's large presence in the industry and Onyx's financial interests," Onyx decided not to agree to the \$1.25 million letter of credit. He also denied that Onyx had agreed to the terms set forth in the January 2016 agreements and certified that he didn't have the authority to bind PSEG.

An attorney for the defendants declined to comment on the decision, and a representative for PSEG didn't immediately respond to a request for comment.

PSEG Energy Resources & Trade LLC is represented by Lawrence Lustberg of Gibbons PC.

The defendants are represented by Jonathan W. Wolfe of Skoloff & Wolfe PC and Daniel M. Perry of Milbank Tweed Hadley & McCloy LLP.

The case is PSEG Energy Resources & Trade LLC v. Onyx Renewable Partners LP and Blackstone Energy Partners LLC, case number L-6932-16, in the Superior Court of the State of New Jersey, County of Essex.

--Editing by Breda Lund.