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## NJ Utility Can't Arbitrate Solar Row With Blackstone Unit

By **Bill Wichert**

Law360 (February 14, 2018, 4:50 PM EST) -- A New Jersey appeals court on Wednesday said a utility affiliate could not force arbitration of its dispute with a company backed by private equity firm Blackstone under a purported contract for the \$17.1 million sale of solar renewable energy credits, finding the parties never entered into a binding agreement.

The three-judge appellate panel upheld a **trial court ruling** denying PSEG Energy Resources & Trade LLC's bid to compel arbitration of its claims against Onyx Renewable Partners LP, saying contract documents were never executed and rejecting PSEG's assertion that certain oral discussions "adequately substantiated a mutual and binding agreement."

Given the need for execution outlined in contract documents, the trial court properly determined that "the parties each intended that the execution of the contracts was a key precondition to bind them to this five-year, \$17.1 million transaction," the panel said.

"A fully-executed contract in this setting plainly was not a mere formality," the panel said.

PSEG Energy Resources & Trade is a subsidiary of PSEG Power LLC, an energy supplier that must possess a certain number of solar renewable energy credits, or SRECs, under state law, according to the appellate opinion. PSEG Energy Resources & Trade buys and sells SRECs for affiliated entities, the opinion said.

In November 2014, PSEG and Onyx agreed to a prospective deal in which PSEG would purchase 20,000 New Jersey SRECs annually from Onyx at \$171 per SREC for energy years 2016 to 2020, the opinion said. PSEG has described the proposed \$17.1 million transaction as "one of the 'very largest' SREC transactions 'in New Jersey's history,'" according to the opinion.

PSEG initially requested in April 2015 that Onyx provide a \$15 million letter of credit for the deal, but the company's representatives ultimately told Onyx representatives in a December 2015 phone call that PSEG would accept Onyx's proposal for a \$1.25 million letter of credit, the opinion said.

PSEG representatives also said on the call that it would accept Onyx's proposal to postpone the initial SREC delivery date from July to September 2016, the opinion said.

PSEG incorporated those terms into drafts of a Master Power Purchase & Sale Agreement and a Purchase and Sale of Solar Renewable Energy Credits Transaction Confirmation Letter, according to the opinion.

"As the trial court aptly recognized, the confirmation letter and proposed master agreement both contain important language reflecting the parties contemplated the contract documents needed to be executed by duly authorized representatives of both companies in order to consummate the transaction," the opinion said.

The proposed contract documents also included an addendum that contained a clause requiring that disputes related to the transaction be subject to arbitration, the opinion said.

Luciano Pisano, PSEG's associate general trading counsel, has asserted that Oynx's chief legal officer, Ryan Marrone, acknowledged in a Jan. 29, 2016, phone call that "the parties were in agreement as to 'all terms and conditions for the SREC transaction,'" according to the opinion. Marrone has denied saying on the call that Onyx agreed to the proposed contract terms, the opinion said.

PSEG gave Onyx a full set of the contract documents to be executed, but the parties never mutually signed them, the opinion said. Onyx did not deliver a letter of credit to PSEG by an anticipated date in February 2016 and, as a result, PSEG began purchasing SRECs from other sources.

After further negotiations between the parties failed, PSEG launched the instant action in October 2016 in Essex County Superior Court against Onyx and co-defendant Blackstone Energy Partners LP, the opinion said. Another Blackstone entity, Blackstone Solar HoldCo. LP, owns an equity interest in Onyx, according to the opinion.

The lawsuit asserted claims of breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel, and fraud and misrepresentation, the opinion said, and PSEG moved to compel binding arbitration based on the arbitration clause within the addendum.

In March, Superior Court Judge Stephanie A. Mitterhoff denied the motion, concluding that the record "does not support PSEG's claim that the parties entered into a binding agreement, in the absence of fully-executed contract documents for this large and sophisticated business transaction," according to the appellate opinion.

"Among other things, the judge reasoned that PSEG 'viewed both the provision of a letter of credit and an executed contract as essential to cementing an enforceable agreement,' and that the letter of credit and executed contract were essential to PSEG to cement the transaction," the opinion said.

Judge Mitterhoff rejected PSEG's arguments that the parties reached a binding agreement in certain phone calls, including the Jan. 29 call with Marrone, noting that "Onyx never delivered a letter of credit," "the parties never signed the agreement" and "Marrone individually lacked the authority to bind Onyx to the transaction," according to the opinion.

On PSEG's appeal of the judge's ruling, the appellate panel found that Judge Mitterhoff soundly determined that, given the language in the drafts of the confirmation letter, master agreement and addendum, the parties intended for the contract documents to be executed in order to bind them to the deal.

The panel also concurred with the judge that the record does not show that Marrone had "actual or apparent authority to bind Onyx."

Following the Jan. 29 phone call, the panel noted, Marrone's email to PSEG sought "a 'fully executable' set of documents for CEO [Matthew] Rosenblum to sign, a phrasing which is consistent with Onyx's position that the transaction could not be binding until the contract documents were actually signed by both parties."

"Moreover, even if Rosenblum had provided his personal oral assent to all of the negotiated terms of the proposed transaction, the language of the drafted contract documents — which we have already spotlighted — emphasizing the importance of 'execution,' defeats PSEG's claim of enforceability," the panel said.

The panel affirmed Judge Mitterhoff's "interlocutory order denying arbitration and her related decision rejecting PSEG's contract-based contentions," and asserted "no views as to whether PSEG's remaining claims of fraud, promissory estoppel, and piercing the corporate veil survive."

Counsel for the defendants could not immediately be reached for comment Wednesday. A PSEG spokesman said Wednesday that the company declined to comment.

Judges Jack M. Sabatino, Mitchel E. Ostrer and Lisa Rose sat on the appellate panel.

PSEG is represented by Lawrence S. Lustberg, Thomas R. Valen and John D. Haggerty of Gibbons PC.

The defendants are represented by Daniel M. Perry and Katrina Voorhees of Milbank Tweed Hadley & McCloy LLP, and Jonathan W. Wolfe and Jane J. Felton of Skoloff & Wolfe PC.

The case is PSEG Energy Resources & Trade LLC v. Onyx Renewable Partners LP et al., case number A-3057-16T2, in the Superior Court of New Jersey, Appellate Division.

--Additional reporting by Jeannie O'Sullivan. Editing by Jack Karp.

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