

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Lake Benton Power Partners I
LLC's Petition for Property Tax Recovery

ISSUE DATE: March 12, 2002

DOCKET NO. E-002/M-00-314

ORDER REJECTING PETITION WITHOUT
PREJUDICE

PROCEDURAL HISTORY

On March 14, 2000, Lake Benton Power Partners I LLC (LBPPI) filed a petition requesting approval of an amendment to the power purchase agreement between LBPPI and Northern States Power Company (NSP) which would allow LBPPI to obtain reimbursement of its property tax expenses from NSP. It is requesting that LBPPI be allowed to recover actual taxes paid in 1999 and 2000 as well as taxes going forward.

On April 13, 2000, NSP filed comments. NSP stated that the property tax amounts LBPPI is requesting are already included in the price LBPPI is already charging NSP and which NSP's customers are already paying. NSP did indicate its willingness to continue discussions with LBPPI to determine whether the property taxes in question were backed out of Lake Benton's price.

On April 13, 2000, the Department of Commerce (DOC) filed comments recommending denial of LBPPI's petition.

Reply comments were filed on April 24, 2000, by LBPPI and also by the DOC.

On June 21, 2000, Lake Benton requested that the Commission defer deliberations, which were scheduled for June 28, 2000, to allow additional discussions with NSP and the DOC.

On December 14, 2001, LBPPI requested that the Commission set the matter for decision as the parties had been unable to reach a resolution.

On January 8, 2002, Xcel Energy (NSP dba Xcel Energy) filed its reply concurring with LBPPI's request for Commission action.

The matter came before the Commission on February 21, 2002.

FINDINGS AND CONCLUSIONS

I. Background

LBPPI¹ owns and operates the wind generation facility commonly known as NSP Phase II located northwest of Lake Benton, Minnesota. All energy and capacity produced by this facility is sold to NSP pursuant to a Power Purchase Agreement (PPA) approved by the Commission in 1997.²

These wind facilities consist generally of wind easements or leases, on which are located the turbines atop steel towers and foundation pads, as well as related access roads, power lines, transformers and miscellaneous equipment.

A tax exemption enacted in 1991 exempted such items from property taxation.³ In 1995, the exemption was amended to limit its applicability to facilities installed before January 2, 1995 and to single owner facilities 2 MW or less in size. At that time certain portions of the foundation and towers were designated as taxable. Turbines, blades, transformers and other relatively expensive portions of such facilities remained exempt. In 1997 this section was rewritten again with the result that turbines, blades, transformers and related equipment was designated as taxable property for facilities greater than 12 MW in size.⁴

The bidding on the Phase II wind generation project was initiated in October 1994 with an agreement entered into in September of 1996. An amended agreement was approved by the Commission in 1997 and the project was dedicated in September of 1998.

II. Request of LBPPI

LBPPI requested that the Commission require NSP to amend the Power Purchase Agreement (PPA) to allow LBPPI to obtain reimbursement of its property tax expenses from NSP, pursuant to Minnesota Statutes § 216B.16, subd. 6d. LBPPI requested that it be allowed to recover actual taxes paid in 1999 and 2000, as well as taxes going forward. The reimbursement by NSP would be flowed through NSP's energy fuel adjustment clause.

¹ LBPPI is an affiliate of Enron Wind Corp. Prior to its acquisition by Enron Corp. in 1998, Enron Wind operated as Zond Corporation.

² The Power Purchase Agreement was between Enron Wind Corp. and NSP. Later LBPPI assumed Enron's obligation as the Seller under the PPA.

³ Minn. Stat. § 272.02, subd. 1(21)(1991), currently codified as § 272.02, subd. 1(22)

⁴ Minn. Stat. § 272.02, subd. 1(21)(c)(1998), currently codified as § 272.02, subd. 1(22)(c).

III. The Statute

Minn. Stat. 216B.16, subd. 6d (2001) provides:

Subd. 6d. **Wind energy; property tax.** An owner of a wind energy conversion facility which is required to pay property taxes under section 272.02, subdivision 22, or a public utility regulated by the public utilities commission which purchases the wind generated electricity may petition the commission to include in any power purchase agreement between the owner of the facility and the public utility the amount of property taxes paid by the owner of the facility. The public utilities commission shall require the public utility to amend the power purchase agreement to include the property taxes paid by the owner of the facility in the price paid by the utility for wind generated electricity if the commission finds:

- (1) the owner of the facility has paid the property taxes required by this subdivision;
- (2) the power purchase agreement between the public utility and the owner does not already require the utility to pay the amount of property taxes the owner has paid under this subdivision; and
- (3) the commission has approved a rate schedule containing provisions for the automatic adjustment of charges for utility service in direct relation to the charges ordered by the commission under section 272.02, subdivision 22.

IV. Position of the Parties

A. LBPPI

LBPPI argued that the statute cited above was enacted to avoid inequitably penalizing past projects with unforeseen tax increases and to mitigate the effect of increased taxes on future projects. It argued that the legislature enacted this statute contemporaneously with the tax increases to provide a means by which developers could be assured recovery of those taxes from utilities purchasing power from wind facilities.

It argued that it has satisfied the statutory criteria, as set forth above, for approval. It argued that it has paid \$71,810 in 1999 for NSP Phase II Assessments and is scheduled to make regular payments of future amounts, as required by Subdivision 6d(1).

It argued that Subdivision 6d(2), which requires that the PPA between the wind generation owner and the utility not require the utility to pay the property taxes for the facility or to reimburse the owner for such payments, has been met. LBPPI cites Section 5.12 of the Phase II PPA, providing that the "Seller shall pay all present or future federal, state, municipal, or other lawful taxes or fees applicable to Seller or the Plant," to support its position.

It further argued that NSP is not indirectly reimbursing LBPPI through the PPA pricing. It argued that a considerable portion of current tax costs consists of additional burdens imposed by the legislature after the bid and PPA pricing were already set. LBPPI could not have foreseen the 1997 changes in 1995 and could not have altered its bid and pricing accordingly.

Finally, LBPPI argued that NSP has an approved Energy Fuel Adjustment clause which allows for the automatic adjustment of charges in relation to purchased power costs and fuel costs, thereby meeting the final statutory requirement.

B. NSP's Position

NSP did not dispute that the first statutory requirement was satisfied. As to the second statutory requirement regarding the treatment of property taxes in the PPA, NSP argued that there was significant evidence to indicate that LBPPI had included property taxes in the final pricing structure it negotiated with NSP, therefore NSP was paying the property taxes by virtue of the final price.

It argued that the independent evaluator's report for the NSP Phase II bidding indicated that the expectation was that a property tax component would be included in the price, that NSP informed bidders that they were expected to address the tax risk in their bids, and that bidders were given an opportunity to revise their bids in May of 1995 due to continuing legislative activity. NSP indicated that LBPPI⁵ responded with a revised bid and statement indicating that the revised bid reflected the new tax treatment.

Regarding the last requirement of the statute, NSP stated that it believed that the Commission's prior approval of recovery of costs related to the PPA would provide for recovery from ratepayers of any Commission ordered amendment. However, NSP asked that if the Commission granted LBPPI's request that the Commission confirm that the charges are recoverable through the Energy Fuel Adjustment clause.

C. Department of Commerce

The DOC argued that the evidence provided by NSP indicates that the PPA includes recovery of property taxes by LBPPI. The DOC was persuaded that once the potential for property tax changes became known to LBPPI it is reasonable to conclude that LBPPI would have or should have taken that possibility into account and restructured its risk premium accordingly. The DOC concluded that LBPPI's guaranteed price included both known property tax changes (on foundations and towers) and a substantial risk premium to cover future property tax changes (on turbines, blades transformers and related equipment).

⁵ The actual bidder was Zond Minnesota Development Corporation II.

The DOC also argued that although NSP does have an automatic adjustment for certain payments made under the PPA, these payments do not include property taxes, and that the third criterion of the Statute has not been met.

V. Commission Action

The Commission will reject the petition of LBPPI. The Commission is concerned that the final price under the PPA appears to include a built in risk premium by LBPPI for future property taxes. If the Commission were to require that these taxes be paid by the utility this would allow for double recovery by the seller, at the expense of the ratepayer.

The record supports the conclusion that potential sellers, including LBPPI, were informed by NSP that there was continuing activity in the legislature regarding property taxes on wind facilities and that sellers were given the opportunity to reexamine their bids in light of new information. The Commission agrees with the DOC that it is reasonable to conclude that LBPPI would have taken this into account in its bid and included a risk premium for property taxes. The record is insufficient to support the claim that LBPPI did not build in such a risk factor.

For these reasons the Commission will reject the petition without prejudice.

ORDER

1. The petition of Lake Benton Power Partners I LLC's is rejected without prejudice.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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