UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BENTON COUNTY WIND FARM LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 1:13-cv-01984-SEB-TAB
	)	
DUKE ENERGY INDIANA, INC.,	)	
	)	
Defendant.	)	

ORDER ON THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

This matter comes before us on the parties' Motions for Summary Judgment. [Dkt. Nos. 53, 59.] The motions are fully briefed. Having considered the arguments and the uncontroverted evidence, we DENY Benton County Wind Farm LLC's Motion for Summary Judgment and GRANT Duke Energy Indiana, Inc.'s Motion for Summary Judgment, for the following reasons:

Introduction[1]

The term "wind power" describes the process by which wind's kinetic energy is converted into electricity by the use of wind turbines. A wind turbine works the opposite way that a fan works. Instead of using electricity to make wind, like a fan, wind turbines use wind to make electricity. The wind turns blades which spin a shaft that connects to a

[1] Drawing on readily-available internet sites, we have embellished our treatment of the issues raised by the parties with this introductory explanation of wind energy to provide context for the business relationship out of which both the contract and the parties' ensuing dispute arose.

generator to generate electricity. The electricity cannot be stored, however. The electricity passes through a grid and is transmitted through electrical wires to the consumer.

Although large-scale wind generation is relatively new, in the past decade it has become one of the fastest growing sources of electricity generation in the United States. Prior to 2008, wind power in Indiana was extremely rare, limited to individual, small-scale turbines. Over the past seven years, Indiana has increased its electrical output to 1,745 MW generated by 1,031 turbines on six wind farms. According to Wind on the Wires (a wind advocacy organization), within the next decade Indiana is expected to triple its wind energy generation to more than 5,000 MW.

Benton County Wind Farm was the first wind farm in Indiana, beginning operations in 2008, and consists of 87 turbines. These wind turbines (or their blinking red warning lights) are observable for miles, especially while driving on I-65 from Indianapolis to Chicago. Just one of these 87 turbines provides power sufficient to supply 600 homes per year. The towers for these turbines often exceed 200 feet in height, are costly to install (approximately $1-2 million per turbine), and are extremely large and heavy (weighing approximately 300,000 pounds per turbine).

This new and developing source of energy has given rise to new business entities and relationships as techniques for the commercial exploitation of this resource have evolved and progressed. The litigation before us here reflects all these factors, requiring the Court to review the contract entered into by the parties and to resolve the dispute that has arisen under it.

Background and Facts[2]

The parties agree as to nearly all of the relevant facts. Most importantly, the parties stipulate that the contracts at issue are "clear and unambiguous." [Dkt. No. 55-1 at 1 (Duke); Dkt. No. 63 at 17 (BCWF).] The parties' dispute has arisen over their respective contractual obligations in light of subsequent changes in circumstances relating to the sale and purchase of wind energy. The specific provocation for the filing of this lawsuit was Duke's submission of bids to the intervening grid authority the amounts of which fell below the threshold at which Benton County Wind Farm LLC ("BCWF") was able to run its wind farm at 100% capacity. BCWF asserts that Duke's actions constitute a breach of the parties' contract, which Duke denies.

[2] Our jurisdiction in this matter is authorized by 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000 exclusive of interest, attorney's fees, and costs. [*See* Compl. at ¶¶ 11-14.] BCWF provides the identity of its members in paragraph 11 of the Complaint. [*Id.* at ¶ 11.] BCWF is a Delaware limited liability company whose members are Benton County Holding Company LLC and Aircraft Services Corporation. Benton County Holding Company LLC is the managing member of BCWF and is a Delaware limited liability company. Benton County Holding Company LLC's members are Orion BC Holdings and Vison Energy LLC. Orion BC Holdings LLC is a Delaware limited liability company whose sole member is Orion Energy Group LLC, whose members are all citizens of California. Vision Energy LLC is an Ohio limited liability company whose sole member is J. Turner Hunt. Mr. Hunt is a citizen of Ohio. Aircraft Services Corporation is incorporated in Nevada and maintains its principal place of business in Connecticut. [*Id.*] Duke is incorporated in Indiana and has its principal place of business in Hendricks County, Indiana. [*Id.* at ¶ 12.]

A. The Introduction of Wind Energy in Indiana.[3]

In 2005, when Indiana's General Assembly enacted legislation to mandate utility procurement of renewable energy, Duke issued a solicitation for 100 megawatts ("MW") of renewable power generation requiring the successful bidder to develop, permit, construct, and operate a renewable power plant. In exchange, Duke offered to pay a fixed price per MW generated. BCWF became the successful bidder in response to this solicitation.

B. The Renewable Wind Energy Power Purchase Agreement ("PPA").

On September 1, 2006, Duke and BCWF entered into a Renewable Wind Energy Power Purchase Agreement ("PPA") whereby Duke agreed to purchase energy generated by BCWF's wind farm located in Benton County, Indiana (the "Wind Farm"). Several

[3] Before detailing the facts giving rise to this dispute, we include a brief glossary of terms and abbreviations as used by the parties throughout their briefing and by the Court in this Order.

LMP	Locational Marginal Price (the prevailing market price)
MISO	Midwest Independent Transmission System Operator, Inc. (administrator of the regional grid at issue)
IR	Intermittent Resource
DIR	Dispatchable Intermittent Resource
SCED	Security Constrained Economic Dispatch
RT-SCED	Real Time Security Constrained Economic Dispatch
NRSI	Network Resource Interconnection Service
RTO	Regional Transmission Organization (aka MISO)

specific provisions of the complex arrangement embodied in the PPA are relevant to the parties' current dispute:[4]

> 4.1 Sale and Purchase of Energy and Credits
>
> During the term of this Agreement, Seller shall deliver and sell to Buyer and Buyer shall accept and purchase from Seller (a) Electrical Output of the Plant; and (b) any Credits associated with, and to the extent available from, such Electrical Output purchased by Buyer. After the Commercial Operation Date, the Capacity Rights shall belong to Buyer, *provided* that Seller makes no representation or warranty whatsoever regarding the quantity of capacity associated with the Plant or any rights associated therewith.
>
> . . .
>
> 4.4 Payment.
>
> Buyer will pay Seller for the Electrical Output and Credits at a price per MWh of Electrical Output delivered to Buyer at the Point of Metering in accordance with Exhibit A attached hereto.
>
> 4.5 Measurement of Electricity
>
> All Electrical Output will be measured at the Point of Metering and will meet the specifications established by the Interconnection Agreement, as the same may be amended from time to time. For purposes of monthly billing in accordance with Article 10, NIPSCO and/or the RTO will ensure that the Meters are read at the end of each Month.
>
> 4.6 Buyer's Failure to Accept Delivery of Electrical Output.
>
> (a) In the event that Buyer fails to accept delivery of all of the Electrical Output at the Point of Metering, whether due to Buyer's failure to obtain Transmission Service (if

[4] "RTO" is defined by the PPA as "the Midwest Independent Transmission System Operator, Inc., a Regional Transmission Organization based in Carmel, Indiana, or its successor organization, which is approved by the Federal Energy Regulatory Commission." [PPA at Art. 1, p. 7.]

applicable) or for any reason other than Seller's failure to perform, an Emergency Condition, a Force Majeure Event that prevents such acceptance pursuant to Article 14 or the proper exercise by Buyer of its suspension rights pursuant to Section 15.2(a), then Buyer shall pay to Seller as liquidated damages an amount equal to the positive difference, if any, between (i) (x) the amount that would have been payable by Buyer to Seller hereunder if such Electrical Output had been accepted by Buyer plus (y) additional transmission charges, if any, reasonably incurred by Seller in delivering the Electrical Output to such third party purchaser and (ii) the net amount, if any, that Seller, using Commercially Reasonable Efforts, actually realizes through remarketing of such Electrical Output to Persons other than Buyer, *provided* that in the event Seller is unable to remarket such Electrical Output, then the net amount described in clause (ii) shall be $0 and the damages owed by Buyer shall also include the then-current amount of the PTC (on a per MWh basis) on an After-Tax Basis for each MWh of such Electrical Output that Seller was unable to remarket. The damages provided in this Section 4.6 shall be the sole and exclusive remedy of Seller for any failure of Buyer to accept delivery of Electrical Output that it is required to accept hereunder.

(b) Seller shall include in a monthly invoice delivered to Buyer pursuant to Section 10.1 the amounts owed by Buyer pursuant to Section 4.6(a) and a description, in reasonable detail, of the calculation of damages resulting from Buyer's failure to accept delivery of Electrical Output.

[Dkt. No. 1-1 at Art. 4.][5] The parties defined the term "Electrical Output" as follows:

Electrical Output: Means the entire electric energy output of the Plant delivered to the Point of Metering, as measured pursuant to Article 8.

[*Id.* at Art. 1 (Definitions).][6] The Point of Metering is also a defined term in the PPA.

[5] The parties agree that BCWF was entitled to earn Production Tax Credits ("PTCs") for all the power it generated.

[6] Article 8 of the PPA provides in relevant part:

> The meters and metering equipment (collectively, the "Meters") at the Point of Metering will be installed, maintained and repaired in accordance with the Interconnection Agreement and will be owned and operated in accordance with the Interconnection Agreement. The Interconnection Agreement shall provide that the Meters will be installed such that they will measure the Electrical Output on the high side of the Plant's step-up transformers at the Point of Metering. Buyer will have no responsibility for the ownership, operation, maintenance and control of the Meters.

[PPA § 8.1.]

> **Point of Metering**: Means the interconnection point with NIPSCO and/or RTO, which is more fully described in the Interconnection Agreement.

[*Id.*] With respect to the scheduling, delivery, and transmission of the energy generated by BCWF, the parties agreed:

> 6.2 Scheduling/Market Participant
>
> The Parties will reasonably cooperate with each other with respect to the bidding and scheduling with NIPSCO and/or the RTO of the Electrical Output to be sold and delivered by Seller and accepted and purchased by Buyer. Buyer will be responsible for all such bidding and scheduling. The Parties agree that Buyer shall be the RTO Market Participant for the Plant (as defined by the RTO Requirements), except in connection with the delivery of test energy pursuant to Section 9.2 or after the occurrence of an Event of Default with respect to Buyer.
>
> 6.3 Environmental Quality Certification Requirements
>
> Seller agrees to use Commercially Reasonable Efforts to conform its administration of this Agreement to fall within the parameters contained within the requirements of any Credits or similar benefits for renewable energy adopted by the State of Indiana in effect on the Effective Date, to enable qualification of the Electrical Output as renewable energy, as defined in those requirements.
>
> Notwithstanding anything to the contrary set forth herein, nothing in Section 6.2 or this Section 6.3 shall require Seller to take any action effecting, or which would otherwise result in, any reduction in the Electrical Output or cause Seller to incur additional costs as a result of such provisions.

[*Id.* at Art. 6.]

The parties included provisions in their PPA addressing a termination of the agreement by either party. Section 15.4 states: "[T]he Parties acknowledge and agree that if this Agreement is terminated due to an Event of Default by either Party, the actual or direct damages incurred by the non-defaulting Party shall include: . . . ." [*Id.* § 15.4]. Damages in the case of termination by the Seller due to an Event of Default by the Buyer are to be calculated in the following manner:

> (a) in the case of a termination by Seller due to an Event of Default by Buyer, the net present value of the difference, if positive, between (x) the amount that Buyer would have been required to pay to Seller pursuant to this Agreement for delivery of all Electrical Output that would have been delivered by Seller hereunder during the remainder of the Term (absent termination of this Agreement and based on an assumption as to the amount of Electrical Output calculated using commercially reasonable projections based on historical performance of the Plant if such termination occurs two (2) years or more after the Commercial Operation Date; if such termination occurs earlier than two (2) years after the Commercial Operation Date then the Parties shall jointly retain an independent wind resource consultant to estimate the Electrical Output that would have been delivered by Seller hereunder during the remainder of the Term, taking into account all relevant data, and such estimate shall be binding on the Parties) and (y) the net amount, if any, payable to Seller by a third party pursuant to any replacement power purchase agreement that Seller using Commercially Reasonable Efforts enters into for the replacement of such Electrical Output, *provided* that to the extent Seller is unable to remarket all of such Electrical Output, then the net amount described in clause (y) shall be $0 and the damages owed by Buyer shall also include the then-current amount of the PTC (on a per MWh basis) on an After-Tax Basis for each MWh of such energy that Seller was unable to remarket.

[*Id.*] The PPA requires Duke and BCWF to conform to MISO requirements. [PPA § 5.4(d) ("Subject to the right to Contest their applicability, both Parties will comply with all applicable RTO Requirements in all material respects.") ("RTO" is defined as "the Midwest Independent Transmission System Operator, Inc." (MISO).]

Endorsing the opinion of BCWF's expert, Dr. Roy J. Shanker, Ph.D., Duke notes that the PPA "has no provision for calculation of deemed generation" and the "PPA does not contain any language on how to calculate the megawatt hours of energy that could have been delivered." [Dkt. No. 55-1 at 10.][7]

[7] BCWF points to Section 15.4(a) of the PPA as a method for calculating lost generation in the event BCWF terminates the contract due to Duke's default. [Dkt. No. 86 at 14.] This section is irrelevant, however, where, as here, the parties have affirmed the contract, claimed it is not ambiguous, and seek to enforce it, not terminate it.

C. Transmission Services.

The PPA includes a description of "Transmission Services" that may or may not be required for Duke to accept the energy generated by BCWF:

> 6.4 Transmission.
>
> Buyer represents that it intends to deliver and sell all of the Electrical Output to the RTO at the Point of Metering and does not intend to utilize any Transmission Services. If Buyer nevertheless utilizes Transmission Services for the Electrical Output during the Term or is required (due to a change in the applicable transmission rules) to use Transmission Services in order to accept deliveries of the Electrical Output at the Point of Metering, then Buyer shall be responsible for arranging for all Transmission Services required to effectuate Buyer's acceptance of delivery and purchase of Electrical Output, including, without limitation, obtaining Transmission Service, in an amount of capacity equal to the Designated Nameplate Capacity Rating, and shall be responsible for the payment of any charges related to such Transmission Services hereunder, including, without limitation, charges for transmission or wheeling services, ancillary services, imbalance, control area services, congestion charges, location marginal pricing, transaction charges and line losses. The Parties acknowledge that the purchase price of Electrical Output does not include charges for such Transmission Services, all of which shall be paid by Buyer.

[PPA at Art. 6.] "Transmission Services" is a defined by the PPA as follows:

> **Transmission Services**: Means all transmission or wheeling services, scheduling services, imbalance services, OASIS, congestion and congestion management services, tagging services, dispatch services, ancillary services, control area services, and other transmission services necessary for Buyer to accept Electrical Output at the Point of Metering and transmit, and deliver Electrical Output from the Point of Metering, using the highest priority transmission service available.

[*Id.* at Art. 1.] MISO has never required Duke to obtain Transmission Services to accept power that is delivered to the Point of Metering. Duke claims that it is not required under the PPA to utilize Transmission Services to accept power that is delivered to the Point of Metering. [Dkt. No. 55-1 at 15 (citing Shanker Dep. at 144:21-145:14).][8]

[8] BCWF cites the testimony of its expert, Dr. Shanker, that Duke does "not need to use transmission services – they have not, so far, used them. That doesn't mean they don't need to or are not required to under the provision of 6.4." [Dkt. No. 86 at 13 (citing Shanker Dep. at 142).] However, Dr. Shanker's opinion is not a fact, but a conclusion of law.

D. The Joint Energy Sharing and Operating Agreement ("JESOA").[9]

On December 19, 2007, BCWF, Duke, and Vectren Power Supply, Inc. entered into the Joint Energy Sharing and Operating Agreement ("JESOA"), which sets forth an agreed method for dividing the electrical output of the Wind Farm. BCWF contracted with Vectren for the sale of 30 MW of power from the wind farm in addition to the 100.5 MW already subject to the PPA. [Dkt. No. 1-2 (JESOA (Recitals B-C)).]

The JESOA defines "Electrical Output" as "the electric energy output of the Facility delivered to the Delivery Point." [*Id.* at 3.] "Delivery Point" as defined in the agreement is "the interconnection point of the Facility to the RTO-controlled transmission grid." [*Id.* at 2.] "Total Facility Output" as used in the JESOA means "the total electrical energy produced by the Facility Capacity from time to time, net of energy used by the Facility, as measured at the Delivery Point." [*Id.* at 5.] Section 2.4 of the JESOA provides, in part:

> Notwithstanding anything in this Agreement to the contrary, Seller shall have the right to curtail the Total Facility Output as required under the Interconnection Agreement or as instructed by the RTO or NIPSCO and to comply with all RTO and NIPSCO operating procedures in effect from time to time, and Duke and Vectren agree to cooperate with Seller in connection therewith and to comply (to the extent compliance is required by either of them) with all RTO and NIPSCO curtailment orders and operating

[9] The majority of BCWF's claims relate to both the PPA and the JESOA. BCWF notes the similarity between these two agreements. [*See* Compl. at ¶ 25 ("Like the [PPA] between BCWF and Duke, the JESOA makes clear that Duke and Vectren bear the entire economic responsibility for bidding BCWF's power into MISO's electricity markets, and for paying any costs related to the delivery of power to MISO.") (quoting JESOA § 3.2(a)); *id.* at ¶ 26 (Like the [PPA], the JESOA also makes clear that Duke and Vectren are not permitted to limit BCWF's power output.") (quoting JESOA § 2.4); *see also id.* at Count I (Breach of Contract related to both the PPA and JESOA), Count II (Breach of Implied Promise Not to Hinder Performance related to both the PPA and JESOA), Count IV (Declaratory Judgment).] In their filings, the parties often refer primarily to the PPA. [*See, e.g.*, Dkt. No. 10 at 18-28 (BCWF); Dkt. No. 55-4 at 24-37 (Duke).] As a result, we primarily discuss the PPA, but separately consider the JESOA, *supra*. [*See* Part E.5.]

> procedures and with all RTO Requirements in effect from time to time. *Except to the extent expressly provided in the respective PPAs, neither Duke nor Vectren shall have the right to curtail or reduce the Total Facility Output.*

[*Id.* § 2.4 at 7 (emphasis added).] Duke and Vectren also agreed:

> 2.5 Transmission from Delivery Point. Duke and Vectren shall each be responsible for all transmission of their respective Shares of the Total Facility Output from the Delivery Point, including the procurement and management of financial transmission rights associated with their respective Nodes and all other transmission or congestion rights under applicable RTO Requirements.

[*Id.* § 2.5.] The JESOA did not "modify the rights and obligations of the Parties under [their respective PPAs] except to the extent expressly provided [t]herein [and] in the event of a conflict between the terms of either PPA and [the JESOA], the terms of [the JESOA] shall control." [*Id.* § 8.5.]

E. The Benton County Wind Farm and MISO.

The Wind Farm began operations on or about April 19, 2008. At the time the Wind Farm began operating, it was the only wind farm in Indiana generating electricity. The Wind Farm is interconnected to the transmission system owned by Northern Indiana Public Service Company ("NIPSCO") and controlled by MISO. MISO is the entity responsible for administering the regional electrical grid covering Duke's service area. According to BCWF's Vice President, James Eisen, MISO "manage[s] or operate[s] the transmission grid in this region." [Eisen Dep. 49:3-6.] MISO is the "traffic cop to make sure that those deliveries [of power that's being generated] don't cause problems in the system." [*Id.* at 49:17-22.]

1. Locational Marginal Price (LMP).

The Locational Marginal Price ("LMP") constitutes a significant component of the parties' overall dispute. The LMP is the prevailing market price for energy generated at a specific time in a specific place.[10] The LMP is the amount that Duke receives from MISO (when the LMP is positive) or pays MISO (when the LMP is negative) to inject BCWF-generated power into the MISO grid. The amount that Duke pays BCWF is dictated by the PPA; the LMPs do not affect the price Duke pays BCWF for electricity. Although BCWF is not directly affected by the LMP, Duke's cost (and that of its customers) is substantially impacted by the LMPs.

The LMP can be positive, negative, or neutral. When the LMP is positive, Duke benefits because MISO pays Duke for power that passes into the grid and Duke can subsidize its payment to BCWF with the monies it receives from MISO. When the LMP is negative, Duke pays MISO (in addition to BCWF) for the power that enters the grid. When the LMP is $0/MWh, Duke pays only BCWF to inject power into the grid and no money is exchanged between Duke and MISO.

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[10] The PPA defines the LMP as :

> the market clearing price at a specific Commercial Pricing Node (CPNode) in the Midwest Market that is equal to the cost of supplying the next increment of load at that location. LMP values have three components for settlement purposes: marginal energy component, marginal congestion component, and marginal loss component. The value of an LMP is the same whether a purchase or sale is made at that node.

[PPA, Art. 1.]

Duke's cost for power fluctuates significantly based on the LMP. When LMPs are negative, the cost of power to Duke is higher because Duke pays both MISO *and* BCWF for energy. If, however, BCWF is prevented from generating electricity when the LMPs are negative, then Duke does not purchase any electricity and as a result does not pay the negative LMPs. If Duke purchases energy only when the LMP is positive or neutral, then Duke's cost is that which it agreed to pay BCWF pursuant to the PPA, or less.

2. IR Rules.

At the time the parties entered into the PPA and BCWF became operational, on April 19, 2008, MISO treated wind generation facilities as Intermittent Resources ("IR"), meaning that MISO accepted all available produced energy at the prevailing market price (LMP) and MISO managed congestion issues manually.

As IRs, generators of wind energy were not required to inform MISO in advance of expected electric generation, but were permitted to generate and deliver electric power whenever possible (i.e., when the wind blew) in return for payment of the prevailing LMP at its location. Duke describes the Wind Farm at this time as a "must run" facility – i.e., MISO took all of the power from the Wind Farm regardless of price. [Dkt. No. 82-1 at 6.] As an IR, BCWF was not subject to curtailment by MISO based on the cost of its power relative to the costs of other generators' power. During the IR period, Duke submitted an offer price in the day-ahead market that equaled the PPA price at the time the offer was submitted. Initially, LMPs paid to Duke for BCWF's output were relatively high (reflecting the relative abundance of transmission capacity available to BCWF as the first

wind farm in the area), allowing Duke to profit from the power it purchased from BCWF and resold into MISO markets.

After BCWF had commenced operation, more wind farms were added by other producers to the transmission grid in Benton County and surrounding areas without any transmission upgrades or expansion in transmission capability. In the immediate geographic proximity of BCWF, the 106 MW Hoosier Wind Project was placed into service in November 2009, and the 600 MW Fowler Ridge Wind Farm, which was placed into service in three phases, began in early 2009 and was completed in December 2009. As a result, by the end of 2010, more than 800 MW of wind resources were in operation in or near Benton County. Consequently, MISO began to experience increasing congestion in the transmission system in the Benton County area due to wind generation. MISO's grid did not have sufficient capacity to accommodate all the electric power that was being generated. The increase in the number of wind farms also brought about a drop in LMPs based on the additional supply, requiring MISO to discourage potential excess generation.

MISO can and did discourage generation in a congested area by requiring generation facilities to accept lower LMPs for use of the grid. When MISO set a negative LMP, the market participant (i.e., Duke) was required to pay MISO for MISO to purchase that unit of power and inject the power into the MISO grid at the congested location. [Dkt. 1 at ¶ 16; Dkt. 19 at ¶ 16.] Duke paid MISO more than $4.4 million in negative LMPs in connection with IR-classified power it purchased from BCWF prior to March 1, 2013. Duke sought and received reimbursements from its retail customers for all negative LMPs it incurred prior to March 1, 2013.

As a further response to increasing congestion, MISO issued manual curtailments to BCWF and other wind farms pursuant to which MISO operators instructed wind farms, including BCWF, to reduce or stop production at times when the Wind Farm was otherwise capable of generating electricity. At times, therefore, BCWF did not generate all the power it was capable of generating and Duke was not required to pay for all the power that BCWF was *capable* of delivering but did not generate. [BCWF's expert, Shanker Dep. at 77-78.] The term used by the parties for the power BCWF is capable of delivering but does not actually deliver is "deemed generation." BCWF did not seek payment from Duke for deemed generation during the IR classification period.

3. DIR Rules.

Beginning in 2010, MISO created a new resource designation for wind farms called Dispatchable Intermittent Resource ("DIR"). DIR is different from IR in one key aspect relevant to the parties' dispute: under MISO's DIR rules, wind generators were made subject to "economic dispatch," meaning that Duke, as the contractually-designated Market Participant,[11] was required to submit price offers to MISO indicating the prices at which Duke was willing to sell BCWF's output. In contrast, under the IR classification no bid was required; BCWF was permitted to generate and deliver power in return for payment of the prevailing LMP. Under the DIR designation, MISO accepted only the power that

[11] The parties agreed in the PPA that Duke acting as the Market Participant was responsible for submitting price and quantity offers to MISO.

cleared its 5-minute market price hurdle[12] as offered by Duke as opposed to MISO accepting all power at the prevailing LMP under the IR classification.

The daily price MISO pays under the DIR system is based on an MISO proprietary algorithm, which system is referred to as Security Constrained Economic Dispatch ("SCED"). This computer algorithm produces significant variation in the LMP depending on the precise location and time at which a seller seeks to supply power to the grid. DIRs utilize communications protocols causing their dispatches in the real-time market to be automated by MISO's Real-Time Security Constrained Economic Dispatch (RT-SCED) algorithm. The RT-SCED enables MISO to manage the real-time dispatches from its generation facilities so that energy is produced at the lowest possible cost to its consumers, while taking into account any operational limitations with the system's generation and transmission facilities. When MISO's LMP at a wind generator's location falls below the Market Participant's price offer, the RT-SCED de-selects that generator and creates an automatic dispatch signal which is sent to the generator requiring it to reduce its electrical power output or stop generating all together.

Thus, when Duke's offer price exceeds the price MISO is willing to pay, MISO does not clear BCWF to run; importantly, BCWF is obligated to follow MISO's direction. [Shanker Rpt. at 9; PPA § 5.4.] When MISO accepts Duke's offer, the Wind Farm is dispatched, and Duke pays for all power delivered to the Point of Metering. With rare

[12] According to Kevin Neal, Duke's business development manager for Duke's wholesale power origination and joint owner agreements group, MISO "would give five-minute dispatch instructions to the generator based on all the inputs." [Neal Dep. at 180-81.]

exceptions, MISO is the only entity that makes the decisions with respect to dispatch down signals. [Shanker Dep. 243:6-15; Swez[13] Dep. at 204 ("Again, we're [sic] not manually curtailing the unit. MISO is curtailing the unit.").] As Mr. Eisen acknowledges, "MISO is running the market and clearing the price." [Eisen Dep. 141:7-9.]

As a rule, it is difficult for Duke to determine in advance a price MISO will accept. However, as BCWF notes, Duke has the ability to submit the lowest possible offer price allowed under MISO's tariff, which is negative $500/MWh. [Dkt. No. 86 at 13 (citing Shanker Dep. at 209-10).] MISO makes decisions with respect to dispatch down signals after Duke makes its offers [Dkt. No. 55-1 at 8]; however, the submission of the lowest possible offer price by Duke has the effect of maximizing the amount of power produced by BCWF [Dkt. No. 86 at 13]. Stated otherwise, if the offer price submitted by Duke is greater than what MISO is willing to pay (the LMP), then MISO does not clear BCWF to run. [Dkt. No. 86 at 14; Dkt. No. 55-1 at 8.] However, Duke's offer does not always clear, even when it is below the LMP, which, according to Duke, demonstrates that even a low offer does not guarantee MISO will clear BCWF to run. [Dkt. No. 92-1 at 5.]

The DIR program became operational on June 1, 2011, and was voluntary among the wind generators until February 28, 2013. According to Duke, as of March 1, 2013, the program became mandatory for all wind resources that were put in service after 2005. [Dkt.

[13] John Swez is an employee of Duke with the title Director, Generation Dispatch and Operations.

No. 55-1 at 7 (citing Rose Report[14] at 6).][15] Certain exceptions to DIR status were permitted, including those where the wind farm's entire capacity was covered by certain transmission services. BCWF explains that the transmission-services exemption from DIR rules resulted from a MISO study of wind resources with Transmission Services to determine whether the injection of wind power into the utility grid required the installation of network upgrades to the electrical grid. [Dkt. No. 86 at 12.] Duke chose not obtain these transmission services so BCWF was subject to the DIR rules. [*Id.* at 12-13.]

According to BCWF, Duke also had the ability to designate the wind farm as "self-scheduled," which allows it to operate as it did under the IR rules. [Dkt. No. 86 at 13-14.] John Swez, testifying on behalf of Duke, attempted to explain during his deposition:

> The truest exact nature of what it means in MISO is, is that you can call a unit a self-scheduled unit, and MISO considers that unit fixed at its offer price, similar to the way that Duke Energy offered Benton County before DIR was essentially as a self-scheduled unit. Which you can accomplish the same thing by making an offer, a commit status offer of must run, and having the minimum, a maximum load equal to each other. That's basically a self-scheduled unit.

[14] Judah L. Rose is an expert hired by Duke who authored an expert report dated October 31, 2014 which was submitted by Duke.

[15] BCWF maintains that Duke "made sure BCWF registered as a DIR," in fact, insisted that BCWF register as a DIR, because Duke did not want BCWF to become a behind-the-meter generator to avoid DIR status. [Dkt. No. 86 at 10.] BCWF claims that "Duke specifically asked MISO to send a letter 'on MISO stationery' stating that BCWF did not qualify for an exemption from DIR rules (including the exemption that would have been available had Duke obtained transmission services as it had agreed to do in the PPA)." [*Id.* (citing Ex. R).] That characterization, however, is not at all what Exhibit R states. Exhibit R, as submitted by BCWF, is an email communication initiated by Diane Jenner of Duke with the subject line, "Evaluation of Whether Benton County Wind Must Become a DIR," in which she asks: "Can we please get this evaluation in writing on MISO stationery? Thanks." [Dkt. No. 60-18.] Ms. Jenner's email neither suggests an answer nor encourages MISO to reach a certain conclusion.

[*Id.* at 14 (citing Exhibit KK, Swez 30(b)(6) Dep. at 180).] This passage is far from clear, but it is not disputed that Duke did not designate BCWF as a self-scheduled unit. [*Id.* (citing Swez Dep. at 181-82).]

Duke asserts that "MISO required BCWF to register as a DIR and did not list 'self-scheduling' as an exemption to the DIR requirements." [Dkt. No. 92-1 at 5-6.] Duke additionally notes that facilities that were exempt from DIR were typically in service prior to April 1, 2005 – a date not applicable to BCWF. [*Id.* at 4.] Duke notes that the parties are in agreement that none of the DIR exemptions applied to BCWF. [*Id.* (citing Dkt. 79-2 at 5, April 16, 2012 letter from Marc Keyser to Diane Jenner[16]).] According to Duke, BCWF "failed to obtain 100% Network Resource Interconnection Service, which would have exempted the Wind Farm from the DIR rules." [*See id.* at 5.]

F. Duke's Performance Under the PPA.

As a preliminary matter, BCWF admits that Duke has always paid BCWF the contract price for energy delivered to the Point of Metering. [Dkt. No. 55-1 at 11 (citing Eisen Dep. 82:13-23; Shanker Dep. 119:9-15).] On this matter, there is no dispute.

1. Problems Arising from Negative LMPs prior to the March 1, 2013 Reclassification of Wind Power as DIR.

Prior to wind energy's reclassification as DIR in early 2012, Duke and BCWF separately reached out to MISO to learn more about the DIR process, including details relating to curtailments. [Dkt. No. 82-1 at 6.] In March 2012, Duke questioned why MISO

[16] Both Marc Keyser and Diane Jenner are Duke employees. Neither party explains their precise positions or titles with Duke.

was not curtailing the Wind Farm at that time. Duke employee John Swez noted in a March 21, 2012 email communication that before March 2012, MISO curtailed the Wind Farm quite often even when LMPs were positive. [Ex. 23 to Jenner Dep.] However, when LMPs became negative in March, MISO appeared to reduce the number of curtailments for a period of time and did not increase the frequency or size of curtailments at that time. Thus, Duke inquired of MISO in an effort to understand MISO's process for handling curtailments. Ms. Jenner explained that Duke was "making MISO aware that there were significant negative LMPs at Benton County Wind Farm, and MISO didn't seem to be doing anything to take care of the significant LMPs there." [Dkt. No. 82-1 at 7 (citing Supp. App. 3, Jenner Dep. 178:12-16).]

On February 28, 2012, Mr. Swez sent an email to his Duke co-workers recommending various solutions for dealing with negative LPMs:

Proposal:

- Once Duke sees DA LMP's clear negative and has reasonable belief that they will clear negative for the next day, Duke will be able to curtail output from the wind farm for the next day.
- Once curtailed, Benton County will turn off the wind farm on that day.
- Payment will be made from Duke to Benton County based on the day-ahead generation forecast.*
  - Accounting will need to be involved, since payment will now be made for MWhrs not produced. This is a paradigm shift from the current accounting.
- Curtailment will continue until Duke believes congestion has cleared (as witnessed by day-ahead LMP)
- Once Duke ends curtailment, unit will begin generating again and payment for "unproduced" generation will cease.

. . .

- Note – this risk was recognized when we signed this contract. However, what has worked for DEI for the past few years was the fact that MISO curtailed the output when prices turned negative. For some reason, MISO appears to have ended this practice, at least temporally.

[Dkt. No. 61-9.] A few weeks later, on March 14, 2012, Mr. Swez sent another email to his co-workers explaining ways to address the negative LMPs. Mr. Swez's email included a memorandum that stated, in part:

> During March, 2012, day ahead LMP at Benton County began clearing negative, at times as low as -$50/MWhr during some hours. This means that Duke Energy Indiana is selling energy from the Benton County facility at negative (i.e. paying to generate). Due to the nature of the PPA, DEI pays the fixed contract price to Benton County LLC and receives revenue from MISO via payments from LMP. Due to the fact that LMP's began to clear negative, DEI has an interest to curtail the output of the generator and just pay Benton County for the wind generation that was never generated. This will save DEI money by avoiding selling at negative LMP.

[Dkt. No. 61-10.]

Duke did not pursue an amendment to the PPA to allow it to curtail BCWF's output when MISO set negative LMPs. On March 21, 2012, Duke employee, Diane Jenner, addressed her concern and confusion over MISO's failure to manually curtail BCWF's energy generation. In her email to Duke co-workers, Ms. Jenner stated:

From: Jenner, Diane L
Sent: Wednesday, March 21, 2012 9:35 AM
To: Neal, Kevin W; Swez, John; Kirschner, Ed; Hils, Doug
Cc: FERC Compliance@duke-energy.com
Subject: Benton County Negative LMP Issue
Importance: High

I just sat through a MISO presentation at the Reliability Subcommittee (see attachment) that implies that MISO is still doing manual curtailments of wind that is not DIR yet (at least they did so as recently as February). We need to find out from MISO why they have discontinued this practice for Benton County Wind Farm (which would fix our current negative LMP issue in the short term). My question is, and being mindful of the mixed group on this e-mail, who is the right person to contact MISO to find out why they are NOT doing manual curtailments at Benton County during March?

[Dkt. No. 60-22.] On March 27, 2012, after learning that MISO had curtailed BCWF to zero output, Ms. Jenner sent an email to Ron Snead (also a Duke employee) stating: "FYI-Maybe our questions are getting some traction." [Dkt. No. 60-23.] BCWF scheduled its own meeting with MISO in March 2012 to inquire regarding MISO's curtailment process generally and curtailments specifically related to the Wind Farm. [Dkt. No. 82-1 at 6, 21 (citing McGraw Dep. at 227-29, Ex. 18).]

By the spring of 2012, Duke employees were considering whether there was anything they "could do to limit the amount of money that [Duke] customers were paying as a result of those negative LMPs." [Jenner Dep. at 128-29.] In an email exchange between Ms. Jenner and Mr. Neal, dated March 28, 2012, Ms. Jenner stated that she "thought [Duke wasn't] going to amend [the PPA] for curtailment rights but instead deal with thru offers." [Dkt. No. 60-25.] Mr. Neal responded, "That is my preference but the Operating Guidelines cannot supersede the Agreement. If the Operating Agreement says DEI cannot curtail then we would have to amend that statement." [*Id.*] Ms. Jenner responded that she "didn't think [Duke was] going to ask to curtail but continue to have MISO do it thru offer prices." [*Id.*] At her deposition, Ms. Jenner stated that "at this point in time, I believe we were thinking that the offer price could be used to mitigate negative LMPs at [BCWF]." [Dkt. No. 60-24 (Jenner Dep. at 209).] Ms. Jenner also stated that she and her colleagues understood that if Duke submitted an offer price of zero dollars, BCWF would receive an order from MISO to reduce output whenever LMPs were negative. [*Id.* at 130-31, 12-19.]

In response to data requests from the Indiana Utility Regulatory Commission ("IURC") regarding costs incurred at the Wind Farm, Duke noted in August 2012 that the DIR process might alleviate the "negative revenues" Duke was paying to MISO:

> In addition, assuming BCWF becomes a Dispatchable Intermittent Resource ("DIR") under MISO's rules by the March 1, 2013 date, the Company believes that the DIR construct will help alleviate the negative LMP situation at BCWF. (Supp. App. 6, Swez Dep. 240:3-12; Supp. App. 12, Swez Dep. Ex. 20, Response to SDI Data Request 4.8, IURC Cause No. 38707 FAC 93.)

[Dkt. No. 82-1 at 7.][17]

2. Duke's Offers to MISO.

Since MISO's DIR rules took effect on March 1, 2013, Duke, in its role as the Market Participant, has offered a price of $0/MWh for electrical output from the BCWF. [Dkt. No. 55-1 at 12-13.] Duke's $0/MWh offer reflects Duke's willingness to pay BCWF the PPA price, if MISO accepts the $0/MWh offer, but Duke is not willing to pay negative LMPs for the power. [*Id.*] After Duke communicates its offers, MISO decides whether to issue dispatch down signals. [*Id.* at 16 (citing Shanker Dep. at 243:6-15).] As explained above, MISO is "running the market and clearing the price" and is the "traffic cop" to make sure that the deliveries of generated power do not cause problems in the system. [*Id.* at 17 (citing Eisen Dep. at 49:17-22, 141:7-9).]

[17] Although BCWF suggests that Duke's consideration of an amendment to the PPA and its questions to MISO are an indication of a breach of the PPA or a finding that Duke's offers to MISO under the DIR classification were unreasonable, we disagree. These facts do not demonstrate a nefarious purpose on the part of Duke or an effort to circumvent the PPA or to collude with MISO to avoid its contractual obligations.

In developing an offer price, Duke engaged in internal discussions among several employees, including Ms. Jenner, Mr. Neal, and Mr. Swez, and based on their careful consideration in balancing a variety of factors, Duke determined that a zero dollar offer to MISO was appropriate and justifiable. Duke typically sets its offer price based on its variable costs to run a unit – in this case, the PPA price. [Neal Dep. at 139.] As John Swez, Duke's Director, Generation Dispatch and Operations, testified:

> I believe zero strikes the best balance between our customers and the PPA, meaning that if it was out of purely doing this to benefit my customers, I would offer $52 a megawatt hour, and purely to benefit Benton County Wind Farm would be some max negative offer. I believe zero strikes the best balance and zero represents what to me makes sense, in that if you are going to generate electricity, you know, you would think that you would have a positive value for that energy to be – to be paid – to be received. So if you're going to sell your product, you would think you will get a positive, you know, greater than zero amount.

[Swez Dep. 215.] Kevin Neal explained that Duke's obligation was to "manage [the] MISO costs through prudent utility practice pursuant to our obligation to our ratepayers." [Neal Dep. 195.] Balancing Duke's obligations to its ratepayers and its contractual obligations to BCWF, Mr. Neal concluded that "zero was the most appropriate offer price." [*Id*. 173.]

Both BCWF's expert witness, Dr. Shanker, and James Eisen, Vice President of BCWF, have opined that Duke is required under the PPA § 6.2 to submit the maximum negative offer price of negative $500/MWh to satisfy its obligation to reasonably cooperate with BCWF. [Shanker Dep. at 210 ("If Duke has a take obligation to buy the output of the plant, it shouldn't impede the output of the plant and should offer the lowest possible rate."); Dkt. No. 55-1 at 13 (citing Shanker Dep. at 236 ("Duke's obligations under the

PPA warrant Duke's submission of the lowest allowable bid under the MISO tariff (negative $500/Mwh).")).][18] Mr. Eisen testified with respect to Duke's obligation under the PPA to reasonably cooperate, as follows:

> Q . . . Is it Benton County's position that in order for the parties to reasonably cooperate with each other, Duke is required to submit the maximum negative bid to MISO?
>
> A I think – yes. With respect to this – this provision, yes, I would – that's my interpretation of that.
>
> Q So to reverse that, *if Duke submits any bid other than the maximum negative offer, then Benton County would argue that is not reasonable cooperation under this contract*?
>
> A *Correct.*

[Eisen Dep. 153:11-22 (emphasis added).] On the other hand, if Duke had no take-or-pay obligations, then, according to Mr. Shanker, Duke's offers would be equal to "the contract price." [Dkt. No. 55-1 at 14 (citing Shanker Dep. at 209).]

Since March 1, 2013, there have been times when MISO accepted Duke's $0/MWh offer. However, when the LMPs at BCWF's location fall below Duke's offer price, MISO typically opts to reduce BCWF's output. As a result, since March 1, 2013, BCWF's output has declined by approximately 50%.

[18] As BCWF's expert Dr. Shanker notes, generators may choose to continue to generate power when LMPs are below zero for a variety of reasons. [Dkt. 56-3, Shanker Report at 21-22, ¶¶ 34-35.] For example, a generator may continue to operate when it is receiving payments, such as Production Tax Credits ("PTCs"), from the federal or local government that exceed the marginal cost of production from a facility. "When this happens, these outside payments make it profitable to sell at a negative price in order to gain the federal or state credit." [*Id*. ¶ 35.] In the case of the Wind Farm, Duke does not receive any PTCs, so it is not profitable for Duke to sell at a negative price and any losses must be borne by Duke and/or passed on to Duke's ratepayers.

During the time period between March 1, 2014 and September 30, 2014, the LMP was greater than zero 80% of the time and no dispatch down occurred over 62% of the time. During the time when Duke submitted its zero dollar offers, MISO cleared the Wind Farm approximately 59% of the time. The Wind Farm generated a minimum amount of power. When this power was produced during a time when MISO had set negative LMPs, Duke paid MISO the negative LMP despite Duke's offer. Through March 31, 2014, the total amount Duke paid in negative LMPs during the DIR process, when it was making zero dollar offers that did not clear, was $666,324.93. [Swez Aff. at ¶ 12.]

G. The Pending Litigation.

Following the adoption of the DIR classification by MISO for wind energy and Duke's submission of $0/MWh bids, BCWF's electrical output and revenues have continually declined, bringing the company to the verge of default on its debt. BCWF blames Duke's breach of its obligations under to the PPA and the JESOA for BCWF's declining revenues. On December 16, 2013, BCWF filed the Complaint in this action in which BCWF alleges that Duke was obligated under the parties' agreements not to curtail the Wind Farm's output, to procure the necessary transmission services, and to pay liquidated damages when it failed to accept BCWF's electric power. BCWF contends that, when Duke made $0/MWh offers to MISO and failed to procure transmission services, Duke breached the parties' agreements and further breached those agreements when it failed to pay BCWF liquidated damages which resulted in BCWF's losses. Duke denies having breached the PPA or JESOA and any liability for BCWF's losses as a result of the wind energy's DIR classification.

Summary Judgment Standard

Summary judgment is appropriate when the record before the Court establishes that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding whether genuine issues of material fact exist, the Court construes all facts in a light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. *Id*. at 255. When, as in this case, the parties have filed cross-motions for summary judgment, "'we construe the evidence and all reasonable inferences in favor of the party against whom the motion under consideration is made.'" *Cavin v. Home Loan Center, Inc.*, 531 F.3d 526, 528-29 (7th Cir. 2008) (quoting *Premcor USA v. Am. Home Assurance Co.*, 400 F.3d 523, 526 (7th Cir. 2005)). However, neither the "mere existence of some alleged factual dispute between the parties," nor the existence of "some metaphysical doubt as to the material facts," will defeat a motion for summary judgment. *Michas v. Health Cost Controls of Ill., Inc.*, 209 F.3d 687, 692 (7th Cir. 2000) (internal citations omitted).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The party seeking summary judgment on a claim on which the non-moving party bears the

burden of proof at trial may discharge its burden by showing an absence of evidence to support the non-moving party's case. *Id*. at 325; *Doe v. R.R. Donnelley & Sons, Co.*, 42 F.3d 439, 443 (7th Cir. 1994). Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). But, if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to establish his or her case, summary judgment is not only appropriate, but mandated. *Celotex*, 477 U.S. at 322*; Ziliak v. AstraZeneca LP*, 324 F.3d 518, 520 (7th Cir. 2003).

Courts are often confronted with cross-motions for summary judgment, as is the case here, because Rules 56(a) and (b) of the Federal Rules of Civil Procedure allow both plaintiffs and defendants to move for such relief. "'In such situations, courts must consider each party's motion individually to determine if that party has satisfied the summary judgment standard.'" *Midwest Title Loans, Inc. v. Ripley*, 616 F. Supp. 2d 897, 902 (S.D. Ind. 2009) (quoting *Kohl v. Ass'n. of Trial Lawyers of Am.*, 183 F.R.D. 475 (D.Md.1998)). "When evaluating each side's motion the court simply 'construe[s] all inferences in favor of the party against whom the motion under consideration is made.'" *Morgan v. Fennimore*, Cause No. 1:09-cv-399-SEB-TAB, 2010 WL 5057418, at *1 (S.D. Ind. Dec. 3, 2010) (quoting *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 561–62 (7th Cir. 2002) (quoting *Hendricks–Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir.1998))).

Analysis

A. Summary of the Parties' Dispute.

The dispute between the parties in this litigation boils down to a determination of their existing contractual relationship in view of significant changes in the manner of wind energy production and distribution that have occurred following the execution of their long-term agreement. When the parties entered into the PPA (and commenced performing their obligations thereunder), BCWF was the sole wind farm in the Benton County (Indiana) area. As previously noted, after BCWF began generating energy for Duke's purchase, several additional wind farms entered the market area, which ultimately caused electrical transmission lines to be congested and gave rise to the need for manual generation curtailments. For a period of time, because the Wind Farm was a "must run" facility, Duke suffered a negative fiscal impact of the oversupply of energy based on the negative LMPs. However, after wind energy was re-classified as DIR, the negative impact of the additional wind energy generation shifted to BCWF who was faced with curtailment orders from MISO, requiring it to decrease its output by approximately 41%.

Two intertwining legal issues have arisen under the PPA as a result: First, does the PPA's requirement that Duke "reasonably cooperate" with BCWF when bidding power require Duke to perform its obligations in such a way that its bids result in BCWF's maximum production of electricity? Second, when Duke makes bids to MISO that result in the curtailment of BCWF's production, is Duke indirectly violating the PPA's prohibition against Duke's curtailment of BCWF's output? The answers to these questions turn on whether the PPA is properly construed as an output contract or a take-or-pay

contract, the latter requiring Duke to purchase all the power BCWF was (is) capable of producing.

BCWF seeks by this litigation to compel Duke to purchase all the power BCWF is able to generate, thereby forcing Duke to make aggressive bids to MISO in order to maximize BCWF's output and the benefits of its bargain under the PPA. BCWF summarizes its position in this way: "BCWF contends that the PPA requires Duke to either: (i) do what is necessary to ensure that BCWF can generate power (whether through its offer prices, or by procuring Transmission Services, or by self-scheduling the wind farm); or (ii) if it chooses none of the above, pay BCWF liquidated damages." [Dkt. No. 86 at 25.] BCWF contends that Duke is improperly "shift[ing] the market risk allocation agreed to when the fixed price contract was negotiated." [*Id.* at 29 (citing *N. Ind. Publ. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986)) ("As we have already noted, a fixed-price contract is an explicit assignment of the risk of market price increases to the seller and the risk of market price decreases to the buyer, and the assignment of the latter risk to the buyer is even clearer where, as in this case, the contract places a floor under [the] price but allows for escalation.").]

Duke, in response, interprets the PPA to provide a legitimate means of shielding itself from the effect of excessive negative LMPs resulting from the congested wind energy transmission lines. Duke agreed in the PPA to pay for a specific amount of wind energy generated by BCWF (the Electrical Output) measured at a specific point (the Point of Metering). Consequently, if Duke's reasonable offers to MISO are not accepted and MISO curtails BCWF's generation, Duke maintains that it is not obligated to pay for deemed

generation – i.e., generation that does not meet the definition of Electrical Output. So long as Duke purchases all of BCWF's "Electrical Output," Duke is not liable to BCWF for liquidated damages. Since the PPA requires Duke to purchase only the energy that reaches the Point of Metering, which it has consistently done, it has paid for all of the power it was obligated to purchase under the PPA.

Neither party argues that performance under the PPA is impractical or that the purpose of the PPA has been frustrated by the changing wind energy landscape. Nor does either party contend that the PPA is void or voidable. In fact, neither party seeks to revise or amend the contract.[19] Despite their disagreement over the proper interpretation of the PPA, both parties seek to affirm what they characterize as their unambiguous agreement so they can pursue their rights thereunder.

We conclude, as explained in detail below, that Duke did not breach its agreement under the PPA or the JESOA. The parties agreed that Duke would purchase "Electrical Output" delivered to the "Point of Metering," which Duke has done; and that Duke would make reasonable offers to MISO, which Duke has done; and that Duke would not curtail BCWF's production, which Duke has not done. The difficulty in interpreting and enforcing this agreement stems primarily from the fact that, in major respects, events have passed it by. The parties' contract no longer mirrors the parties' commercial/economic needs and

[19] Duke's argument that "an unanticipated benefit to one party is not a sufficient ground for [the court] to rewrite the contract" is well-taken although not entirely relevant here. [*See* Dkt. No. 82-1 at 15-16) (citing *Caisse Nationale de Credit Agricole v. CBI Indus, Inc.*, 90 F.3d 1264, 1274 (7th Cir. 1996)).] BCWF is not attempting to rewrite the contract; rather, it asks us to apply the PPA in an advantageous way to BCWF so it can avoid the contractually unanticipated reduction in production.

expectations or the realities of the much expanded and more complex marketplace. For the Court to conclude that the PPA is an output contract requiring Duke to purchase all BCWF's output without regard to the effect of negative LMPs or MISO's curtailment orders, we would need to rely on extrinsic evidence. Because the parties have stipulated that the PPA is unambiguous, we are constrained to apply the plain terms of the contract, giving no consideration to the abundance of extrinsic evidence the parties have adduced in briefing the pending motions.

B. Contract Application and Interpretation.

"Where there are no genuine issues of material fact, contract interpretation is particularly well-suited for summary judgment." *Allstate Ins. Co. v. Tozer*, 392 F.3d 950, 952 (7th Cir. 2004); *see also Eckart v. Davis*, 631 N.E.2d 494, 497 (Ind. Ct. App. 1994) (holding that the interpretation or legal effect of a contract is a question of law to be determined by the court).[20] "A plaintiff moving for partial summary judgment on the issue of liability in a breach of contract claim initially must 'show' only that there is no genuine issue of fact regarding the liability elements of its claim." *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164, 1167 (S.D. Ind. 1992). A defendant is liable for breach of contract where the plaintiff establishes that: "(1) a contract existed; (2) the defendant breached the contract; and (3) the plaintiff suffered damage resulting from the breach." *Nikish Software Corp. v. Manatron*, 801 F. Supp. 2d 791, 800 (S.D. Ind. 2011). Conversely, a defendant is

[20] The contracts at issue contain a choice of law provision mandating that Indiana law applies to any dispute between the parties. [PPA § 17.8; JESOA § 8.8.] Thus, we have applied Indiana law in resolving the dispute before us.

entitled succeed on summary judgment where it demonstrates that plaintiff cannot prove at least one essential element of its case. *See, e.g., Moss v. Crosman Corp.*, 136 F.3d 1169, 1175 (7th Cir. 1998) ("We therefore agree with the district court that [plaintiff] cannot prove one essential element of their case . . . and that in turn makes summary judgment for the defendants appropriate.").

The primary purpose of contract construction is to determine the "mutual intention of the parties." *Hutchinson. Shockey, Erley & Co. v. Evansville–Vanderburgh Cty. Bldg. Auth.*, 644 N.E.2d 1228, 1231 (Ind. 1994). Such intent is discerned as of the time the contract was made and by considering the language used by the parties to express their rights and duties. *INB Banking Co. v. Opportunity Options, Inc.*, 598 N.E.2d 580, 582 (Ind. Ct. App. 1992). The first step in discovering intent is to gather meaning from the "four corners" of the written document. *Kutche Chevrolet-Oldsmobile-Pontiac-Buick, Inc. v. Anderson Bank. Co.*, 597 N.E.2d 1307, 1309 (Ind. Ct. App. 1992). Courts must give words their plain and usual meaning, unless review of the contract as a whole reveals some other meaning was intended. *INB Banking Co.*, 598 N.E.2d at 582. We may not construe unambiguous language to give it anything other than its clear, obvious meaning, and we may not add provisions to a contract that were not placed there by the parties. *Simon Prop. Group, L.P. v. Michigan Sporting Goods Distrib., Inc.*, 837 N.E.2d 1058, 1070 (Ind. Ct. App. 2005) (citing *Art Country Squire, L.L.C. v. Inland Mortg. Corp.*, 745 N.E.2d 885, 889 (Ind. Ct. App. 2001)). "Absent a provision to the contrary, a contracting party takes the risk of most supervening changes in circumstances, even though they upset basic assumptions and unexpectedly affect the agreed exchange of performances, unless there is

such extreme hardship to justify relief due to impracticability of performance or frustration of purpose." 27 Williston on Contracts § 70:77 (4th ed.) (citing Restatement (Second) of Contracts § 154(a)).

As previously noted, the parties agree that the contracts at issue (the PPA and JESOA) are not ambiguous and that the contract language is clear. [Dkt. No. 63 (BCWF Opening Br. at 5, n.5) (citing *Acuity Mu. Ins. Co. v. T&R Pavement Markings, Inc.*, No. 1:10-cv-00239-SEB, 2011 WL 2472246, at *4, *6 (S.D. Ind. June 21, 2011) ("[B]ecause the terms of the PPA and JESOA are clear and unambiguous, the Court need not consider extrinsic evidence to grant this motion."); Dkt. No. 102 (BCWF Surreply at 3-4) ("BCWF believes the Court can and should decide summary judgment based on the express terms of the parties' contractual agreements . . . ," citing Indiana law that custom and practice evidence is extrinsic to the parties' agreement); Dkt. No. 55-1 (Duke Opening Br. at 19) ("Where the terms of a contract are clear and unambiguous, they are conclusive and the court will not construe the contract or consider extrinsic evidence but [will] merely apply the contractual provisions.") (citing *Eckart v. Davis*, 631 N.E.2d 494, 497 (Ind. Ct. App. 1994)); Dkt. No. 82-1 (Duke Resp. Br. at 12) ("Because BCWF is correct that the terms of the PPA and JESOA are clear and unambiguous, it follows that witness testimony interpreting the terms of agreements is unnecessary . . . ."); Dkt. No. 92-1 (Duke Reply at 10) ("Dr. Shanker provided no support for this assertion, but it is irrelevant since the Court need only look at the PPA to conclude that Duke is obligated to pay only for the power delivered.").]

Where the terms of a contract are clear and unambiguous, they are conclusive and the court will not construe the contract or consider extrinsic evidence but will merely apply the contractual provisions. *Eckart*, 631 N.E.2d at 497. Witness testimony regarding interpretation of a contract is not to be permitted because it could invade the province of the court. *Landmark Builders, Inc. v. Cottages of Anderson, LLP*, No. IP 01-C-1592-C-M/S, 2003 WL 21508118, *2 (S.D. Ind. May 20, 2003); *see also U.S. v. Lupton*, 620 F.3d 790, 799-800 (7th Cir. 2010) ("The court was correct in noting that the meaning of statutes, regulations, and contract terms is a 'subject for the court, not for testimonial experts. The only legal expert in a federal courtroom is the judge.").

Despite their agreement that the contract is clear and unambiguous, both parties nonetheless submitted substantial extrinsic evidence regarding the meaning of the contract and the parties' contractual intent – none of which may we properly consider if the contract is truly unambiguous. For example, Duke cites BCWF's witnesses' interpretation of the PPA on the issue of whether the contract is to be considered a "take or pay" contract. [Dkt. No. 55-1 at 9-10; Dkt. No. 92-1 at 3 (refuting BCWF's characterizations of Duke's witnesses and highlighting BCWF's expert's testimony); Dkt. No. 55-1 at 23; Dkt. No. 82-1 at 12-13.] BCWF details statements from Duke's representatives that, according to BCWF, "confirm" that the PPA is a "take or pay" contract for a "must run facility" [Dkt. No. 86 at 7-8; Dkt. No. 63 at 8-9; Dkt. No. 98 at 3; *see generally* Dkt. No. 86 at 16-17], which statements Duke predictably attempts to explain away [Dkt. No. 82-1 at 12-13; Dkt. No. 92-1 at 8]. Both parties have also adduced expert witness opinion as to the meaning of "take or pay" contracts, and, no surprise, the experts have proffered conflicting opinions.

BCWF references statements made by Duke during the IURC approval when Duke sought to recover from its customers the payments it had made based on the PPC. [Dkt. No. 63 at 8-9.][21] Duke has supplemented and explained those statements in its response. [Dkt. No. 82-1 at 5.] Further, BCWF cites communications among Duke employees relating to "Behind the Meter Generation" (BTMG) designations that relate to adoption of the new DIR rules as well as Duke's alleged desire that BCWF *not* be designated as BTMG. [Dkt. No. 63 at 15.] Duke outlined possible ways in which BCWF might have mitigated its damages [Dkt. No. 82-1 at 10; Dkt. No. 92-1 at 5], while BCWF explained that it contributed $4 million to upgrade transmission lines [Dkt. 63 at 16]. None of these facts or theories are relevant, however, given the parties' stipulation that the contracts at issue are unambiguous. We simply are not permitted to consider this evidence in applying the unambiguous contract terms to the parties' dispute.[22]

[21] Indeed, BCWF cites the IURC's December 6, 2006 order approving the PPA as support for its position that Duke could recover its negative LMP costs from its customers. [Dkt. No. 63 at 9.] Duke responds that to recover negative LMPs from its customers, Duke must go through separate IURC proceedings to demonstrate its prudent utility practices to manage costs. [Dkt. No. 82-1 at 4.]

[22] Duke seeks "to strike the extrinsic evidence submitted by BCWF because extrinsic and parole evidence is inadmissible to interpret an unambiguous contract." [Dkt. No. 82-1 at 12, n.4; *see also* Dkt. No. 92-1 at 10, n.3 ("As it did in its Response Brief, Duke moves to strike BCWF's extrinsic evidence.").] We deny Duke's request primarily on procedural grounds. Motions to strike are disfavored. *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989). Additionally, Southern District of Indiana Local Rule 7-1(a) requires that all motions be filed separately. "A motion must not be contained within a brief, response, or reply to a previously filed motion, unless ordered by the court." S.D. Ind. L.R. 7-1(a). Moreover, Local Rule 56-1(i) provides that "[t]he court disfavors collateral motions – such as motions to strike – in the summary judgment process. Any dispute over the admissibility or effect of evidence must be raised through an objection within a party's brief." While we will not entertain Duke's footnote motion, its objection is well taken. Both parties have submitted parole evidence in support of their motions

C. The PPA is Not a Take-or-Pay Contract that Requires Duke to Pay for Deemed Generation.

The parties extensively debate whether the PPA is a so-called "take-or-pay contract," i.e., an agreement by which Duke is required to take all of the power that *has been or could have been* generated by BCWF or otherwise pay for all of the power that *could have been* generated by BCWF.[23] BCWF defines a "take or pay" contract as one which "require[s] a buyer to purchase or pay for all of the seller's output, even when it is unprofitable to do so or the buyer does not have use for the seller's commodity." [Dkt. No. 86 at 16.] The plain language of the PPA establishes that it is not a take-or-pay contract in the sense that Duke must pay for "deemed generation;" it is, instead, a take-or-pay contract in the sense that Duke must pay for all of BCWF's actually generated and delivered Electrical Output.

1. PPA Defined Terms.

The expressly-defined terms in the PPA establish that Duke is obligated to accept and pay for only the Electrical Output delivered to the Point of Metering. Duke's

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for summary judgment while arguing that the PPA and JESOA are unambiguous. We have disregarded all extrinsic evidence in applying the plain language of the contracts at issue.

[23] The record reflects that Duke representatives often referred to the PPA as a "take-or-pay contract." [*See, e.g.* Dkt. No. 60-17, Ex. Q (E-mail from Swez, Apr. 27, 2008) ("Due to the fact that this contract is a 'take or pay' contract, we are not able to offer the unit with any sort of 'dispatchability'. I.E., [sic] when the unit is out of the money (when the unit LMP is less that [sic] about $45/MWhr currently), we still must take all generation.").]. Duke has explained this and other testimony to mean that "[Duke] take[s] the output of energy as delivered by – as received from Benton County and we pay Benton County for that energy and sell it to MISO." [Dkt. No. 80 at 6 (citing Swez Dep. at 123).] The parties' characterizations of the contract are ultimately irrelevant, however, because our task is simply to apply the unambiguous terms of the agreement without consideration of extrinsic evidence.

obligations to accept and purchase wind energy from BCWF are repeatedly described in the PPA by the defined term "Electrical Output." The PPA defines "Electrical Output" as the "entire electric energy output of the Plant delivered to the Point of Metering." [PPA at 4.] The parties defined "Point of Metering" as the "interconnection point with NIPSCO and/or RTO." [*Id.* at 6.] As discussed *supra*, nowhere in the PPA is Electrical Output defined to include "deemed generation."

Section 4.1, for example, requires Duke to "accept and purchase from the Seller (a) Electrical Output of the Plant," and Section 4.4 requires Duke to pay BCWF "for the Electrical Output and Credits at a price per MWh of Electrical Output delivered to Buyer at the Point of Metering." Section 4.5 reiterates that "[a]ll Electrical Output will be measured at the Point of Metering," and Section 4.6 provides remedies if Duke "fails to accept delivery of all of the Electrical Output at the Point of Metering." We cannot ignore or attempt to explain away the clear, consistent, and repeated use of these PPA terms, "Electrical Output" and "Point of Metering," so as to revise Duke's purchase obligations to be a "deemed generation" requirement as BCWF requests. The PPA is quite clear that Duke's obligation to purchase generated power is defined in terms of Electrical Output and nothing else.

Although BCWF contends that the PPA requires Duke to purchase all of the wind energy it *could* generate (similar to an output contract), the PPA lacks crucial terms to evidence such an agreement by the parties. Most conspicuously, the PPA lacks terms to explain or impose a method of calculating deemed generation, nor does it provide a minimum amount of energy for which Duke was obligated to compensate BCWF under

the contract. *See Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1292 (7th Cir. 1985) ("Such [take or pay] clauses require the customer, in consideration of the pipeline's extending its line to his premises, to take a certain amount of gas at a specified price – and if he fails to take it to pay the full price anyway."); *Midcon Corp. v. Freeport-McMoran, Inc.*, 625 F. Supp. 1475 (N.D. Ill. 1986) ("Under a take-or-pay contract, the pipeline company must take a certain minimum quantity of gas per year, or else be liable for the difference between that quantity and the quantity actually taken."). The parties have not included terms in their agreements relating to a minimum quantity of energy generation or an equation to calculate deemed generation for which Duke is liable.[24] Further, the parties omitted any agreement requiring Duke to take all of the maximum-rated capacity of BCWF's production. The parties instead merely agreed that Duke was obligated to accept and pay for "Electrical Output," which was defined in the PPA as the energy generation measured at the Point of Metering.

2. PPA Section 4.6.

BCWF urges us to interpret the PPA in a way that imposes a requirement on Duke to pay for deemed generation based specifically on Section 4.6 of the PPA, which relates to remedies for Buyer's breach and liquidated damages. Section 4.6 provides:

[24] BCWF argues that Section 15.4 of the PPA provides a method for calculating damages for deemed generation. Section 15.4 relates to termination of the PPA, not a breach of the PPA. [PPA § 15.4 ("Damages Payable in the Event of Termination" and specifically provides "in the case of a termination by Seller due to an Event of Default by Buyer, ...").] Section 15.4 provides that Electrical Output is calculated using projections based on historical performance or an independent wind resource consultant depending on the timing of the termination. No evidence in the record demonstrates that either party has terminated or seeks to terminate the PPA.

(a) In the event that the Buyer fails to accept delivery of all of the Electrical Output at the Point of Metering, whether due to Buyer's failure to obtain Transmission Service (if applicable) or for any reason other than Seller's failure to perform, an Emergency Condition, a Force Majeure Event that prevents such acceptance pursuant to Article 14 or the proper exercise by Buyer of its suspension rights pursuant to Section 15.2(a), then Buyer shall pay to Seller as liquidated damages an amount equal to the positive difference, if any, between (i) (x) the amount that would have been payable by Buyer to Seller hereunder if such Electrical Output had been accepted by Buyer plus (y) additional transmission charges, if any, reasonably incurred by Seller in delivering the Electrical Output to such third party purchaser and (ii) the net amount, if any, that Seller, using Commercially Reasonable Efforts, actually realizes through remarketing of such Electrical Output to Persons other than the Buyer, *provided* that in the event Seller is unable to remarket such Electrical Output, then the net amount described in clause (ii) shall be $0 and the damages owed by Buyer shall also include the then-current amount of the PTC[25] (on a per MWh basis) on an After-Tax Basis for each MWh of such Electrical Output that Seller was unable to remarket The damages provided in this Section 4.6 shall be the sole and exclusive remedy of Seller for any failure of Buyer to accept delivery of Electrical Output that it is required to accept thereunder.

[PPA at § 4.6.] The plain language of § 4.6 provides that this section is applicable only if and when Duke fails to accept delivery of all Electrical Output at the Point of Metering.

BCWF advances three arguments based on Section 4.6 in support of its position that Duke is liable for deemed generation. First, BCWF maintains that power is automatically accepted at the Point of Metering and, as a result, Section 4.6 necessarily refers to deemed generation because Duke cannot refuse to accept power at the Point of Metering. Second, BCWF argues that because it receives PTCs (Production Tax Credits) when it generates electricity, the inclusion of PTCs as damages demonstrates that Section 4.6 is applicable to

[25] "PTC" stands for Production Tax Credit.

deemed generation. Third, because Section 4.6 clearly includes safe harbor provisions for Force Majeure and Emergency Conditions, and those events occur when BCWF cannot produce power, Section 4.6 relates to deemed generation. We find none of these arguments persuasive in deciding whether Duke is obligated to purchase power that is deemed generated.

a. Automatic Acceptance of Power at the Point of Metering.

BCWF maintains that because BCWF-generated electricity "immediately travels through wires at the speed of light, past the Point of Metering, and *into MISO's electrical grid*," Duke cannot prevent generated power from passing the Point of Metering and Duke cannot physically reject (or fail to accept) generated power. [*See* Dkt. No. 86 at 20 (emphasis added).] Stated differently, generated electricity cannot be halted at the Point of Metering awaiting acceptance. Duke agrees that once power is generated, Duke has no way to prevent its flow into the grid. [*See* Dkt. No. 63 at 23 (citing Swez Dep., Neal Dep., and Jenner Dep.).] According to BCWF, because Duke cannot decline to accept generated power, Section 4.6's liquidated damages provision makes sense only if read to refer to damages resulting from instances when BCWF is *prevented* from generating power.

BCWF presses for an interpretation of the PPA that holds Duke liable for deemed generation because, it says, Duke cannot as a practical matter "reject" power at or after the Point of Metering. This interpretation, however, discards the parties' contractually-defined terms, "Electrical Output" and "Point of Metering." These two terms define the measure of power which Duke must accept and compensate BCWF. When read as a whole, the oft-repeated terms in the PPA, "Electrical Output" and "Point of Metering," do not support

BCWF's interpretation. Moreover, BCWF's proposed interpretation is also inconsistent with the remaining portions of Section 4.6.

BCWF's proposed interpretation ignores the provisions of Section 4.6 that provide mechanisms by which BCWF could mitigate its damages by remarketing "Electrical Output" (again, defined as the energy reaching the Point of Metering) to buyers other than Duke. It is clear that the parties envisioned a system by which Duke could fail or refuse to accept power, in which event BCWF could deliver power to another buyer (Vectren, for example) to mitigate its damages resulting from Duke's failure to accept the Electrical Output. [*See* PPA § 4.6 (contemplating BCWF selling Electrical Output to a buyer other than Duke which by its terms relates to actual generated power, not hypothetical deemed generation).] Even if a mistake (mutual or otherwise) informed the PPA language relating to the actual process of electricity flow from BCWF to the grid, because both parties assert that their contract is neither ambiguous nor that it embodies a mistake, any such error would at most render the PPA void or voidable.[26] To the extent a supervening change in circumstances occurred following the execution of the PPA that casts the parties' contractual assumptions in a different light, that risk was assumed by the parties. We are not at liberty to rewrite their agreement to accommodate such a change in circumstance

[26] BCWF reiterates its position that the PPA is not ambiguous, while suggesting that the Court should interpret it in a fashion that "harmonize[s] the contract's provisions." [*See* Dkt. No. 86 at 28.] We need not perform this task (assuming we even grasp how the parties would have us do so) of harmonizing contract provisions since the parties both maintain that the PPA is not ambiguous. Our role here, we repeat, is limited to applying the contract's terms as written.

under the guise of interpreting it, particularly where the contract is not ambiguous. 27 Williston on Contracts § 70:77.

BCWF's proposed reading of Section 4.6 is inconsistent with the explicit terms of the PPA and does not reflect the parties' stated intentions. BCWF's take on this provision ignores the definitions of the terms, "Electrical Output" and "Point of Metering," *and* ignores the parties' agreement that if Duke fails to accept Electrical Output generated by BCWF, BCWF is obligated to mitigate its damages by undertaking to sell the energy to a different buyer.[27] Nothing in Section 4.6 supports an interpretation that the parties intended for Duke to pay BCWF for deemed generation.

b. Production Tax Credits As Liquidated Damages.

BCWF further contends that because the parties included Production Tax Credits as a component of liquidated damages flowing from Buyer's breach, Section 4.6 is properly construed as applicable when BCWF is unable to produce electricity [*See* Dkt. No. 63 at 23.] Because it earns PTCs whenever it generates energy, BCWF contends there is no

[27] We are not persuaded by Duke's argument that it "can fail to accept delivery of Electrical Output by failing to pay for the Electrical Output." [Dkt. No. 82-1 at 27.] In the same way the parties' included the defined terms, "Electrical Output" and "Point of Metering," the parties could have incorporated the term "pay" in Section 4.6, but chose instead to use the term "accept." This is a relevant distinction. Section 4.4 of the PPA relates to Duke's obligations to pay for the power it accepts – a provision that would be superfluous if Section 4.6 is interpreted to refer to Duke's obligation to pay for power as being synonymous with acceptance. Moreover, liquidated damages are "generally enforceable where the nature of the agreement is such that damages for breach would be uncertain, difficult, or impossible to ascertain." *Weinreb v. Fannie Mae*, 993 N.E.2d 223, 232-33 (Ind. Ct. App. 2013). If Duke simply failed to pay for the energy it accepted, liquidated damages would be unnecessary because it would be relatively easy to calculate the loss amount. We are not persuaded that the parties intended liquidated damages to be payable to BCWF when and if Duke failed to pay for power it had accepted from BCWF.

logical explanation for including PTCs as a form/component of liquidated damages unless PTCs are viewed as damages based on deemed generation. [*Id*.]

As Duke notes in response, parties to a contract are free to include a provision in their contract that provides for PTCs to benefit BCWF, even if BCWF might secure PTCs in some other way. The parties may define the terms of their contract, indeed, to award BCWF a "double recovery," if Duke fails to accept power generated by BCWF. *See, e.g. Harris v. Primus*, 450 N.E.2d 80, 84 (Ind. Ct. App. 1983) ("Absent any evidence to show that the amount of damages claimed is unreasonable, such a stipulation for liquidated damages will be acceptable."); *Weinreb*, 993 N.E.2d at 232-33 ("While liquidated damages clauses are ordinarily enforceable, contractual provisions constituting penalties are not. The distinction between a penalty provision and one for liquidated damages is that a penalty is imposed to secure performance of the contract and liquidated damages are to be paid in lieu of performance.") (citations omitted).[28] The inclusion of the liquidated damages provision in the PPA does not imply liability based on Section 4.6 against Duke for deemed generation.

[28] In support of its position, BCWF misquotes Duke's witness. BCWF contends that "[t]here is no dispute that BCWF earns PTCs whenever it generates energy." [Dkt. No. 63 at 23.] What Mr. Swez actually said was:

Q. You don't get PTCs unless you actually generator [sic] electricity; right?

A. That is correct.

[Swez Dep. at 207.] This statement does not establish BCWF's entitlement to receive PTCs *whenever* it generates electricity. While generation is a prerequisite to receiving a PTC, generation may not be the only requirement for getting a PTC, according to this testimony.

c. Force Majeure and Emergency Safe Harbor Provision.

Section 4.6 also provides that Duke is not liable for liquidated damages where its failure to accept energy is the result of a Force Majeure or Emergency Condition. BCWF contends that the Force Majeure and Emergency Conditions in Section 4.6 contemplate situations where BCWF is unable to generate power. Thus, unless Duke is obligated under the PPA to pay for deemed generation, these safe harbor provisions are superfluous. [Dkt. No. 63 at 24.] Stated differently, BCWF contends that if Duke has no obligation to purchase power unless it passes the Point of Metering, no basis exists to warrant these safe harbor provisions.

BCWF's position is premised on its characterization that Article 14 ("Force Majeure") and specifically Section 14.1(a) includes only "situations in which BCWF is unable to generate power." [*See id*.] Contrary to BCWF's interpretation, Section 14.1(a) also references failures of NIPSCO and MISO to install Interconnection Facilities as well as labor strikes (not limited only to BCWF workers) as situations during which Duke would not be liable for liquidated damages if it failed to accept BCWF's generation of power. Duke provides the example of an unexpected failure of a transmission line as an emergency condition in which Duke would not accept power, and for which it would not be liable in liquidated damages. [Dkt. No. 82-1 at 28.] We need not attempt to imagine every possible situation in which a Force Majeure or Emergency Condition might excuse Duke from paying liquidated damages. Suffice to say, there are others in addition to the one advanced

by BCWF. The Force Majeure provisions in Article 14 of the PPA are not superfluous and do not create an obligation for Duke to pay for deemed generation under the PPA.[29]

3. Reasonable Cooperation Requirement.

If the PPA is a take-or-pay contract, as BCWF contends, the contractual requirement that Duke reasonably cooperate with BCWF with respect to bidding power into the MISO grid lacks a purpose. [PPA § 6.2.] As discussed *infra*, BCWF maintains that Duke's obligation under the PPA is to bid an amount which would result in BCWF operating at the maximum level (i.e., not being subject to MISO curtailment orders). If Duke is obligated to purchase all the power that BCWF could ever generate (under a take-or-pay theory), then BCWF's interpretation of Section 6.2 requiring Duke to make maximum bids is at best redundant and at worst contradictory. Under BCWF's theory, Duke is required to pay for deemed generation regardless of whether MISO curtails its production. If true, there is no basis for requiring Duke to reasonably cooperate with BCWF with regard to bids to MISO under Section 6.2.

[29] Duke argues that MISO curtailment orders are Emergency Conditions that prevent liquidated damages under Section 4.6. On its face, the repeated references to MISO's obligation to manage line congestion suggest that it is a routine event, rather than an "emergency." However, Article I of the PPA defines "Emergency Condition" as "a condition where [MISO] order[s] a reduced or curtailed output for reliability purposes in accordance with the Interconnection Agreement." [PPA Art. 1 at 4.] Insufficient evidence as well as a question of fact exist as to whether MISO's routine curtailments were performed for "reliability purposes in accordance with the Interconnection Agreement." [*See, e.g.*, Dkt. No. 63 at 27-28 (BCWF criticizes Duke's expert witness's opinion because it ignores certain facts related to SCED curtailment orders).] In any event, because there is no basis to conclude that Duke breached the PPA thereby triggering an obligation to pay liquidated damages, the emergency condition exception is irrelevant to our analysis.

The plain language of the PPA requires Duke to accept and pay for all Electrical Output as measured at the Point of Metering – which it did [*see* BCWF's witnesses, Eisen Dep. at 82 and Shanker Dep. at 119]. Duke is not obligated under the PPA to pay for deemed generation or any power generated by BCWF that did not reach the Point of Metering.

D. Duke's Failure To Use Transmission Services.

We repeat: the plain language of the PPA sets forth Duke's intent "to deliver and sell all of the *Electrical Output* to" MISO "*at the Point of Metering*" and "not . . . to utilize any Transmission Services." [PPA § 6.4.] The PPA further provides that if Duke utilizes Transmission Services "for the Electrical Output" or is required to use Transmission Services (due to a change in the applicable transmission rules), then Duke is responsible for arranging and paying for such services. [*Id.*] It is undisputed that Duke was able to accept all of BCWF's Electrical Output at the Point of Metering without the use of Transmission Services. It is further undisputed that MISO has not required Duke to utilize Transmission Services to accept Electrical Output. Consequently, Duke has neither utilized any Transmission Services nor was it required to do so.

BCWF cites MISO's change in the "rules" regarding wind power classification (DIR instead of IR), arguing that because Duke is responsible for arranging Transmission Services when "required (due to a change in the applicable transmission rules)," Duke was required to obtain Transmission Services to accept as much power as BCWF could possibly generate. [Dkt. No. 86 at 26-27.] No evidence has been submitted to show that after MISO reclassified wind energy as DIR, MISO required Duke to obtain Transmission Services to

accept the PPA-defined "Electrical Output." There simply is no evidence before us of an "applicable transmission rule" requiring Duke to obtain Transmission Services in order to accept BCWF's Electrical Output.

BCWF once again invites us to ignore the defined terms, "Electrical Output" and "Point of Metering," in favor of an interpretation that requires Duke to obtain Transmission Services to accept deemed generation – i.e., power not generated but that is within BCWF's capacity to generate. [*See* Dkt. No. 63 at 20 ("Duke is now unable to accept deliveries of BCWF's output due to its bidding policy when LMPs are negative.").] This interpretation plainly contradicts the plain and unambiguous language of the PPA. Because both parties have stipulated that the PPA is unambiguous, our duty (we say again) is to apply the terms of the contract in light of the parties' dispute. Accordingly, we hold that the PPA does not require Duke to obtain Transmission Services in order to accept deemed generation. Therefore, no breach has occurred by Duke of this provision.

E. Duke's $0/MWh Offers to MISO.

BCWF next contends that Duke breached the PPA and the JESOA when it made allegedly unreasonable $0/MWh offers to MISO. It should be noted that such offers were not always accepted by MISO, and when such offers were not accepted, they resulted in MISO curtailments of BCWF's output. BCWF argues that Duke's $0/MWh offers to MISO constituted an impermissible indirect curtailment of BCWF's output in breach of the PPA § 6.3 (as it relates to § 6.2) and JESOA § 2.4. It is BCWF's position that these "actions [by Duke] to insulate itself from the market price and congestion risks that the PPA and JESOA allocated to it constitute breaches of these contracts." [Dkt. No. 63 at

22.] Duke responds that its $0/MWh offers to MISO were both permissible and reasonable, were often accepted by MISO, and, where curtailment determinations were made, MISO was the entity that made them, not Duke. Both parties seek summary judgment in their respective favor on this claim.

1. BCWF's Decreased Production and Duke's Reasonable Cooperation Obligation.

Section 6.3 of the PPA provides:

> Environmental Quality Certification Requirements
>
> Seller agrees to use Commercially Reasonable Efforts to conform its administration of this Agreement to fall within the parameters contained within the requirements of any Credits or similar benefits for renewable energy adopted by the State of Indiana in effect on the Effective Date, to enable qualification of the Electrical Output as renewable energy, as defined in those requirements.
>
> Notwithstanding anything to the contrary set forth herein, nothing in Section 6.2 or this Section 6.3 shall require Seller to take any action effecting, or which would otherwise result in, any reduction in the Electrical Output or cause Seller to incur additional costs as a result of such provisions.

[PPA § 6.3]. Section 6.2 provides:

> Scheduling/Market Participant
>
> The parties will reasonably cooperate with each other with respect to the bidding and scheduling with NIPSCO and/or the RTP of the Electrical Output to be sold and delivered by Seller and accepted and purchased by Buyer. Buyer will be responsible for all such bidding and scheduling. The Parties agree that Buyer shall be the RTO Market Participant for the Plant (as defined by the RTO Requirements), except in connection with the delivery of test energy pursuant to Section 9.2 or after the occurrence of an Event of Default with respect to Buyer.

[*Id.* § 6.2]. The undisputed material facts do not establish that Duke breached either Section 6.2 or 6.3 of the PPA.

Duke contends that because Sections 6.2 and 6.3 of the PPA refer to energy actually produced ("Electrical Output"), Duke's obligation to reasonably cooperate with BCWF with respect to bidding and scheduling refers only to power that has been generated. [*See* Dkt. No. 82-1 at 18-19; Dkt. No. 55-1 at 29.] This interpretation of the PPA correctly applies the parties' definitions to the defined terms of their unambiguous contract. Because the parties contend that the PPA is not ambiguous our analysis of this claim may end here.

We acknowledge, however, that the evidence establishes that Duke's bids did affect MISO's decisions to curtail BCWF's production. If Duke's bid did not satisfy the threshold cost for MISO to clear BCWF to operate, then MISO would curtail BCWF's production. With its production curtailed, BCWF could not generate power to meet the PPA's definition of "Electrical Output" and, as Duke maintains, there would be no power generated for Duke to bid or sell under Section 6.2 of the PPA. This is another example of the parties' strained attempts to conform the facts of their dispute to the PPA, which they contend is unambiguous.

Even if we were to disregard the parties use of the defined term, "Electrical Output," and hold that Sections 6.2 and 6.3 relate to not-yet-generated power, we would reach the same result, to wit, that Duke did not breach either Section 6.2 or 6.3 of the PPA. As described below, Section 6.3 imposes no duties on Duke, and, in addition, Duke reasonably cooperated with BCWF as required by Section 6.2.

a. Section 6.3.

BCWF first asserts that Duke had a duty not to reduce or curtail BCWF's output pursuant to PPA § 6.3. [*See* Dkt. No. 86 at 25 (". . . Section 6.3 of the PPA, which bars Duke from taking actions as Market Participant that would require BCWF to reduce its output, ..."); *id.* ("BCWF contends that the PPA requires Duke to either: (1) do what is necessary to ensure that BCWF can generate power . . . .").] We disagree with this interpretation of Section 6.3. This provision is wholly unrelated to Duke's duties to BCWF. Section 6.3 relates to BCWF's efforts to qualify its Electrical Output as renewable energy in order to enjoy the tax credits and other benefits that accompany a renewable-energy designation. In conjunction with BCWF's agreement to use commercially-reasonable efforts to qualify Electrical Output as renewable energy, BCWF is not required to reduce its Electrical Output or incur additional costs. Because Section 6.3 (on its own) imposes no obligations or duties on Duke, it cannot provide the basis of a breach of contract claim against Duke.

b. Section 6.2.

Section 6.2 requires the parties to reasonably cooperate with each other with respect to bidding and scheduling of Electrical Output, and, pursuant to Section 6.3, not to require BCWF to curtail its production. A determination of "reasonableness" is typically a quintessential question for the finder of fact and not an appropriate issue for determination on summary judgment. However, Indiana courts have held that reasonableness determinations can be questions of law determined by the court when that term is used in a contract. *See Liberty Mut. Ins. Co. v. OSI, Indus., Inc.*, 831 N.E.2d 192, 203 (Ind. Ct.

App. 2005) ("When the facts regarding the notice are undisputed, the issue of reasonableness is a question of law for the court."); *Koenig v. Bedell*, 601 N.E.2d 453, 455 (Ind. Ct. App. 1992) ("[T]he contract contained a standard clause requiring notice of a claim to be given within a reasonable time as contemplated by the above referenced statute. When the facts regarding the notice are undisputed, the issue of reasonableness is a question of law for the court."); *Raymundo v. Hammond Clinic, Ass'n*, 449 N.E.2d 276, 280 (Ind. 1983) ("The ultimate determination of whether a noncompetition covenant is reasonable is a question of law.").

As provided in Section 6.3, nothing in Section 6.2 "shall require Seller [i.e., BCWF] to take any action" resulting in "any reduction in the Electrical Output." BCWF claims that Duke breached its obligation under Section 6.2 to "reasonably cooperate" with BCWF when Duke made $0/MWh offers to MISO and those offers resulted in MISO's requiring BCWF to reduce its Electrical Output. BCWF does not contend that Duke refused to communicate with it or that Duke failed to take into consideration BCWF's perspective when submitting its bids to MISO. Rather, BCWF maintains that Duke's bid amounts themselves constituted a breach when Duke's bids resulted in a curtailment of the Wind Farm's operation. [*See* Dkt. No. 86 at 29 ("The real question the Court must answer with respect to Duke's price offers is whether they breached Duke's obligations under Section 6.3 of the PPA or Section 2.4 of the JESOA not to curtail BCWF's output.").] [30] BCWF

[30] This argument echoes BCWF's position that Duke is required to bid the lowest negative offer price because it has an obligation to buy all of the possible output of the Wind Farm. [*See*

maintains that to reasonably cooperate under the PPA, Duke was required to make the lowest allowable bid under MISO's tariff – negative $500/MWh. The lowest allowable bid would have reduced the likelihood that MISO would reject Duke's offer and, in turn, would have reduced the likelihood that MISO would curtail BCWF's production.

BCWF's Vice President, James Eisen, testified that any time Duke submitted any bid other than the maximum negative offer, Duke failed to reasonably cooperate with BCWF, contrary to the requirements of the PPA. [Eisen Dep. at 153.] This opinion was repeated by BCWF's expert witness, Dr. Shanker. [Shanker Rebuttal Report at 4.][31] BCWF's position clearly does not square with the unambiguous PPA. If the only action Duke could take that would satisfy its obligation to reasonably cooperate with BCWF were to submit the maximum negative offer, then the PPA would have dispensed with the more flexible requirement of "reasonable cooperation" and eliminated all of Duke's (and BCWF's) discretion in that regard. To find that "reasonableness" under the PPA requires Duke to bid only the maximum negative bid, then no cooperation clause would have been necessary; the parties would have simply included the maximum negative bid as the bid

Shanker Dep. at 210.] Because we have determined that the PPA is not a "take-or-pay" contract in the sense that Duke is obligated to purchase "deemed generation," we reject this argument.

[31] BCWF explains that even if Duke were to submit negative $500/MWh bids, it would not necessarily mean that Duke will pay negative $500/MWh for BCWF's electricity because the market price is set by the highest bid that cleared the auction. [Dkt. No. 86 at 25, n.19.] This fact does not contradict or change BCWF's witnesses' views that a reasonable bid by Duke is the maximum negative offer.

requirement. We have no authority to read the cooperation provision out of the PPA, especially when in another context it forms a basis for one of BCWF's claim.[32]

Because BCWF's proposed "reasonable cooperation" bid price contention is not reasonable, we look to see whether Duke's $0/MWh bid was reasonable. A $0/MWh bid means that Duke pays BCWF the amount due under the PPA and provides the power to MISO for free. [Dkt. No. 55-1 at 25.] We do not agree with Duke's characterization that because it negotiated "the right to bid the energy into the market as the Market Participant" that "[t]he right to make an appropriate bid lies squarely with Duke per the contract." [*Id.* at 26.] Nor do we concur with BCWF's characterization that if we "accept Duke's argument, Duke would effectively have free license to submit offer prices high enough to curtail BCWF's output completely, without incurring any kind of damages obligation." [Dkt. No. 63 at 28.] The correct interpretation of the PPA lies between those two extremes. The PPA expressly requires Duke to reasonably cooperate with BCWF in terms of bids to MISO – not to bid at any price of its choosing with no consideration for BCWF or to bid at a level that solely benefits BCWF to the exclusion of Duke. The evidence adduced here

[32] BCWF argues that "it would not have made any sense for the parties to have included a provision regarding specific offer prices at the time the deal was negotiated." [Dkt. No. 86 at 25.] This may be true, but the parties did anticipate that bids would need to be made to MISO and presumably the parties understood that MISO's tariff would limit those bids. [PPA § 6.2.] It is not unreasonable to expect the parties to include a provision in the PPA that confined Duke's bid amount (whether in terms of dollars or in terms of maximums and minimums), if that is what the parties intended. Instead, the parties required "reasonable cooperation" with respect to bids. Thus, we find that the parties did not intend that Duke would submit only the maximum negative bid to MISO and that any other amount would be deemed unreasonable.

supports the conclusion that Duke's $0/MWh bid falls within the boundaries of reasonable cooperation.[33]

We have previously ruled that the PPA is not a "take-or-pay contract" and that Duke was not contractually required to utilize Transmission Services.[34] BCWF's expert, Dr. Shanker, accordingly testified that he would expect Duke to offer to purchase power from MISO "at the contract price." [Dkt. No. 55-1 at 26-27 (citing Shanker Dep. at 209).] The contract price has increased each year ($51.97/MWh in 2013 to $54.60/MWh in 2015). [PPA at Ex. A (Purchase Price).] Although Duke's $0/MWh offer was not the maximum negative offer, it was of greater value to BCWF than the contract price (meaning Duke is willing to pay BCWF and sell the power to MISO for free). In that sense, it satisfies the reasonableness threshold established by BCWF's own expert witness.

Duke explained that in such situations it typically bids its variable costs, that is, the price it pays to BCWF pursuant to the PPA. Such a bid represents the most favorable offer for Duke's customers, because MISO would defray Duke's costs to BCWF. Stated differently, Duke sells the power to MISO for the same price Duke purchases the power from BCWF. Duke's typical practice is consonant with BCWF's expert witness's opinion. [*See* Shanker Dep. at 209.] The undisputed material facts before us demonstrate that Duke

[33] In its response, BCWF states that "Duke cannot reasonably contend that Section 6.2 was meant to give it the ability to curtail BCWF's output when its losses become unreasonable under the DIR." [Dkt. No. 86 at 29.] We do not understand this to be Duke's argument. We understand Duke to contend that its $0/MWh offers were reasonable and thus that its bids satisfy Duke's obligations under PPA § 6.2.

[34] We make no judgment as to whether Duke may be required to utilize Transmission Services in the future should circumstances change.

"balanced its interests under the PPA and those of its customers against the interests of BCWF and determined to offer well below its typical bidding price." [*See* Dkt. No. 82-1 at 17.] Mr. Swez, Duke's Director of Generation Dispatch and Operations, testified that if he were attempting to benefit only Duke customers, he would offer $52/MWh (which would greatly reduce the cost to ratepayers because MISO would defray the cost Duke paid to BCWF), but Duke in fact offered $0/MWh in an effort to strike a fair balance between the interests of BCWF and those of Duke's customers. [*Id.*at 22 (citing Swez Dep. at 215).]

MISO accepted Duke's $0/MWh bid more than half of the time it was submitted by Duke. Indeed, "during the time when Duke submitted its zero dollar offers, MISO cleared the Wind Farm approximately 59% of the time." [Dkt. No. 82-1 at 24.] Moreover, on occasion MISO did not accept Duke's $0/MWh offer when the LMP was greater than $0/MWh, evidencing that a low offer did not necessarily guarantee that the price would clear, permitting BCWF to generate power. We therefore do not regard Duke's $0/MWh bid as unreasonable. Given that Duke neither curtailed BCWF's output nor made unreasonable offers to MISO, there is no basis on which to conclude that Duke breached the PPA § 6.2.

BCWF advances various arguments in its footnotes in an effort to establish that Duke's reasonable offer should have been a negative $40/MWh. According to BCWF, MISO has stated a "presumptively reasonable offer price for the owner of wind generation resources is negative $40 (the amount of money wind facilities receive in Tax Credits for every MWh of power they generate)." [Dkt. No. 86 at 30, n.23.] BCWF also maintains that it is the opinion of Duke's expert that, if Duke had to pay liquidated damages when its

bid curtailed BCWF's production (although we have found that it did not), "the most rational offer price for Duke to submit would be negative $40." [*Id.*] BCWF further notes that Mr. Swez "acknowledged that the offer price that would allow the most generation at the least loss would be the negative value of Production Tax Credits and Renewable Energy Credits." [*Id.*] None of these positions contradicts the undisputed evidence of the reasonableness of Duke's $0/MWh offers. BCWF's cited evidence actually shows a "presumptive" reasonable offer as per MISO's opinion, a "rational offer," and an offer price that would allow for the highest amounts of energy generation with the lowest level of loss. None of these opinions directly refutes Duke's evidence that its $0/MWh offers comported with its obligation to provide reasonable cooperation with BCWF.[35]

2. Duke's Reliance on MISO To Curtail BCWF Production.

We find no basis on which to conclude that Duke's bids to MISO were an impermissible means of accomplishing what Duke is prohibited from doing under the PPA, i.e., to force BCWF to decrease its production. In making this argument, BCWF ignores a critical player in the curtailment relationship between Duke and BCWF: MISO. The undisputed material facts demonstrate that it is *MISO* who was the "traffic cop" charged

[35] Duke provided additional evidence to illustrate that the opinions advanced by BCWF are not consistent with the arguments made by BCWF. For example, MISO's Mr. Herbst did not testify that the most rational offer price for Duke to submit would be negative $40. Instead, he characterized negative $40 as a "presumed break even point," saying nothing about a reasonable price offer. [Dkt. No. 92-1 at 16-17.] In addition, Duke's expert witness's testimony regarding a "rational offer" was based on a "hypothetical contract" proposed by BCWF's attorney the specific provisions of which Duke's witness stated he would need to review before offering an opinion. [*Id.* at 17.] Duke also explains that Mr. Swez's opinion was based on a government subsidy to offset negative LMPs, which is not applicable here, since BCWF rather than Duke owns the tax credits. [*Id* at 17-18.]

with ensuring power deliveries, managing the market, and clearing the price. When necessary, MISO curtailed BCWF's Electrical Output under both the IR rules and the DIR rules, even when Duke's bid was more beneficial than MISO's clearing price. When BCWF generated its minimum amount of power during a time when MISO was setting negative LMPs, Duke paid MISO the negative LMP despite Duke's $0/MWh offer. In fact, Duke paid a total of $666,324.93 in negative LMPs despite the DIR process.

Although BCWF contends that Duke has engaged in impermissible curtailments of BCWF's production by offering unreasonable bids of $0/MWh to MISO, the undisputed material facts establish that it was MISO's ultimate decision whether to accept Duke's offer, whether to force Duke to accept power despite the amount of its offer when negative LMPs exist, and whether to curtail BCWF's generation of power. BCWF's expert agrees that it is difficult for Duke to anticipate when MISO will or will not dispatch, given that MISO's calculations are proprietary and complex. [Dkt. No. 82-1 at 23 (citing Neal Dep. 172-73).][36] Clearly, this process is not as linear and straightforward and transparent as BCWF suggests, especially since it is MISO's SCED system that auto curtails output whenever the LMP falls below Duke's offer. [*See* Dkt. No. 63 at 19.]

[36] It is unclear how precise Duke's attempts would have to be in anticipating the dollar amount of a particular bid at which MISO would clear BCWF to operate. [*See* Dkt. No. 86 at 25, n. 20 ("Duke may not always know with certainty whether a particular offer price would be accepted, Duke would know the *relative likelihood* of the offer's acceptance.") (emphasis added).] Despite the lack of precision in this regard, both parties agree that Duke could not predict with absolute certainty whether MISO would accept its price offers.

3. Risk Allocation Shift.

BCWF further contends that Duke's $0/MWh offers to MISO reflect Duke's improper attempts to shift the market risk allocation that had been agreed to in the fixed-price PPA. We disagree with this contention. Although the PPA constitutes a long-term fixed price contract between BCWF and Duke, the parties anticipated that Duke would advance bids in the market to sell the energy it purchased from BCWF. [*See* PPA § 6.2.] Duke's $0/MWh bids are thus not impermissible in shifting the market risk between the parties under the terms of the PPA.

BCWF likens our case to *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986). There the court considered the doctrine of impossibility as a basis on which one party could walk away from a contract, holding as follows:

> Since "the very purpose of a fixed price agreement is to place the risk of increased costs on the promisor (and the risk of decreased costs on the promisee)," the fact that costs decrease steeply (which is in effect what happened here – the cost of generating electricity turned out to be lower than NIPSCO thought when it signed the fixed-price contract with Carbon County) cannot allow the buyer to walk away from the contract.

Id. at 278 (citations omitted). In *Northern Indiana Public Services, supra*, the utility sought to be relieved of its obligations under a long-term, fixed-price contract. That contract required the utility to accept a specific amount of coal over twenty years. Because over time the utility was able to purchase coal less expensively from another provider, it stopped accepting deliveries from Carbon County, for which refusal it sought the court's approval. *Id.* at 267. Here, Duke does not seek relief from the PPA. Duke has not claimed that its

purchase obligations to BCWF under the PPA are impossible or unreasonable. Duke has not refused delivery of electricity from BCWF (although at times MISO has ordered BCWF to stop production). *Northern Indiana Public Service Company* is therefore inapposite.

4. Duke's Alleged Hindrance of BCWF's Performance.

BCWF claims that by submitting $0/MWh offers thereby causing MISO to curtail its output, Duke violated an implied condition of the PPA to refrain from hindering BCWF's performance under the contract. [Dkt. No. 86 at 30-32.] This claim falls short for the same reasons we have concluded that Duke did not breach the express "reasonable cooperation" requirement of the PPA set out in § 6.2 and that Duke is not liable for liquidated damages. The PPA does not impose any obligation on Duke to do everything possible to ensure that BCWF can generate its maximum amount of power. [*See supra*.] Duke's $0/MWh offers thus were neither unreasonable nor did they hinder BCWF's performance.

An implied duty not to prevent or hinder performance of a contract "obviously cannot have been contemplated by the parties." 23 Williston on Contracts § 63:26 (4th ed.). Here, BCWF maintains that Duke's $0/MWh offers to MISO hindered its performance of the contract in that those offers caused the curtailment of the Wind Farm's production. Clearly, the parties contemplated in their agreement that Duke would make offers to MISO, and, in fact, delegated to Duke the power to offer bids, and imposed on Duke a requirement that it reasonably cooperate with both BCWF and MISO. [*See* PPA § 6.2.] No minimum or maximum bid amount or any other specific amount was imposed

on Duke under the PPA. Duke did not have the right itself to curtail BCWF's production, according to the PPA.

The "implied duty not to hinder performance" sometimes provides an excuse for non-performance, but it does not constitute a stand-alone claim. [*See* Dkt. No. 55-1 at 32 (citing *Maddox v. Wright*, 489 N.E.2d 133, 137 (Ind. Ct. App. 1986) ("It is well established that where the actions or conduct of one party to a contract prevent the other from performing his part, the other's non-performance will be excused."); *Manzon v. Stant Corp.*, 202 F. Supp. 2d 851, 862-63 (S.D. Ind. 2002); *Rogier v. Am. Testing & Eng'g Corp.*, 734 N.E.2d 606, 621 (Ind. Ct. App. 2000).] If *Duke* were asserting a claim for breach of contract by BCWF for failing to generate electricity after Duke failed to bid or failed to obtain the necessary Transmission Services, this implied duty might apply to excuse BCWF's non-performance. But here, BCWF seeks to impose liability *on* Duke rather than to excuse BCWF's own non-performance. Reliance on an implied duty is unavailable to BCWF given the facts of the case before us.

BCWF contends that Duke's $0/MWh offers amounted to a form of "contractual sabotage" by Duke that prevented BCWF's performance which, in turn, allowed Duke to avoid its obligation to pay BCWF for electricity.[37] Unfortunately for BCWF this argument does not hold water, given the plain language of the PPA as well as Indiana law. "A

[37] BCWF describes this situation as being "no different than if Duke hired someone with wire cutters to cut the transmission line connecting BCWF's wind farm to the Point of Metering." [Dkt. No. 86 at 31.] Colorful though this analogy is, we disagree with its thrust. If Duke had actually cut the transmission lines, a tort action would likely arise. Here, Duke's conduct is governed by the parties' contract.

condition precedent is either a condition which must be satisfied before an agreement becomes enforceable or a condition which must be fulfilled before the duty to perform an already existing contract arises." *Hamlin v. Steward*, 622 N.E.2d 535, 539 (Ind. Ct. App. 1993); *see also Sand Creek Country Club, Ltd. v. CSO Architects, Inc.*, 582 N.E.2d 872, 875 (Ind. Ct. App. 1991) ("Conditions precedent are disfavored and must be explicitly stated."). Here, no condition precedent to performance existed. The parties' duties are set out in the contract: BCWF was obligated to generate electricity and Duke was obligated to pay for the Electrical Output as measured at the Point of Metering. The agreement and the parties' duties to perform it are fully enforceable.

Duke contends, and we agree, that the doctrine of failure of a condition precedent *excuses* a breach. However, BCWF seeks to apply this doctrine to establish a breach, rather than excuse a breach. We repeat what we have said previously: Duke is not obligated under the PPA to purchase all the energy that BCWF *could possibly* generate, and there is no evidence to establish that Duke hindered BCWF's ability to generate electricity. Because MISO was empowered to make all curtailment determinations, requiring Duke to accept power even when the LMPs were below Duke's bid, MISO was authorized to curtail BCWF's production when the LMP was greater than Duke's bid. The undisputed material facts demonstrate that Duke did not impermissibly hinder BCWF's production of power or prevent BCWF from performing its responsibilities under the PPA by offering to sell

BCWF's power to MISO for no less than $0/MWh.[38] Duke did not breach its obligations to reasonably cooperate with BCWF.

5. Duke's $0/MWh Offers and JESOA's Requirements.

BCWF's attempts to show that Duke breached the JESOA by making $0/MWh offers are equally unavailing. Section 2.4 of the JESOA provides, in part:

> Notwithstanding anything in this Agreement to the contrary, *Seller shall have the right to curtail the Total Facility Output as required under the Interconnection Agreement or as instructed by the RTO* or NIPSCO and to comply with all RTO and NIPSCO operating procedures in effect from time to time, and Duke and Vectren agree to cooperate with Seller in connection therewith and to comply (to the extent compliance is required by either of them) with all RTO and NIPSCO curtailment orders and operating procedures and with all RTO Requirements in effect from time to time. *Except to the extent expressly provided in the respective PPAs, neither Duke nor Vectren shall have the right to curtail or reduce the Total Facility Output*.

[JESOA § 2.4 at 7 (emphasis added).][39] This section 2.4 of the JESOA does not provide a basis on which to find that by offering $0/MWh to MISO Duke breached the agreement. This section provides that BCWF "shall have the right to curtail the Total Facility Output"

[38] It is for this reason that BCWF's case citations on page 31 of its opposition brief are inapplicable here. Because Duke has no obligation to bid so that BCWF is operating at maximum capacity, Duke has not hindered BCWF's performance. [*See contra* Dkt. No. 86 at 31 (collecting cases related to breach of contract for one party to hinder, prevent, delay, or make more expensive the other party's performance).]

[39] The JESOA's definition of the terms related to the electrical output are similar to those in the PPA. The JESOA defines "Electrical Output" as "the electric energy output of the Facility delivered to the Delivery Point." [JESOA at 3.] "Delivery Point" is defined in the agreement as "the interconnection point of the Facility to the RTO-controlled transmission grid." [*Id.* at 2.] "Total Facility Output" as used in the JESOA means "the total electrical energy produced by the Facility Capacity from time to time, net of energy used by the Facility, as measured at the Delivery Point." [*Id.* at 5.]

and that Duke does not have the right to curtail or reduce the Total Facility Output. Section 2.4 also requires both Duke and BCWF to "comply with all [MISO] operating procedures."

Although Section 2.4 expressly denies Duke the right to "curtail or reduce the Total Facility Output," as discussed *supra*, it is as we have said now many times, not Duke that curtails or reduces BCWF's output, but MISO. BCWF points to Duke's internal discussions in which Duke expressed its desire to curtail BCWF's production when LMPs were negative, proffering it as evidence of Duke's breach of contract. [*See* Dkt. No. 63 at 19-20 (pointing to Duke's internal emails indicating a desire for MISO to curtail BCWF production because the contract prohibits Duke from doing the same).] Whatever Duke's subjective desires were in terms of wanting MISO to curtail BCWF's production when the LMPs are negative, they do not establish a breach of contract by Duke. We have found Duke's $0/MWh offers to be reasonable as a matter of law. Accordingly, Duke cannot be deemed to have breached the JESOA § 2.4 by offering $0/MWh to MISO when MISO, thereafter curtailed or reduced the Electrical Output of the Wind Farm.[40]

[40] Because we do not find that Duke breached the contracts by making $0/MWh offers, we need not reach the issue of causation. BCWF suggests that Duke admits that the $0/MWh offers resulted in curtailment and, as a result, we should engage in a causation analysis to conclude that Duke found a way for MISO to do what it could not. [*See* Dkt. No. 86 at 24 (arguing that it is Duke's $0/MWh offers that cause a curtailment and thus Duke should not be rewarded for finding a way for MISO to curtail on its behalf).] Yet, both of the cases cited by BCWF illustrate that the "test of causation" only occurs after a breach is established. *See Fowler v. Campbell*, 612 N.E.2d 596, 602 (Ind. Ct. App. 1993); *WESCO Distrib., Inc. v. Arcelor Mittal Ind. Harbor LLC*, 23 N.E.3d 682, 708 (Ind. Ct. App. 2014). Since no breach exists here, we have sidestepped the question of causation.

F. Duke Did Not Breach Its Duty of Good Faith.

BCWF has also argued that Duke had both an express duty of good faith, pursuant to Section 12.2(c) of the PPA, as well as an implied obligation of good faith under Indiana law. The PPA provides that it is "subject to the application of (i) general principles of equity (regardless of whether considered in a proceeding in equity or at law), including, without limitation, the possible unavailability of specific performance, injunctive relief or any other equitable remedy and (ii) concepts of materiality, reasonableness, good faith and fair dealing." [PPA § 12.2(c).] BCWF contends that Duke violated § 12.2(c) of the PPA by failing to submit competitive market bids or pay liquidated damages. Indiana courts recognize a duty of good faith and fair dealing in instances where (as here) the duty is expressly provided for in the contract. *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 918 (Ind. Ct. App. 2011) (citing *Allison v. Union Hosp., Inc.*, 883 N.E.2d 113, 123 (Ind. Ct. App. 2008)).[41] Having found Duke not liable for liquidated damages and having ruled that it made reasonable offers to MISO as it was required to do under the PPA, no grounds exist for finding that Duke's conduct violated PPA § 12.2(c) or any implied duty under Indiana law.

Duke faults BCWF's Count III Breach of Duty of Good Faith and Fair Dealing as duplicative of or subsumed by BCWF's breach of contract claim. [Dkt. 55-1 at 33 (citing

[41] BCWF cites *Market St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991), the Seventh Circuit's holding that the "doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of rule." However, because *Market Street Associates* is based on Wisconsin law, not Indiana law, it provides no useful precedent.

Baxter Healthcare Corp. v. O.R. Concepts, Inc., 69 F.3d 785, 792 (7th Cir. 1995) (finding that the duty of good faith and fair dealing is an interpretive rule and "not an independent source of duties for the parties to a contract"); *Troutt v. City of Lawrence*, No. 1:06-CV-1189-DFH-TAB, 2008 WL 3287518, at *17 (S.D. Ind. Aug. 8, 2008) (treating claim for breach of contractual duty of good faith as a breach of contract claim); *Amaya v. Brater*, 981 N.E.2d 1235, 1239 (Ind. Ct. App. 2013).] In the absence of a finding that Duke breached the PPA or JESOA, Duke is not liable for a breach of its duty of good faith and fair dealing, even as a separate claim. *See Amaya*, 981 N.E.2d at 1242; *Baxter*, 69 F.3d at 791–92.

A question of fact as to Duke's state of mind exists according to BCWF that forecloses summary judgment on BCWF's claim of breach of good faith and fair dealing. [*See* Dkt. No. 86 at 33 (BCWF arguing that Duke cannot be granted summary judgment because a state-of-mind inquiry cannot be concluded on summary judgment).] Duke's alleged state of mind, however, is irrelevant since Duke did not breach the contract. In like fashion, Duke did not breach a duty of good faith and fair dealing towards BCWF.

G. BCWF Declaratory Judgement Claim – Count IV.

Summary judgment is available under Federal Rule 56 on claims for declaratory relief. BCWF seeks such declaratory relief here under the federal declaratory judgment statute, 28 U.S.C. § 2201. Rule 57 provides that "[the Federal Rules of Civil Procedure] govern the procedure for obtaining a declaratory judgment under 28 U.S.C. §2201." *See Medical Assurance Co., Inc. v. Hellman*, 610 F.3d 371, 381 (7th Cir. 2010) ("[S]ummary judgment is a good tool to examine not only whether Medical Assurance can succeed as a

matter of law, but also whether this case is a suitable candidate for declaratory relief."); *State Farm & Cas. Co. v. Sanders*, 805 F. Supp. 1453 (S.D. Ind. 1992) (granting summary judgment on claim for declaratory judgment); *Am. Family Mut. Ins. Co. v. Lane*, 782 F. Supp. 415, 420 (S.D. Ind. 1991) ("[T]he Court concludes that the declaratory judgment plaintiff's Motion for Summary Judgment should be GRANTED.").

The declaration BCWF seeks, however, that Duke's conduct violated the PPA and JESOA, is not available as a matter of law. Based on our prior rulings that Duke was not required to make maximum negative bids or to pay liquidated damages for deemed generation, Count IV fails as a matter of law to state a claim upon which relief can be granted. Duke is thus entitled to summary judgment on BCWF's Count IV for declaratory judgment.

H. Duke's Affirmative Defenses.

Finally, BCWF has moved for summary judgment on Duke's affirmative defenses: unjust enrichment, equity and reasonableness, and mitigation of damages. Each of Duke's affirmative defenses is predicated on its obligation to pay for deemed generation – that BCWF would be unjustly enriched if Duke were to pay for power not generated; that Section 12.2(c) of the PPA prevents BCWF from imposing huge losses upon Duke and its ratepayers; and that BCWF failed to mitigate its damages suffered by curtailment orders. Having ruled in favor of Duke on the breach of contract claims, we have addressed Duke's affirmative defenses.

Conclusion

For the foregoing reasons, we DENY BCWF's Motion for Summary Judgment and GRANT Duke's Motion for Summary Judgment. Final judgment shall enter accordingly.

Date: 7/6/2015

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Clay J. Pierce
DRINKER BIDDLE & REATH, LLP
clay.pierce@dbr.com

Laurie E. Martin
HOOVER HULL TURNER LLP
lmartin@hooverhullturner.com

Andrew W. Hull
HOOVER HULL TURNER LLP
awhull@hooverhullturner.com

John D. Papageorge
TAFT STETTINIUS & HOLLISTER LLP
jpapageorge@taftlaw.com

Michele Lee Richey
TAFT STETTINIUS & HOLLISTER LLP
MRichey@taftlaw.com