

Cape Wind's last stand

Jinjoon Lee & Brian Eckhouse

15/01/2015

The Cape Wind offshore wind project has overcome many hurdles in its 14-year development history. The latest challenge for Energy Management (EMI), the developer of what could be the first offshore wind farm in the Americas, will be to bring its power purchase agreement back from an apparent death.

Massachusetts utilities National Grid, a subsidiary of the UK transmission operator, and NSTAR, part of Northeast Utilities, have terminated their power purchase agreements (PPAs) for the first \$2.6 billion 363MW phase of the planned 468MW project. The utilities said in January that Cape Wind had failed to close its financing by 31 December 2014, as the PPAs stipulated.

EMI had already asked for – and received – a one-year extension to the end of 2014. But to extend the deadline any further, EMI would have had to post \$1.82 million (\$1.17 million to National Grid and \$645,000 to NSTAR) in collateral by 31 December. EMI instead argued that it was able to suspend the timetable because a series of lawsuits – including a new challenge that was filed in late 2014 – prevented it from reaching financial close by that date.

The sponsor had lined up a bank tranche as part of the \$1.95 billion debt package before 31 December, bankers say, including a \$150 million loan guarantee from the US Department of Energy. Had the project not again been entangled in litigation, EMI was poised to launch and close the only remaining debt piece – a planned bond guaranteed by Danish export credit agency EKF.

The status and sources of Cape Wind's project equity are less clear – publicly at least. Siemens Financial Services, the turbine provider to Cape Wind, is expected to provide \$100 million of equity, and PensionDanmark committed a \$200 million mezzanine loan. Macquarie, which owns 49.89% stake in the Baltic 2 wind project off the coast of Germany, also considered a Cape Wind investment, several sources told *IJGlobal*.

The force majeure defense

Boston-based EMI has not said whether it would file a legal challenge to the PPA terminations. But in a January 2015 letter to the utilities, EMI invoked a *force majeure* clause, defined in Cape Wind's PPAs as “an unusual, unexpected and significant event” that is beyond the control of the party claiming its existence.

Force majeure is generally understood to be an unexpected occurrence, such as an earthquake that destroys a project's foundation or a bolt of lightning that has struck a transmission line, notes Robert Freedman, a partner at Shearman & Sterling in New York, who is not involved in the Cape Wind project. But man-made events tend to be trickier to accommodate. “Then you get into a debate about whether that event was foreseeable,” he says.

The *force majeure* clause is one of the most heavily negotiated parts of the documentation for a project and an accompanying financing.

EMI, in its response to NSTAR and National Grid, argues that the litigation from the Alliance to Protect Nantucket Sound –

a long-time opponent of the project – constitutes an “unusual, unexpected and significant” event.

“It has been completely beyond Cape Wind’s control and could not have been prevented or avoided,” EMI wrote. Most recently, a group appealed the Massachusetts Energy Facilities Siting Board’s November 2014 approval for Cape Wind’s interconnection facilities, which will be located in the town of Barnstable. Cape Wind is being built as close as 8km off the Massachusetts coast, in Nantucket sound.

Utilities reject argument

National Grid does not share EMI’s interpretation of the PPA. “Cape Wind did not meet its commitments and declined its option to extend the contract,” wrote a utility spokesman in an email to *IJGlobal*.

The PPA stipulates that “a failure to satisfy contractual conditions or commitments, or lack of or deficiency in funding or other resources” will not count as *force majeure*.

NSTAR also dismissed EMI’s *force majeure* argument. “The challenges alluded to by Cape Wind were ongoing and well known to the parties at the time the agreement was entered into and were not the type of events that excuse Cape Wind from performing its obligations under the contract,” it wrote in an email.

The *force majeure* clause has been invoked when governmental approval processes delay development. Developers, though, almost never invoke the *force majeure* clause in the face of litigation, and one lawyer described the move as unprecedented.

If EMI pursues the *force majeure* argument in court, the ensuing decision could set legal precedents in US power.

EMI’s present challenge isn’t limited to the legal ones. Long-time Massachusetts Governor Deval Patrick – an unabashed supporter – has left office. Successor Charlie Baker, a one-time Cape Wind critic, favours a greater use of renewables, without supporting any specific project.

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