IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOWER COLORADO RIVER AUTHORITY, Plaintiff, vs. PAPALOTE CREEK II, LLC f/k/a PAPALOTE CREEK WIND FARM II, LLC, Defendant.	§	CIVIL ACTION NO. 1:15-CV-656-SS

PLAINTIFF'S OPPOSED MOTION TO COMPEL ARBITRATION

Plaintiff Lower Colorado River Authority ("LCRA") submits this Motion to Compel Arbitration seeking an order compelling Defendant Papalote Creek II, LLC f/k/a Papalote Creek Wind Farm II, LLC ("Papalote") to binding arbitration. This is to certify that on August 28, 2015, the undersigned counsel for LCRA contacted Leslie Thorne and Ben Meschel, counsel of record for Papalote, by phone and in writing to determine whether Papalote opposes this Motion. Despite such efforts counsel was not able to obtain Papalote's position on whether or not the motion is opposed, and thus the motion is being submitted as opposed.

Relief Requested

LCRA seeks to compel Papalote to arbitration pursuant to the terms of a contract entered into by the two parties. The Power Purchase Agreement ("PPA") provides for the purchase by LCRA of energy and related products produced by a wind generation facility owned by Papalote. In the event LCRA purchases less than the full amount of energy produced by the facility, then LCRA may owe damages determined in accordance with formulas set forth in the PPA. A separate provision in the PPA limits LCRA's aggregate liability to $60 million. The parties dispute whether this provision imposes a cap on ***all*** damages that LCRA would be required to

pay under the PPA, including when LCRA purchases less than the full amount of energy. LCRA seeks to submit this dispute to binding arbitration in accordance with the arbitration clause in the PPA, which provides that either party may submit "any dispute" to binding arbitration, in order to obtain certainty with respect to LCRA's rights and performance obligations under the PPA.

Factual Background

On December 18, 2009, LCRA and Papalote entered into the PPA which provides for the purchase by LCRA, and the sale by Papalote, of energy and related products produced at the Papalote Creek II Wind Project (the "Project") located in San Patricio County, Texas. (Doc. 1, Notice of Removal, PPA attached thereto as Exhibit A-2, at p. 14). The PPA commenced on December 18, 2009 and extends through September 28, 2028. (*Id.*, ¶ 2.1; Affidavit of Richard Williams ("Williams Aff."), attached hereto as Exhibit "A," at ¶ 4).

Section 3.1 of the PPA provides that "[i]n accordance with and subject to the provisions of [the PPA] … Buyer shall purchase and receive … all of the Project's capacity, Net Electricity, Ancillary Services and environmental Credits … generated by the Project." (PPA, ¶ 3.1). The PPA provides a fixed price for all energy purchases. (*Id.*, ¶ 3.3). In the event that LCRA purchases less than the Project's full output of energy, then Section 4.3 of the PPA sets forth a formula for calculating liquidated damages to be paid by LCRA. (*Id.*, ¶ 4.3). The PPA contains a separate provision, in Section 9.3, that caps LCRA's financial liability under the PPA: "Buyer's damages for failure to perform its material obligations under this Agreement shall likewise be limited in the aggregate to sixty million dollars ($60,000,000)." (*Id.*, ¶ 9.3).

To date LCRA has made all purchases of energy in accordance with the PPA. (Williams Aff., ¶ 5). LCRA has paid over $184 million to Papalote for such purchases since the commencement of the PPA, despite the fact that the price of energy thereunder is substantially

above current market rates. (*Id*.). While LCRA has thus far purchased the full amount of energy produced by the Project, LCRA contends that in the event it reduces or ceases further purchases then Section 9.3 caps LCRA's obligation to pay damages under the PPA, including liquidated damages, at $60 million. (*Id*., ¶ 6). Papalote disagrees with LCRA's interpretation and contends that, regardless of the limitation of liability provision, LCRA remains liable to purchase and pay for the total amount of all energy generated by the Project over the full term of the PPA. (*Id*.).

LCRA has a statutory obligation to its wholesale customers to charge only the reasonable and necessary costs of providing energy. (*Id*., ¶ 3). The liquidated damages provisions and the liability cap in the parties' fixed-price contract help mitigate the risk of fluctuating energy prices and enable LCRA to manage its cost exposure and its rates to customers. LCRA contends that the plain language of Section 9.3 limits the liability of both parties to $60 million. (*Id*., ¶ 6). For instance, the liability cap would have applied had Papalote failed to build the Project and it would apply to damages owed by a party on an early termination of the PPA. In LCRA's view it also applies to any damages LCRA would owe pursuant to Section 4.3. (*Id*.). Such damages compensate Papalote for the difference between the fixed price in the PPA and the lower price at which Papalote sells the energy not taken by LCRA, thus making Papalote whole until the Section 9.3 cap on damages is reached.

Papalote disagrees with LCRA's interpretation of the PPA. (*Id*., ¶ 6). While Papalote has taken the position in discussions with LCRA that it disagrees that Section 9.3 limits LCRA's damages to $60 million, the pleading filed by Papalote herein offers no specifics on its substantive position. Thus, the parties need an arbitrator to determine the extent of LCRA's potential liability for damages arising under the PPA *before* LCRA purchases less than all of the available energy.

On April 24, 2015, LCRA's Chief Financial Officer Richard Williams contacted Mark Frigo, Vice President and Head of Marketing in North America for Papalote's parent company E.ON Climate & Renewables North America, LLC ("E.ON"), to initiate a discussion with Papalote about LCRA's interpretations of the liability cap and possible decreases in energy purchases as a result of that interpretation. (*Id*., ¶ 7). Thereafter, on April 30, May 7, May 8 and May 18, Mr. Williams, Mr. Frigo and other executives of the parties held telephone conferences to discuss their different opinions of the PPA and possible compromises. (*Id*.).

The parties continued their efforts on May 26, 2015, when senior executives of Papalote traveled to LCRA's office in Austin to meet with senior officers of LCRA. (*Id*.). Papalote's representatives at that meeting included Mr. Frigo, E.ON's Chairman and Papalote's Director and Senior Vice President Patrick Woodson, and Papalote's Chief Financial Officer Tom Festle. (*Id*.). LCRA's representatives at the meeting included Mr. Williams, LCRA's General Manager Phil Wilson, and LCRA's Chief Commercial Officer Ken Price. (*Id*.). Unable to reach a resolution, representatives of LCRA and Papalote conducted further telephone conferences on May 29, June 5, June 9, June 10, June 17 and June 18. (*Id*.). The parties' discussions included their competing interpretations of the liability cap in Section 9.3 and strategies and proposals for resolving the dispute. (*Id*.). Despite such efforts the parties have been unable to reach an agreement on the application of Section 9.3 and the scope and extent of LCRA's financial responsibility under the PPA. (*Id*., ¶ 9).

As a result, LCRA has no choice but to submit this dispute to binding arbitration under Section 13.2 of the PPA in order to obtain certainty with respect to the interpretation of the PPA provisions. To that end Section 13.2 of the PPA states:

> either party may submit any disputes arising under this Agreement, which cannot be resolved by the Parties to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA") effective at the time of the dispute (the "AAA Rules") and the terms of this Section 13.2.

(PPA, ¶ 13.2). Either party may initiate arbitration by delivering to the other a written notice requesting arbitration if they are unable to resolve the dispute within ten days after a meeting—in person or by telephone—among both parties' senior officers or executives. (*Id.*, ¶¶ 13.1, 13.2).

On June 19, 2015, LCRA made written demand on Papalote for arbitration. (Williams Aff., ¶ 10). This demand was made well over ten days after the May 26 in-person meeting between the parties' senior executives. (*Id.*). Despite the conditions precedent having been satisfied, Papalote refuses to acknowledge that the arbitration procedure has been properly invoked under the PPA and refuses to follow the arbitration procedure outlined in Section 13. (*Id.*). Instead Papalote takes the position that arbitration is premature and improper because no breach of the PPA has occurred, and thus there presently is no dispute to be arbitrated. (Doc. 5, Defendant Papalote Creek II, LLC's Answer and Affirmative Defenses ("Answer"), ¶ 4.2).

Argument and Authority

Virtually all, if not all, of the positions taken by Papalote in their pleading to oppose the dispute being submitted to arbitration are matters for the arbitrator to decide. If there is a controversy for the Court to decide it can be distilled into the question of whether there is a "dispute" under the PPA, as questions relating to ripeness, notice and other procedural prerequisites to arbitration fall exclusively within the jurisdiction of the arbitrator.

A. LCRA and Papalote clearly agreed to arbitrate the dispute.

Under the Federal Arbitration Act,[1] a party must be compelled to arbitration if (1) a valid, enforceable arbitration agreement exists, and (2) the asserted dispute falls within the scope of that agreement. *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996). If a party proves the existence of a valid arbitration agreement then, as a matter of federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]" *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Here the first prong of the Court's test is unquestionably satisfied. It is beyond dispute that Section 13 of the PPA is a valid and enforceable arbitration provision. Papalote has not challenged the validity or enforceability of Section 13, nor has Papalote asserted any contractual defenses to invalidate the arbitration agreement. Thus, the only question before the Court is whether the parties have a "dispute" arising under the PPA that can be arbitrated pursuant to Section 13.2.

1. LCRA and Papalote have a "dispute" that must be arbitrated.

While Papalote contends in its answer that the instant dispute is not arbitrable, Papalote shoulders the burden on that issue. *Overstreet v. Contigroup Companies, Inc.*, 462 F.3d 409, 412 (5th Cir. 2006) ("the party resisting arbitration shoulders the burden of proving that the dispute is not arbitrable"). Papalote cannot meet its burden here.

a. *LCRA and Papalote have a "dispute" over the interpretation of the PPA.*

LCRA and Papalote have a "dispute" that must be arbitrated in accordance with Section 13.2. The PPA does not define the meaning or scope of "dispute." Nonetheless, Texas contract law instructs that contract "terms are given their plain, ordinary, and generally accepted

[1] As demonstrated by the express terms of the PPA, and further by Papalote's removal of this case on diversity grounds, the transactions contemplated by the PPA involve interstate commerce and, thus, the Federal Arbitration Act applies. 9 U.S.C. § 2. To the extent Papalote argues otherwise, and the Texas Arbitration Act is deemed to apply, the Court's analysis remains the same.

meanings unless the Contract itself shows them to be used in a technical or different sense." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005). Applying this principle, Texas courts have defined a "dispute" within the context of an arbitration clause as "a controversy, debate, or quarrel." *American Realty Trust v. JDN Real Estate*, 74 S.W.3d 527, 532 (Tex. App.—Dallas 2002, no pet.) (*quoting Webster's Third New International Dictionary Unabridged* 665 (1981)). Extending this definition of "dispute" to the PPA, as the Court should, LCRA and Papalote's disagreement over the interpretation of Section 9.3 unquestionably qualifies as a "dispute" as that term is used in Section 13.2.

b. *The parties' dispute clearly falls within the scope of Section 13.2.*

Section 13.2 provides that "either party may submit any disputes arising under this Agreement" to arbitration. (PPA, ¶ 13.2). The Court must enforce this provision according to its plain meaning. *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 930 (Tex. App.—Houston [1st Dist.] 1996, no writ). Section 13.2 sets no limit on the type, kind or scope of the "disputes" subject to arbitration. Indeed, Section 13.2 imposes no restrictions, qualifications or limitations at all, requiring only that the asserted dispute "aris[e] under this Agreement." (PPA, ¶ 13.2). Interpreting the arbitration provision according to its plain meaning, Section 13.2 means just what it says – *all disputes* arising under the PPA are arbitrable.

Moreover, the instant controversy between the parties clearly "arises under" the PPA – indeed, it goes to the very heart of the PPA. The current dispute springs from and requires interpretation of various provisions in the PPA, and directly affects LCRA's performance obligations thereunder. Courts in this circuit have held that disputes relating to the interpretation and performance of a contract clearly fall within arbitration clauses providing for the arbitration of disputes "arising under" such agreement. *See Ryan v. Thunder Restorations, Inc.*, Cause No. 09-3261 Section 'B'(1), 2011 U.S. Dist. LEXIS 73856, at *7 (E.D. La. July 8, 2011); *see also*

Tracer Research Corp. v. National Evti. Svcs. Co., 42 F.3d 1292, 1295 (9th Cir. 1994) *(cited with approval by Pennzoil Exploration and Production Co. v. Ramco,* 139 F.3d 1061, 1067 (5th Cir. 1998)). Clearly the dispute "arises under" the PPA and falls within the scope of the agreement to arbitrate.

c. *A breach is not a requirement for arbitrating disputes under the PPA.*

Papalote has pled that the arbitration request is premature because no breach has yet occurred. To adopt Papalote's argument – which is in clear conflict with Section 13.2 – would require the Court to add new qualifying or limiting language to the arbitration provision, effectively re-writing the parties' contract.

Papalote's contention that the dispute does not sufficiently ripen and trigger arbitration until a breach occurs would require that Section 13.2 be modified to state that arbitration may be pursued "upon either Party's breach," or "upon either Party's failure to perform a material obligation." The Texas Supreme Court, however, has "long held that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained." *Tenneco, Inc. v. Enterprise Products Co.*, 925 S.W.2d 640, 646 (Tex. 1996).

Further, Papalote's position contradicts existing case law in this circuit. In *Pioneer Navigation v. Maritime Enters.*, Cause No. 95-1054, 1995 U.S. Dist. LEXIS 12739, at *2 (E.D. La. Aug. 30, 1995), the court rejected the argument that a breach must occur before a dispute may be submitted to arbitration under a clause providing that "any dispute" must be referred to arbitration. In *Pioneer Navigation*, Maritime entered into a charter agreement with Pioneer whereby Maritime chartered a vessel to Pioneer, who then entered into a sub-charter agreement with Dreyfus. *Id.* The vessel grounded off the coast of Germany, and Dreyfus asserted various claims for damages against Pioneer. *Id.* When the matter became set for arbitration, Pioneer

made demand upon Maritime to submit to separate arbitration pursuant to the charter agreement's arbitration provision that provided "any dispute" arising between them would be referred to arbitration. *Id.* Maritime argued that the dispute was not ripe for arbitration both because no breach of the charter agreement had occurred, and the claim for indemnity between Maritime and Pioneer would not mature until the liability of Pioneer was established through the arbitration between Pioneer and Dreyfus. *Id.* at *3-4. The court compelled Maritime to arbitration, reasoning:

> the language 'any dispute' [in the charter agreement between Pioneer and Maritime] clearly intended all possible disputes arising under, or related to, the charter party were to be resolved by arbitration. As such, this court's role is limited to staying the litigation and allowing the arbitrators to resolve all issues under the Charter Party, including the ripeness of an issue for arbitration.

Id. at *5.

B. Issues concerning "procedural arbitrability," such as those related to ripeness, are for the arbitrator to decide.

Courts serve a gateway function to determine "questions of arbitrability" – but in a very limited role. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002). In this limited role, courts decide issues of "substantive arbitrability;" i.e., whether the parties are bound by an arbitration clause, and whether an arbitration clause is binding to the particular type of controversy. *Id.* But issues of "procedural arbitrability," such as the timeliness of a notice to arbitrate, are for the arbitrator to decide. *Gen. Warehousemen & Helpers Union Local 767 v. Albertson's Distribution, Inc.*, 331 F.3d 485, 488 (5th Cir. 2003).

Courts in this circuit have cast the "procedural arbitrability" net further to encompass questions related to ripeness. *Albritton v. W.S. Badcock Corp.*, Cause No. 1:02CV378-D-D, 2003 U.S. Dist. LEXIS 28869, at *10 (N.D. Miss. Apr. 7, 2003) (rejecting argument that motion to compel arbitration was not ripe because "[t]he Supreme Court . . . has recently held that

procedural questions such as ripeness are for an arbitrator, not for the court, to decide.") (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 (2002)). As the court held in *Pioneer Navigation*, questions over the "ripeness" of the dispute are for the arbitrator to decide, and not within the province of the Court. 1995 U.S. Dist. LEXIS 12739, at *2.

Even if the Court were to choose to exercise jurisdiction over the issue of ripeness, the Court should still submit this dispute to arbitration. Section 13.2 does not state that the "dispute" must be sufficiently "ripe," nor does it prohibit the submission to arbitration of controversies that relate to contingent or anticipated occurrences. Indeed the parties expressly bargained for the right and opportunity to submit "any dispute" to arbitration in order to provide an expedited mechanism[2] for achieving certainty with respect to their rights and obligations under the PPA, while allowing the parties to continue to perform under the PPA. LCRA is entitled to obtain an interpretation of the language in dispute in order to determine the extent of its liability without incurring the substantial risk of a breach of the parties' contract.

Conclusion

LCRA and Papalote have a dispute that clearly falls within the scope of Section 13.2. Contrary to Papalote's position, a breach is not required to submit this dispute to arbitration and Papalote's interpretation of the arbitration provision would, if accepted, effectively require the Court to rewrite the PPA. Given the strong federal policy in favor of arbitration, and Section 13.2's broad and inclusive language, the Court should submit the dispute between LCRA and Papalote to binding arbitration.

[2] Section 13.2(a) sets forth an accelerated arbitration procedure that culminates in a final hearing to commence "no later than thirty (30) days after the selection of the arbitrator." The final hearing shall be conducted "without continuance or adjournment," and the arbitrator's award shall be issued within thirty days of the closing of the hearing.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: */s/ Breck Harrison*
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ATTORNEYS FOR PLAINTIFF LOWER COLORADO RIVER AUTHORITY

CERTIFICATE OF SERVICE

This is to certify that on this 28th day of August 2015, a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Benjamin L. Mesches
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/s/ Breck Harrison
Breck Harrison

EXHIBIT “A”

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOWER COLORADO RIVER AUTHORITY, Plaintiff, vs. PAPALOTE CREEK II, LLC f/k/a PAPALOTE CREEK WIND FARM II, LLC, Defendant.	§	CIVIL ACTION NO. 1:15-CV-656-SS

AFFIDAVIT OF RICHARD WILLIAMS

STATE OF TEXAS §

COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared Richard Williams, known to me as that person, and after being duly sworn, stated under oath the following:

1. "My name is Richard Williams. I am over the age of eighteen years. I am of sound mind, capable of making this affidavit, and have personal knowledge of the facts stated herein.

2. I am the Chief Financial Officer for the Lower Colorado River Authority ("LCRA"). My business address is 3700 Lake Austin Boulevard, Austin, Texas 78703.

3. In furtherance of LCRA's obligation to its wholesale customers to charge only the reasonable and necessary costs of providing energy to them LCRA conducts periodic reviews of its energy contracts. In my capacity as Chief Financial Officer and as part of LCRA's management team, I have participated in the review of LCRA's obligations and commitments under its various energy contracts.

4. On December 18, 2009, LCRA and Papalote Creek II, LLC f/k/a Papalote Creek Wind Farm II, LLC ("Papalote") entered into a Power Purchase Agreement ("PPA") for the purchase by LCRA, and sale by Papalote, of energy and related products at the Papalote Creek II Wind Project in San Patricio County, Texas (the "Project"). The PPA commenced on December 18, 2009 and extends through September 28, 2028.

5. To date LCRA has made all purchases of energy pursuant to the schedule set forth in the PPA. LCRA has paid over $184 million to Papalote for the purchase of energy since the commencement of the PPA, the price of which is above market rates.

6. While LCRA has thus far purchased the full amount of energy produced by the Project, LCRA contends that in the event it reduces or ceases further purchases then Section 9.3 of the PPA caps LCRA's obligation to pay liquidated damages or any other damages arising under the PPA to an aggregate of $60 million. Papalote disagrees with LCRA's interpretation and contends that, regardless of the limitation of liability provision, LCRA remains liable to purchase and pay for the total amount of all energy generated by the Project over the full term of the contract.

7. To resolve this dispute, the parties have conducted eleven separate telephone conferences and one in-person meeting:

a. On April 24, 2015, I participated in a telephone conference with Mark Frigo, the Vice President and Head of Marketing North America for Papalote's parent company, E.ON Climate & Renewables North America, LLC ("E.ON"), to discuss Section 9.3 of the PPA and LCRA's position that Section 9.3 capped LCRA's damages at an aggregate total of $60 million.

b. On April 30, 2015, myself and Ken Price, LCRA's Chief Commercial Officer, conferred with Mr. Frigo by telephone to discuss the Section 9.3 liability cap in greater detail. Mr. Frigo referenced Papalote's duties to its investors and advised that Papalote believed LCRA remained liable for the full amount of all energy generated by the Project, which Papalote valued substantially in excess of $60 million. At the conclusion of the call, Papalote advised LCRA that it would examine the issue internally with its management team and the parties scheduled a further call for May 7, 2015.

c. On May 7, 2015, Mr. Frigo advised Mr. Price and myself that Papalote's management had discussed the PPA and that Papalote expected LCRA to abide by the terms of the PPA, to which I responded that LCRA would continue to abide by the terms of the contract. A copy of this e-mail exchange is attached hereto as **Exhibit A-1**. Later that day, I participated on a call with Phil Wilson, LCRA's General Manager, and Mr. Frigo to again discuss LCRA's position that Section 9.3 limited LCRA's aggregate liability under the PPA to $60 million. Mr. Frigo requested that the parties hold another telephone conference with their respective legal counsel on May 8, 2015.

d. On May 8, 2015, myself, Mr. Price, LCRA's Managing Associate General Counsel Leigh Sebastian, and LCRA's outside counsel Paul Vrana held a telephone conference with Mr. Frigo and Charlotte Toerber, E.ON's Senior Vice President and General Counsel, to discuss the parties' competing interpretations of Section 9.3 and LCRA's position that Section 9.3 capped its damages at an aggregate total of $60 million. Mr. Frigo stated that he understood LCRA's position and advised LCRA that Papalote needed to report LCRA's position to its risk committee.

e. On May 18, 2015, Mr. Frigo wrote to me by e-mail to follow up after the issue was considered by Papalote's risk committee. Mr. Frigo stated that the risk committee was "upset" and he suggested that the parties hold an in-person meeting with senior executives.

f. On May 26, 2015, Papalote's senior executives traveled to LCRA's office in Austin to meet with senior executives of LCRA, wherein LCRA reiterated its position that Section 9.3 limits its total damages arising under the PPA to an aggregate amount of $60 million. Participants at that meeting included, on Papalote's side, Mr. Frigo along with Patrick Woodson, Chairman of E.ON and a Director of Papalote, and Tom Festle, the Chief Financial Officer for E.ON and Papalote, and, on the other side, myself along with Mr. Wilson and Mr. Price. At this meeting, LCRA stated that while it was flexible in how the parties reached the Section 9.3 cap on LCRA's liability under the contract, LCRA's exposure would not exceed the cap. The parties discussions included various options for structuring a new contract.

g. On May 29, June 5, and June 9, 2015, the parties held additional telephone conferences between and among myself and Mr. Price, on the one hand, and Mr. Frigo, Mr. Woodson and Mr. Festle, on the other hand, to discuss the PPA and strategies for implementing the Section 9.3 cap on liability. The parties further explored proposals for amending or restructuring the contract but were unable to reach agreement. In the June 9, 2015 call, I again advised Papalote that LCRA was firm on its position that the net present value of the contract was capped at $60 million and suggested we go to arbitration if we did not make significant progress soon. Papalote's representatives responded that this may be the direction where it was headed. They further said they would report to their partners and we would talk again the next day.

j. On June 10, 2015, I had a further call with Papalote's representatives during which Mr. Festle stated that LCRA would be very unhappy once LCRA looked at the Consent to Assignment of Rights with the Sumitomo Matsui Banking Corporation, the collateral agent for Papalote's lenders, which Papalote said would prevent LCRA from taking the position that its liability was capped at $60 million. Mr. Festle said that he disagreed with LCRA's interpretation that the PPA capped LCRA's damages to $60 million.

k. On June 17, 2015, myself, Mr. Price and Jonathan Hurst, LCRA's Director of Innovative Finance, held a telephone conference with Mr. Frigo, Mr. Woodson and Mr. Festle to further discuss the PPA and strategies for implementing the Section 9.3 cap on liability. At this meeting Papalote's executives stated that any effort by LCRA to limit its damages to the $60 million cap by failing to take energy would be a breach of the contract. I responded by saying we did not believe it would be a breach and that LCRA had no intention of breaching the contract.

8. All of the calls and the meetings set forth above were set up or confirmed by written e-mail correspondence and schedules sent to the parties.

9. Despite the numerous telephone conferences and meetings, the parties have been unable to reach an agreement on the application of the limitation of liability provision and the scope and extent of LCRA's obligations under the PPA.

10. On June 19, 2015, LCRA made written demand on Papalote for arbitration. This demand was made well over ten days after the May 26 in-person meeting between the parties' senior executives. Despite this demand, Papalote has refused, and continues to refuse, to submit to arbitration under Article 13.2 of the PPA.

I declare under penalty of perjury, under the laws of the State of Texas, that the foregoing is a true and correct.

FURTHER AFFIANT SAYETH NAUGHT."

Richard Williams

SUBSCRIBED AND SWORN TO BEFORE ME by Richard Williams, 27th day of August 2015.

LORRIE A. HAYWOOD
Notary Public, State of Texas
My Commission Expires
January 25, 2018

Notary Public, State of Texas

From: Frigo, Mark
To: Richard Williams; Ken Price
Cc: Beckett, Timothy
Subject: RE: [External] LCRA / E.ON Follow-up Discussion
Date: Thursday, May 07, 2015 11:53:36 AM

Richard,

Ok. We will dial-in. See you at 2:00 p.m.

Mark

From: Richard Williams [mailto:Richard.Williams@LCRA.ORG]
Sent: Thursday, May 07, 2015 11:39 AM
To: Frigo, Mark; Ken Price
Cc: Beckett, Timothy
Subject: RE: [External] LCRA / E.ON Follow-up Discussion

Hi Mark - as I mentioned on the phone, LCRA will continue to abide by the terms of the contract. However, I think there is a mutually beneficial discussion to be had about how compliance under the contract could maximize the value for both parties. As such, I think we should proceed with the 2pm call.

Thanks,

Richard

From: Frigo, Mark [mailto:Mark.Frigo@eon.com]
Sent: Thursday, May 07, 2015 10:39 AM
To: Richard Williams; Ken Price
Cc: Beckett, Timothy
Subject: [External] LCRA / E.ON Follow-up Discussion

Richard and Ken,

We discussed our Papalote II PPA internally with our executives here at E.ON. We currently do not have any intention other than for LCRA to abide by the terms of the PPA they executed. As such, we are not open to explore other options.

I send this e-mail because I want to be upfront and honest. We do value LCRA as a customer. If you

think the 2:00 p.m. call is still necessary, let me know.

With kind regards,
Mark A. Frigo

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOWER COLORADO RIVER AUTHORITY, Plaintiff, vs. PAPALOTE CREEK II, LLC f/k/a PAPALOTE CREEK WIND FARM II, LLC, Defendant.	§ § § § § § § § § § §	CIVIL ACTION NO. 1:15-CV-656-SS

ORDER

On this day came for consideration Plaintiff's Opposed Motion to Compel Arbitration (the "Motion"; Doc. No. 8). The Court, after considering the Motion and any response thereto, finds that the Motion should be and is hereby GRANTED in its entirety.

IT IS THEREFORE ORDERED that all disputes and controversies between Plaintiff Lower Colorado River Authority and Defendant Papalote Creek II, LLC f/k/a Papalote Creek Wind Farm II, LLC shall be submitted to binding arbitration to be conducted pursuant to the provisions of the arbitration agreement executed by such parties;

IT IS FURTHER ORDERED that the award or decision rendered by the arbitrator shall be binding upon Plaintiff and Defendant, and shall be entered by this Court and enforceable in this Court; and

IT IS FURTHER ORDERED that this lawsuit is hereby abated pending final determination by the arbitrator or further order of the Court.

Signed on this ____ day of _____, 2015, at Austin, Texas.

_____
THE HONORABLE SAM SPARKS
UNITED STATES DISTRICT JUDGE

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