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Loss Of Tax Credit Could Put Freeze On Renewable Mandates

By **Keith Goldberg**

Law360, New York (October 24, 2013, 6:18 PM ET) -- While fossil fuel industry-backed groups have so far failed to roll back state renewable energy mandates, states' efforts to expand them may not fare so well if the federal renewable production tax credit is allowed to expire at year's end and hikes up the cost of green projects.

Since it was first enacted in 1992, the PTC has been a boon to wind developers, which say it has helped the industry become commercially viable. However, the credit is set to expire at year's end after being extended for one year in January as part of a broader congressional deal to avoid the "fiscal cliff." Some Republicans in Congress have sought to kill the credit, while the president wants to make it permanent.

Both the PTC and state renewable portfolio standards — which demand that utilities draw a certain percentage of their power from renewable sources by a certain date — have been vital to the growth of the renewable industry, and their interdependence cannot be ignored, experts say.

The PTC's expiration "will increase the scrutiny on RPS standards and how utilities meet them," Patton Boggs LLP partner Josh Greene said. "Less wind generation capacity coming online will make utility regulators continue to ask tougher questions and wrestle with some generation and capacity issues that will cause some people to potentially rethink what we should and what we shouldn't do."

There are currently 29 states that have an RPS in place, and many have beaten back recent challenges from conservative lawmakers and think tanks that claim the standards increase electricity rates for customers.

Fortunately for those states, which include Republican-controlled states such as Kansas and North Carolina, already existent standards are likely safe with or without the PTC. While the tax credit's expiration could curb the appetite for new wind projects by making them more costly to finance, experts doubt it would spark another rethink of existing RPS programs, especially because many states are starting to bump up against their renewable requirements.

"They're targets, but not super-aggressive targets," said Jackie Roberts, a senior director in the Environmental Defense Fund's U.S. climate and energy program.

But without a PTC to spur additional project construction, setting higher renewable targets may be a tougher sell for states, experts say. California, which has one of the most aggressive RPS's in the U.S., recently enacted a law that establishes that its 33 percent renewable requirement for utilities is a floor, not a cap. But the decision to impose higher requirements rests with state utility regulators.

"Given where we are today, with states inching up to the limits, we have talk about where the requirements go next," Roberts said. "It could make it harder to argue for [an increase] if we don't see more projects in the pipeline."

It's not just utility regulators who would have concerns over the ability to meet RPS requirements, but also grid operators such as regional transmission organizations, whose priority is ensuring the grid is stable and reliable, according to Greene.

"They would have to change their models too if the PTC went away, because they are assuming that a certain amount of renewable generation capacity is coming online," Greene said.

However, Elias B. Hinckley, a partner in Sullivan & Worcester LLP's environment, energy and natural resources group, said it was possible that the PTC's absence could actually spur states to beef up their RPS programs in an effort to keep their wind development industries viable.

"Part of all the discussion about the PTC phaseout is that the economics [for wind] have improved a lot," Hinckley said. "The gap that used to be there [between wind and conventional energy sources] five years ago is much higher than the gap there is now."

One reason why efforts to roll back state RPS programs are coming up short is that state lawmakers have decided that renewable industry investment and jobs created by the programs outweighed concerns over higher electricity costs. While additional wind projects needed to meet higher renewable targets will be costlier without the PTC, some states may decide that it would be costlier if their wind industry withers because there's no need for new projects, according to Hinckley.

"I think the discussion shifts that way in a post-PTC world. Wind support is more geographical than political," Hinckley said. "If the industry goes off a cliff next year, you're not going to see that [debate] in someplace like Texas, but somewhere like Iowa or Nebraska, where it really is an important piece of the economy, there would be that discussion."

And even if the project pipeline does dry up, experts say there are ways states can tweak their programs to ensure their renewable goals are met, such as encouraging utilities to increase deployment of energy efficiency technologies that decrease overall energy use.

"Energy efficiency has been referred to as the fifth fuel, and I think there's easy money there with projects that can be implemented," Mayer Brown LLP partner J. Paul Forrester said. "There's just been a lot more positive discussion about these projects recently."

--Editing by Elizabeth Bowen and Philip Shea.