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Tax Credit Revival Too Little, Too Late For Wind Developers

By **Keith Goldberg**

Law360, New York (December 17, 2014, 5:55 PM ET) -- The retroactive, one-year resurrection of the federal production tax credit within the tax extenders bill that Congress advanced Tuesday is a hollow victory for the wind industry, benefiting only a handful of projects while putting future ones back in limbo once the calendar turns to 2015, experts say.

The Senate approved a tax extenders bill passed earlier this month by the House of Representatives, sending it to the White House, where President Barack Obama is expected to sign it. The bill revives the PTC, which expired at the end of 2013, but only until the end of this year.

While a one-year extension is better than no PTC at all, experts say the extension has come far too late to provide a significant boost to a U.S. wind industry that has seen project development and installation slow in 2014 in the tax credit's absence.

“I don't think it’s very likely a wind developer has been waiting all year to begin construction and decides to put a shovel in the ground the next [few] weeks,” said Mickey Leibner, a Washington-based government affairs adviser at Mayer Brown LLP. “That’s just not how things work.”

Between securing land, permits and environmental reviews and actual construction, large-scale wind farms are multiyear projects, and it’s hard for developers and investors to commit to such projects if there’s annual uncertainty over whether they’ll qualify for the PTC, experts say.

"I think even if a two-year extension had been provided here, it would have been a much bigger benefit for wind developers because it would have at least given some certainty to a year of building up projects and knowing those projects would be qualified,” said Kaye Scholer LLP tax department counsel Gregg Benson.

That’s not to say no wind projects will benefit from the extension.

“Basically ... anyone that had a deal at the end of 2013 that they felt might have been susceptible to challenge, but had been working on it throughout 2014, are going to be more comfortable," Benson said.

Developers that were in danger of not completing their projects in time to qualify for the PTC get a reprieve as well. Still, it’s a small group that will ultimately benefit.

As for developers that haven't yet broken ground on their projects, the window to do so is pretty small.

"It's going to be tight, but it doesn't take a lot to qualify," said Greg Jenner, a former head of the U.S. Department of the Treasury's tax policy office who co-chairs Stoel Rives LLP's energy team. "If they have the ability to [execute] a binding, written contract and then give the construction company a limited notice to proceed, as long as they do the right things, like excavate turbine sites, they can do it."

In April 2013, after the previous one-year extension of the PTC, the Internal Revenue Service **said projects would be eligible** for the credit in 2014 if developers had started significant physical construction work or spent more than 5 percent of the project's total cost in 2013. Then the IRS **modified the guidance** in September 2013, saying developers wouldn't have to show continuous efforts toward construction work after 2013 to stay eligible for the credit, as long as the projects were in service by Jan. 1, 2016.

In August, the agency **updated the guidance** by laying out what passes the "physical work" test the agency uses to determine what kind of construction needs to have been completed before 2014 to qualify for the credit, listing some qualifying examples: on-site excavation, roadwork or physical work on a custom-designed transformer that increases a facility's electric voltage. The work's price tag wouldn't be a factor, it said.

The guidance also expanded safe harbor provisions to say that a taxpayer can qualify for the credit if it incurred project costs of at least 3 percent of the total facility cost before Jan. 1, 2014, within certain limitations — down from a previous 5 percent.

But now that the PTC has been extended through 2014, wind developers are hoping the IRS will push back its deadlines another year as well.

"I think it would be helpful if the IRS issued guidance that continuous construction won't be challenged as long as the construction is completed by the end of 2016," Benson said. "That's additional guidance which would be helpful for developers who have done work."

Jenner suspects that if the IRS does move back its completed construction deadlines, that may apply only to new projects that began construction in 2014.

"That could catch a lot of people by surprise," Jenner said. "Suppose you're a new project that began construction in 2013. Do you go out and do something in 2014, and do you get the 2016 date? Can you do [qualifying] construction twice?"

Wind industry representatives say they will push Congress for a permanent PTC solution in 2015, but experts say that's unlikely unless it's part of a broad tax reform package. The current version of Congress floated comprehensive tax reform earlier this year, but the notion went nowhere. Still, with Republicans taking control of both houses of Congress next month, Leibner says that could open the door for a grand tax bargain with the White House.

"I'd hope there are enough lawmakers who want to get something done, and I think President Obama may be willing to try and work with these guys to come up with a package," Leibner said. "It's a pretty good legacy issue if you can get it done."

Jenner is far less optimistic, noting that the last comprehensive tax reform took place in 1986, in a far less inert Congress, yet still took almost two years to complete.

This means wind developers will once again play a guessing game over whether the PTC will get another one-year reprieve in 2015, putting a chill on new development, experts say.

“This is all the silliness that we have to go through because Congress is really pathetic, and I don't think there's a tax lawyer in this country that would disagree with me,” Jenner said.

“It's not the way to make good policy,” he added. “The whole notion where we've got expiring tax credits ... we issue tax credits to incentivize behavior. How can you incentivize behavior when you’re doing this in the middle of December?”

--Editing by Kat Laskowski and Edrienne Su.
