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Tax Credit Delay May Be Life Saver For Wind Projects

By **Keith Goldberg**

Law360 (May 8, 2020, 7:13 PM EDT) -- The U.S. Treasury Department's pledge to consider extending eligibility deadlines for renewable energy tax credits could be a lifeline for coronavirus-impacted wind project developers who face the possibility of losing the tax credit outright if they don't complete construction by year's end.

While the move the Treasury Department hinted at Thursday would benefit wind and solar projects alike, energy tax experts say the biggest beneficiary would be wind developers whose four-year window to finish their projects and thus remain eligible for the production tax credit, or PTC, runs out after 2020. Those developers are being hampered by supply chain disruptions and construction and permitting delays due to the COVID-19 pandemic.

Experts say absent an extension of the four-year safe harbor, the resulting uncertainty over those projects' eligibility threatens to scare off tax equity investors that reap the value of the PTC, especially since developers risk losing the credit entirely if they fail to otherwise convince the IRS that they were continuously building their projects.

"If the four-year safe harbor is extended for a year, that will be a game-changer," said Stoel Rives LLP energy development partner Greg Jenner, a former Treasury official. "It will give all of these projects the certainty they need. It's a bridge they don't have to worry about crossing."

Wind developers who began construction in 2016 in accordance with IRS guidelines must have their projects up and running by the end of 2020 in order to claim the full value of the PTC credit, and all PTC-eligible projects must show continuous construction efforts per the IRS guidelines.

Treasury didn't explain how it would update guidance on eligibility for both the PTC and the investment tax credit that is favored by the solar industry, saying in a letter to Senate Finance Committee members Thursday only that the agency "plans to modify the relevant rules in the near future."

But Finance Committee Chairman Chuck Grassley, R-Iowa, who represents a major wind energy-producing state, said Treasury is working on an April request from committee members to extend safe-harbor rules governing project construction and give eligible projects an extra year to finish up.

If COVID-19-related delays push project completion into 2021, developers will have to convince the IRS that they engaged in continuous construction. That's a facts-and-circumstances case that isn't necessarily easy to make because the government's own rules are vague, experts say.

"Nobody knows what 'continuous' means," said Mayer Brown LLP tax partner Jeff Davis, who co-leads the firm's renewable energy group. "Once you accept that you don't have to interpret 'continuous' to mean, literally, continuous, does that mean you have to make progression on a weekly basis? On a monthly basis? On a quarterly basis?"

What's more, if developers can't convince the IRS they've engaged in continuous construction since 2016, the entire value of the PTC they were hoping to collect goes up in smoke, experts say.

"It's not as if it decreases," Jenner said. "It's like a death penalty."

All of those variables create a level of uncertainty that dissuades tax equity investors from committing money to a project, experts say.

"When you're out negotiating an arms-length transaction with someone who is there for the expected tax benefits, that's hard," K&L Gates LLP partner Elias Hinckley said. "You have this ambiguous construct in the middle of all of it that's fundamental to whether these tax benefits exist."

Davis said it could also put at risk construction loans developers have secured for their projects. Many construction loans have covenants that the projects must be completed by the end of the year, he said.

"But for this [possible] extension, if the developer went to the lender and said, 'There's going to be a delay, we may not get this in service by the end of the year,' the construction lender could potentially view that as a default and stop funding construction," Davis said.

In addition, if a developer isn't able to secure sufficient tax equity funding because a project is no longer able to collect the full value of the PTC, the developer may not have enough money to repay the construction loan, Davis said.

Experts say time pressures aren't as acute for solar developers, since the four-year safe harbor for the completion of projects to qualify for the full value of the investment tax credit expires at the end of 2023 and the credit itself only decreases in value and never expires.

Nevertheless, coronavirus-fueled supply chain disruptions have thrown into question whether solar developers remain eligible for the full ITC for investing at least 5% of their project's cost by the end of 2019 under IRS guidelines, experts say. The guidelines require developers to have a "reasonable expectation" they'll actually have the equipment they're using to satisfy the 5% threshold within 105 days of purchase.

Experts say coronavirus-related force majeure notices were rolling in from solar equipment manufacturers as early as February, citing unforeseen circumstances that prevented them from fulfilling their contractual obligations to project developers. While most developers can make a strong case to the IRS that if not for the pandemic, they reasonably expected to have their equipment in time, the agency making that clear in an official notice would eliminate any lingering uncertainty for developers and tax equity investors, experts say.

"It's just a logical and fair reading of the rules," Hinckley said.

For wind and solar developers alike, the hope is that Treasury's pledge of a revision to tax credit eligibility rules in the "near future" comes sooner rather than later. Until Thursday's letter, experts say developers were scrambling to create contingency plans, such as splitting up wind projects to ensure that wind turbines and associated equipment that can definitely be up and running by the end of 2020 remain eligible for the full PTC.

"A little more guidance would have been nice, but I think this will calm a lot of nerves throughout the industry, even if we don't know exactly what the final rules are going to look like," Hinckley said.

--Additional reporting by Stephen Cooper. Editing by Kelly Duncan and Emily Kokoll.