

US Offshore Wind Leases Only Half The Battle For Industry

By Keith Goldberg

Law360, New York (June 04, 2013, 8:29 PM ET) -- The first-ever offshore wind energy lease sale in U.S. coastal waters unveiled by the Obama administration Tuesday removes some obstacles for potential projects, but attorneys warn that high costs and complex logistics will still present significant hurdles for developers hoping to successfully plant turbines in the ocean.

Details of the lease auction, long in the works, were formally announced by the U.S. Department of the Interior on Tuesday. It will take place on July 31 and offer up nearly 165,000 acres of federal waters off the coasts of Rhode Island and Massachusetts, in two parcels.

Combined, the two lease parcels could accommodate up to nearly 3,400 megawatts of electricity, enough to power more than 1 million homes, the DOI said.

"This is history in the making as we mark yet another major milestone in the president's all-of-the-above energy strategy," Interior Secretary Sally Jewell said in a statement. "Today we are moving closer to tapping into the enormous potential offered by offshore wind to create jobs, increase our sustainability, and strengthen our nation's competitiveness in this new energy frontier."

While the lease sale could provide encouragement for an industry that hasn't yet begun construction of an actual offshore wind farm in the U.S. despite getting approval for several projects off the Atlantic coast, attorneys say it doesn't make securing financing for a project, as well as surviving any environmental or legal challenges, any easier for developers.

"A federal offshore wind lease will be an important step, but the project developer will still need staying power to persevere through the environmental and public review process, as well as the commercial aspects of project development," William Holmes, a partner in K&L Gates LLP's energy and infrastructure projects and transactions practice, told Law360.

Offshore wind farms carry significantly higher price tags than onshore wind farms, and no developer is going to be able to secure outside financing without having an appropriate project site, the environmental thumbs-up and long-term power purchase agreements with utilities for the wind energy produced by the proposed project, attorneys say.

The government has attempted to address a couple of those factors through the lease sale. Not only do the lease parcels provide sites for projects, but the DOI's Bureau of Ocean Energy Management made a revised environmental assessment of the lease sites that concluded that reasonably foreseeable environmental effects associated with the issuance of wind leases and related activities wouldn't significantly impact the environment.

"Those are two very important things that you've satisfied in moving forward," Reed Smith LLP partner Henry King said. "But the question of whether the economics are there to support construction costs remains unsolved."

The uncertain future of federal subsidies for the wind industry only makes that question more difficult for developers to answer and may make them hesitant to snap up a federal lease, attorneys say.

Those subsidies include the production tax credit and the energy investment tax credit. These credits were set to expire Dec. 31, but Congress extended them by one year in its deal to avert the fiscal cliff. Some Republicans in Congress have sought to kill the credits, while President Barack Obama wants to make the production tax credit permanent.

Not only would the absence of tax credits make an already costly offshore project even costlier, it would make it more difficult to secure a power-purchase agreement that can satisfy potential project financiers, attorneys say.

"There's no doubt the lease is worth a lot more if the tax credit is around," Keith Martin, co-head of Chadbourne & Parke LLP's project finance practice, said. "If you don't have a tax credit, the electricity will be just more expensive to ratepayers."

Even if a developer secures a federal lease, it could take several years for a project to get off the ground, attorneys say.

"In addition to completing the environmental and public review process for its project-specific development plans, the winning bidder will still need to enter into a power purchase agreement with a creditworthy utility, interconnect with the grid, enter into contracts to procure wind turbines and build the wind project, and secure project financing," Holmes said. "The most challenging of these steps will likely be securing a PPA at a price and on terms and conditions that are financeable."

The most glaring example of an offshore wind project's lengthy timeline is the Cape Wind project off the Massachusetts coast — a project 12 years in the making. The project's developers said in March that they had secured \$2 billion in funding and hoped to begin construction by year's end. Yet the project has been beset by legal challenges from environmental groups and Native American groups, some of which are still pending.

As a result, only the most established, serious players in the U.S. offshore wind industry may look to bid on federal leases, attorneys say.

"Will you have several new entrants? Probably not — not until the longer-term policies are a little more set," said Ed Zaelke, who co-chairs Akin Gump Strauss Hauer & Feld LLP's global project finance practice and is the former president of the American Wind Energy Association. "The ones that are doing offshore wind now are really doing it as a leap of faith."

The DOI seems to have taken that into account — the BOEM said Tuesday that it would also hold a mock auction for nine companies that have expressed interest in a federal lease. Those companies include Deepwater Wind LLC, which has been developing a 30-megawatt farm off Rhode Island since 2008, and Fishermen's Energy, which is preparing to construct a 25-megawatt farm off the coast of Atlantic City, N.J.

"After careful review, BOEM has determined that these companies are legally, technically and financially qualified to participate in the upcoming lease sale," BOEM Director Tommy Beaudreau said in a statement Tuesday.

Yet even if all those companies don't end up bidding on leases, their interest highlights the promise of federal offshore wind leasing, which could inject additional competition into the U.S. offshore wind market, attorneys say.

"[The lease sale] will perhaps be a catalyst for what has already started [in offshore wind development], and I think it's a good signal to the market of where the government is in terms of this," Rob Freedman, who co-chairs Shearman & Sterling LLP's sustainable development group, told Law360. "It shows the government is behind the development of offshore wind."

--Additional reporting by Joshua Alston. Editing by John Quinn and Andrew Park.

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