

# N.C. Renewable Energy Developments: The Good News And The Bad

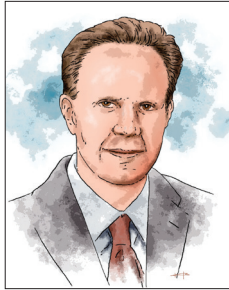
This week's Industry Current is written by **David Burton**, partner, and **Richard Page**, associate at **Akin Gump Strauss Hauer & Feld** in New York. Burton and Page, whose fortes include tax structures involving renewable assets, survey the renewables landscape in North Carolina, which has shelved the decline of renewable energy tax credits amid a regulatory move on the proportion of renewables that state-controlled utilities are required to buy.

There is good news and bad news for North Carolina's budding renewable energy industry. The good news is that North Carolina has delayed the sunset of renewable energy tax credits. The bad news is that North Carolina may soon be freezing an anticipated increase in the percentage of renewable energy that state-regulated utilities are required to purchase. This article reviews both developments.

## GOOD NEWS

On April 30, 2015, the governor of North Carolina signed a legislation that delays the sunset of North Carolina renewable energy tax credits from Jan. 1, 2016 to Jan. 1, 2017, for projects that are "substantially completed" by Jan. 1, 2016. Solar, wind, geothermal, biomass, combined heat and power, and hydroelectric projects qualify for the credit. The tax credit is equal to 35% of the costs of renewable energy property, making it among the most generous of such state incentives in the U.S. For commercial and utility scale projects, the 35% credit is capped at \$2.5 million per installation. For residential projects, the credit is capped at \$3,500 per residence.

For a project to be considered "substantially completed", if the project has a total size of 65 MW or more of direct current capacity, both of the following conditions must be met: (i) 50% of the costs of the project must have been



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incurred, and (ii) 50% of the physical construction of the project must have been completed. If the project has a total size of less than 65 MW of direct current capacity, each of these thresholds becomes 80%. Without this new "substantially completed" leeway, potentially eligible property would have had to have been fully "placed in service" before Jan. 1, 2016 to earn the state's tax credits.

A taxpayer wishing to take advantage of this delayed sunset must file an application with the state by Oct. 1, 2015. The application must include estimates for the total costs of the project and for the total capacity anticipated, the location of the project, and the anticipated credits to be claimed. To process the application, a fee of \$1,000 per MW of capacity must be paid, with a minimum fee of \$5,000.

Because the application is due on Oct. 1, 2015 and the "substantially completed" analysis is to be viewed as of Jan. 1, 2016, applicants must follow up with the state by March 1, 2016 with documentation to verify that the required completion thresholds were in fact met by the start of the year. The documentation required includes: (i) a written certification by the taxpayer stating that the thresholds were met, (ii) a notarized copy of a report written by a licensed engineer confirming that the physical construction threshold was met, and (iii) a notarized copy of a report written by a certified public accountant confirming that the cost threshold was met as determined under U.S. Internal Revenue Code Section 461.

Under IRC Section 461, which provides general rules for the proper taxable year to claim

a deduction, a cost can be accrued in the first year if delivery is reasonably expected to be made in the first three and a half months of the second year. This rule has provided developers in prior years seeking to qualify their projects for federal cash grants or the federal production tax credit by incurring 5% of the cost of the project, with the beneficial flexibility of being able to pay for equipment and include the payment in their qualification test, even though delivery was not made in the year of the payment; but for purposes of the North Carolina tax credit the usefulness of this flexibility is diminished by the fact that North Carolina also requires that a construction threshold be met.

North Carolina renewable energy developers and investors should keep close vigilance over ongoing and newly launched projects to ensure that the requirements mentioned above are satisfied on schedule by the respective Oct. 1, 2015 and Jan. 1, 2016 deadlines.

## BAD NEWS

North Carolina may soon be freezing an otherwise escalating percentage of renewable energy required to be purchased by state regulated utility companies. Many states, like North Carolina, enacted a Renewable Portfolio Standard, which requires state-regulated utility companies to purchase a certain percentage of their power from renewable sources. North Carolina's RPS is now 6% and is scheduled to progress to 12.5% by 2021.

Under H.B. 760 "Regulatory Reform Act of 2015," the RPS would be frozen at 6%. North Carolina's **House of Representatives** voted in favor of this bill by a vote of 77-32. The bill now moves to the **Senate**, which has been relatively lukewarm in its support of renewable energy initiatives as compared to the House.

According to the **American Wind Energy Association**, RPS is also being challenged in two additional states: Ohio and Texas. With respect to North Carolina, the AWEA has argued that if this bill passes, much of the projected \$1 billion worth of investment in North Carolina wind farms will shift elsewhere. ■