

## Energy Industry Updates for November 2010

### Senator Baucus Backs an Extension of the Section 1603 Cash Grant Program

Section 1603 of the American Recovery and Reinvestment Act, which provides cash grants in lieu of tax credits for certain types of qualified energy property, is set to expire at the end of this year.

In 2009, Senator Max Baucus (D-Mont), current Chairman of the Senate Finance Committee, led the passage of Section 1603. Sen. Baucus recently told *North American Windpower*, “[Extending] Section 1603 is a priority, whether it gets extended in December or January and applied retroactively.” He added, “I’m going to find a place for it.” In addition to Sen. Baucus, Vice President Biden recently spoke out in favor of an extension of the program. Moreover, renewable energy industry groups are similarly pushing for an extension as a vehicle to both create jobs and stimulate growth in the industry.

Section 1603 has been a lifeline to the renewable energy industry. It has spurred the development of new projects throughout the country during a time when the tax equity markets vanished and renewable energy projects otherwise would have been unable to monetize the available tax credits. Nonetheless, extension of the cash grant program is far from certain. The political landscape has changed after the midterm election and the Senate Finance Committee already has a full agenda for the rest of the year.

With the politically uncertain future of Section 1603, many developers are still seeking to qualify for cash grants by the end of 2010.

Foley Partner Jeffery R. Atkin recently led a Web conference on Section 1603 eligibility. An audio recording and materials from “Section 1603 Cash Grants: Guidance for Qualifying Your Project by December 31, 2010” are available at: <http://bit.ly/g0MXFZ>.

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### Renewable and Transmission Rulemakings

Two significant rulemakings of interest to the renewable and transmission sectors of the electric industry were issued by FERC in November. First, FERC issued a Notice of Proposed Rulemaking (NOPR) regarding the integration of variable energy resources (VERs) into the power grid. Second, FERC issued a directive to the North American Electric Reliability Corporation (NERC) to modify the definition of the transmission facilities subject to mandatory reliability standards.

#### Proposed Rule to Integrate Renewables (Docket No. RM10-11)

The NOPR includes proposed changes to both the pro forma Open Access Transmission Tariff and the Large Generator Interconnection Agreement. FERC proposed three basic reforms:

1. Requiring public utility transmission providers to offer to all transmission customers the option of using intra-hourly transmission scheduling at 15-minute intervals.
2. Adding a provision into the pro forma Large Generator Interconnection Agreement that provides for interconnection customers whose generating facilities are VERs to submit to transmission providers meteorological and operational data to the extent needed by the transmission provider to develop VER power production forecasting.
3. Adding a new generic ancillary service rate schedule through which transmission providers will offer generator regulation service to transmission customers delivering energy from a generator located within the transmission provider’s balancing authority area. The current OATT contains an ancillary service schedule providing regulation service for load.

Staff stated at a FERC meeting that even though this rulemaking primarily focuses on helping VERs, the proposed changes will help all generation and non-generation resources. By proposing transmission scheduling at 15-minute intervals, FERC seeks to provide greater accuracy in scheduling and, therefore, limit the amount of ancillary services VERs must supply or purchase.

FERC Chairman Jon Wellinghoff stated that the requirement to provide generator regulation service would allow moment-to-moment balancing, and the transmission owner can recover the cost of this service. This would be an optional service in terms of whether the

customer takes it from the transmission owner or otherwise supplies it.

Mr. Wellinghoff noted that as older generation units retire and the nation begins to utilize electric cars, which can be used for storage and ancillary services, the market for variable resources would change. He stated that the proposal is a fair and balanced way to manage the need to integrate VERs and the costs to customers for the operating reserves necessary to balance these resources. Mr. Wellinghoff believes the proposed changes will result in a transmission system that is more efficient and reliable, which will minimize costs to transmission customers.

The other commissioners also echoed support for the proposed rules. Commissioner Philip Moeller noted that the NOPR respects regional differences, but is transformative in adopting the requirement for the intra-hourly scheduling. Commissioner John Norris stated that FERC recognizes the cost of integrating VERs, but that the proposed rule minimizes the costs.

Commissioner Marc Spitzer focused on the NOPR's effects on reducing barriers to entry for VERs, which is good news for ratepayers and the environment. Commissioner Spitzer also noted that FERC is "ahead of the curve" in addressing the technological changes associated with VERs. Commissioner Cheryl LaFleur emphasized that the NOPR reflects the increasing importance of variable energy resources growth.

Comments on the NOPR are due 60 days after publication in the Federal Register.

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## **FERC Directs NERC to Modify Definition of "Bulk Electric System"**

The types of transmission facilities subject to mandatory reliability standards could be changing as a result FERC action. The new, final rule is aimed at protecting the reliability of the bulk power system. The rule requires NERC to revise its definition of "bulk electric system" to ensure that the definition encompasses all facilities necessary for operating an interconnected electric transmission network.

FERC's stated intent is to eliminate inconsistencies across regions, eliminate the ambiguity created by the current characterization of the 100 kilovolt (kV) threshold as a general guideline, provide a review system to ensure that any variations do not compromise reliability, and ensure that all facilities with significant impacts on reliability are subject to mandatory rules.

The current "bulk electric system" definition provides regional entities discretion to define "bulk electric system," including the ability to exclude facilities 100 kV or above, without obtaining approval by NERC or FERC. The NOPR proposed to continue to include all facilities rated above 100 kV and eliminate regional discretion to exclude facilities 100 kV or above, providing a consistent identification of bulk electric system facilities across all regions. The NOPR called for FERC and NERC approval for exempting facilities that would otherwise qualify as part of the bulk electric system on a facility-by-facility basis.

The final rule retains the NOPR bright-line test that includes all facilities operated at or above 100 kV and proposes that NERC adopt a standard process and criteria for excluding facilities at or above 100 kV that are not necessary for the operation of the interconnected transmission network. However, FERC allows NERC to develop its own alternative proposal, so long as it is as or more effective than FERC's approach. NERC must file its revised definition within one year of the order's effective date.

Mr. Wellinghoff stated that it is critically important for the right facilities to be subject to mandatory reliability standards. The current NERC definition allows too much discretion, which, in turn, permits individual regions to define which facilities are subject to reliability standards. Mr. Wellinghoff noted that any alternative NERC proposal must be as effective or more effective than FERC's proposed approach and must not reduce reliability.

Commissioner Spitzer clarified that the order does not call for FERC to rule on every exemption; rather, it allows the regions to grant the exemptions and allows some oversight of the process by FERC.

The final rule will be effective 60 days after publication in the Federal Register.

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## **USPTO Continues to Expand Expedited Examination of Green Technologies Patent Applications**

Patent applicants in the energy industry are likely aware that it can take years for energy industry patent applications to issue as granted patents. A temporary USPTO program provides for significantly expedited handling of green technologies patent applications if applicants file an appropriate petition and meet some additional requirements.

The green technologies expedited examination program has twice been expanded since its December 8, 2009 launch. On November 10,

2010, a Federal Register notice (Vol. 75, No. 217) (Docket No. PTO-P-2010-0083) made clear that the USPTO will now accept petitions under the program "irrespective of the filing date of the application." Previously, only applications filed prior to December 8, 2009 were eligible for participation in the program. This expansion will allow patent applicants in the energy industry to strategically file new or continuing applications and could be a jump start for sluggish energy industry patent portfolios.

Although the expansion of the green technologies expedited examination program will allow applicants to strategically request expedited examination, a 3,000-application limit of the program has not been expanded. As nearly 1,000 petitions under the program have now been accepted, energy industry applicants should file petitions for inclusion into the program as soon as possible. The program is scheduled to end on December 31, 2011 if the 3,000-application limit is not met.

Patent applicants interested in the green technologies expedited examination program should discuss the requirements, timing considerations, positives, negatives, and overall strategy with their patent attorneys. Further information that summarizes the program, its recent expansion, and some strategic considerations in detail is available at <http://bit.ly/USPTOGreenPilotUpdate>.

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## Utilities May Accelerate Coal Plant Retirement

As reported by the *Christian Science Monitor*, a new study by Credit Suisse suggests that up to one-fifth of U.S. coal plants may close within the next five years. The EPA is drafting new Clean Air Act regulations intended to reduce emissions of mercury, sulfur dioxide, and nitrogen oxides.

These more stringent regulations leave utilities with a difficult choice: Pay billions of dollars to upgrade their older coal plants to comply with the new regulations, or shutter the older facilities and attempt to build new natural gas and renewable generators. As natural gas becomes cheaper and pushes down electricity prices, the coal "dark spread" is reduced, placing additional economic pressure on older, less efficient coal plants.

Coal plants face additional headwinds because of potential greenhouse gas regulation. Though Congress failed to pass carbon cap and trade, the EPA is currently preparing rules to govern greenhouse gas emissions of large emitters under the Clean Air Act. With some form of greenhouse gas regulation still possible, if utilities upgrade their older coal plants with costly new pollution controls, they run the risk of incurring additional carbon abatement costs in the future. This risk further tips the balance away from coal and toward lower carbon emission generation sources.

Yet the risks are not one-sided: Several state commissions have voiced concern that building new renewable generation facilities may be cost-prohibitive. Tax incentives and subsidies play a significant role in mitigating higher costs of renewable power. The changing balance of power after the mid-term elections may put the future of some of these incentives at risk, potentially increasing the costs of developing additional renewable capacity.

The combination of these factors may result in the acceleration of coal plant retirements as utilities attempt to balance competing mandates both to comply with emissions reductions requirements and to maintain a reliable supply of low-cost electricity for consumers.

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