UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2017 Renewable Energy Law

January 31 – February 1, 2017
Austin, Texas

Regulatory Highlights – The Year 2016 In Review and Implications for 2017

Diana Liebmann

Author Contact Information:
Diana Liebmann
Haynes and Boone, LLP
San Antonio, Texas

Regulatory Highlights—the Year 2016 In Review and Implications for 2017

The Public Utility Commission of Texas ("PUCT" or "Commission") started out last year much the same way that it is starting out this year—the key item on its agenda will be the sale of Oncor Electric Delivery, LLC out of the EFH bankruptcy—however this sale will be to NextEra Energy Resources, LLC instead of two entities spearheaded by the Hunt family. Many of the other key issues initiated in 2016 have carried over into 2017, including the implications of Reliability Must Run, the determination of a standard for reliability, and the use and deployment of both distributed generation and emergency response service, and possible transitions of Lubbock Power & Light ("LP&L") and Rayburn Country Electric Cooperative ("Rayburn") load into the Electric Reliability Council of Texas ("ERCOT"). A review and discussion of these issues demonstrates that the market design, which continues to evolve around many of the same key issues and in particular renewable development, is influenced by legislative changes, agency guidance and changes to rules.

Extension of Production Tax Credits for Wind Generation

On December 18, 2015 President Obama signed the *Consolidated Appropriations Act, 2016* (the "Appropriations Act") amending Section 45 of the U.S. Internal Revenue Code and extending the Production Tax Credit ("PTC") available to wind generators until 2020 with a phase-out provision. Prior to the passage of the legislation, the PTC was available for wind facilities that had begun construction before January 1, 2015. The passage of this legislation permits wind facilities in development during 2015 and any time through 2020 to be eligible for PTCs. However, the legislation also contemplates a reduction in the value of the PTC for those projects for which construction begins after 2016. If construction begins in 2017, the value of the PTC will be reduced by 20% per MWh, a 40% reduction will apply to facilities that begin construction in 2018 and a 60% reduction applies to facilities beginning construction in 2019. The PTCs are slated to be phased out by the beginning of 2020. It is important to note that beginning construction is a subjective standard and can include spending money committed for construction, such as entering into a turbine supply agreement, so it is likely that developers will have projects front-loaded to maximize the available PTCs, even for projects that will not truly begin development until 2020. The current level of the PTC for wind is $23/MWh and that amount is adjusted upward each year for inflation, though now it will also be reduced in accordance with the statutory scheme. The effect in ERCOT over the last year has been to delay certain projects that were rushing to meet the prior deadlines, but now have more time, and to increase the overall number of projects planned for the ERCOT market.

Extension of the Investment Tax Credit for Wind and Solar Energy Production

The Appropriations Act also amended Section 48 of the U.S. Internal Revenue Code that includes the Investment Tax Credit ("ITC"). The ITC is based on the percentage of each energy property brought into service during a taxable year and is available to a qualified wind or solar development. The current ITC is a 30% tax credit. The ITC available to wind facilities is reduced and eventually phased out during 2017, 2018, and 2019 in the same manner as the PTC, and is not available in 2020. The ITC was set to be reduced to 10% at the end of 2016 for utility scale solar and no longer be available in any amount for residential solar. However the ITC has now been extended through 2021 for solar, a five year extension, though if construction begins in 2020 the ITC will be 26%; if construction begins in 2021 the ITC will be 22%; and if construction begins after 2021, the ITC will be 10%. Similar to the impact of the extension of the PTCs for wind, solar development is anticipated to increase in ERCOT in time to take advantage of the earlier, higher percentage ITCs.

IRS Guidance on Tax Credits

The IRS issued Notice 2016-31 on May 5, 2016 providing guidance as to how wind, solar, biomass, hydropower and other qualified facilities can meet the "safe harbor" provision to obtain production tax credits ("PTC") following the passage of the PTC extension by Congress in December of 2015. The IRS notice essentially extends the construction period by stating that if a facility is placed in service *no more than four years after the calendar year in which construction of the facility began*, then it satisfies the Continuity Requirement of Section 45 of the Internal Revenue Code. In essence so long as 5% or more of the total cost of the project is paid, the project can be considered safe-harbored for purposes of obtaining PTCs for its generation for more than four years after the date the 5% was paid (*e.g.* some proportion of wind turbines were procured) from the time the PTCs expire, which following the extension in 2015 means the beginning of 2020. The extension of the PTC provided for a reduction in the value of the ITC by 20% in 2017, 40% in 2018 and 60% in 2019. However, this new guidance means that if turbines were procured in 2016, a project could be constructed in 2020 and still considered safe-harbored for the entire 100%. For ERCOT, this means that the PTC revenues that incentivize the siting of new wind generation in ERCOT will be around well after the PTCs would otherwise have expired by statute.

Distributed Generation Rulemaking

The Commission initiated Project No. 45078, *Rulemaking Related to Distributed Generation Interconnection Agreements*, to consider amendments to the standard agreement required by P.U.C. Subst. R. 25.211(p), relating to interconnection agreements for distributed generation. The primary issue throughout the rulemaking was which entity would be authorized to sign a distributed generation interconnection agreement—the end-use customer of the Transmission and Distribution Service Provider ("TDSP") as had been the case previously, or the distributed generation developer. As part of the proceeding, the Commissioners discussed their limited jurisdiction over developers of distributed generation ("DG") and requested briefing from the parties concerning the Commission's jurisdiction over a DG owner that develop DG but that are not a customer of the utility, and are not subject to the TDSP tariff in taking transmission and distribution service as a load. Although the Commissioners agreed that they would not have jurisdiction to penalize a DG owner for the failure to comply with Commission rules, both Commissioners Anderson and Marquez voted to allow the DG owner to sign the interconnection agreement with the TDSP *if* the end-use customer agreed that the DG owner had authorization to sign the interconnection agreement. Chairman Nelson dissented because of the likely public expectation that a non-performing DG owner signing an interconnection agreement should be under the jurisdiction of the PUCT and subject to its enforcement authority. The Order adopting this amendment was approved at the December 16, 2016 Open Meeting.