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No Easy Path For Renewable Energy

Law360, New York (April 03, 2009) -- Federal and state governments have been encouraging more renewable energy generation amid growing U.S. electricity demand and concerns about security and climate change due to our reliance on fossil fuels.

The recently adopted economic stimulus package contains a number of measures intended to move toward President Obama's target of quadrupling, to 10 percent, the amount of electricity from renewable sources by 2012.

But, to the extent the energy answer is "blowin' in the wind," it also brings new emphasis to the question of how to move all that green power through an already overburdened electricity transmission grid.

The American Recovery and Reinvestment Act of 2009, passed by Congress and signed into law by President Obama, provides a combination of tax credits, loan guarantees and bonds to promote renewable energy development.

This is sure to be good news for green energy developers who were faced with the nearly simultaneous blows of the credit markets drying up and fossil fuel prices declining precipitously from last summer's historic highs.

Recognizing that building more renewable power projects is only part of the clean energy equation, the stimulus bill also provides billions in loan authority for new transmission lines in the West.

Money alone, however, is not enough to overcome the existing impediments that new transmission projects encounter nearly everywhere.

Indeed, the present lack of transmission lines, and the barriers to developing new ones, constitute the Achilles' heel in the drive to increase renewable energy generation.

Congested Grid

The U.S. Department of Energy (“DOE”), as well as the American Wind Energy Association (“AWEA”) and Solar Energy Industries Association (“SEIA”), have identified an aging, congested transmission grid as a major hindrance to the growth of renewable energy.

DOE’s July 2008 report, “20% Wind Energy by 2030,” and an AWEA/SEIA February 2009 “Green Power Superhighways” white paper both noted that there are hundreds of thousands of megawatts of wind generation and tens of thousands of megawatts of solar power queued up for connection to the grid, but not enough existing transmission capacity to carry the electricity they would produce.

The problem is that the optimal areas of the U.S. for renewable generation tend to be in more remote locations — the central and northern regions are best for wind projects; solar and geothermal fare well in the Southwest — while the urban centers that need the electricity mostly are located on the coasts.

One proposed solution is for a green power superhighway comprised of high-voltage transmission lines from the inland sources of renewable power to the coasts.

A single high-voltage line can carry more electricity than several smaller capacity lines, costs less to build than lower voltage lines and loses less electricity.

Backers of the green power superhighway hold out the promise of substantial long-term savings, as well as providing the needed boost for renewables.

The stimulus bill takes modest steps toward a potential green power superhighway by authorizing new borrowing of up to \$3.25 billion from the U.S. Treasury for the 15-state Western Area Power Administration (“WAPA”) and nearly doubling the borrowing authority of the Bonneville Power Administration (“BPA”), which manages power generation and distribution in the Pacific Northwest.

Both authorizations are to be used specifically for financing, constructing and replacing the transmission grid. The stimulus bill, however, does not provide for transmission line development in the rest of the country.

Project Delays

Even with the stimulus money, it remains to be seen whether transmission projects can overcome systemic issues that often result in years-long delays.

Two proposed developments, Green Path North in California and the New York Regional Interconnect, provide examples of the hurdles that can arise even when a project is entirely in one state.

Green Path North is a proposal by the Los Angeles Department of Water and Power (“LADWP”) to develop a two- to five-mile wide corridor running from Desert Hot Springs to Hesperia, Calif.

The project designers envision a 500-kilovolt transmission line for access to as-yet undeveloped geothermal resources in the Imperial Valley, and shared use of the corridor by other oil, gas and water line projects.

Opponents of Green Path North include the cities of Riverside and Desert Hot Springs and San Bernardino County, along with numerous residents and environmental groups.

They cite the project’s potential impacts to the fragile desert, including Joshua Tree National Park; increased fire hazards, illegal dumping and trespass in the right-of-way; adverse impacts to property values and concerns about whether LADWP will use the line for coal-fired power generated across the border in Mexico.

New York Regional Interconnect (“NYRI”) also has encountered significant opposition. That project is a proposed 190-mile high-voltage transmission line running from near Utica, N.Y., to Orange County, outside of New York City.

NYRI would be the first above-ground upgrade of New York’s transmission system in 20 years, and could carry power generated by several wind and hydroelectric projects proposed in the state’s far northern counties.

Project proponents cite among NYRI’s benefits a reduction of wholesale electricity prices in New York, which currently has the highest rates in the continental U.S., and more property tax revenue, jobs and equipment purchases for local communities.

Opponents of the project argue that NYRI would not have any impact on whether renewable power projects are built in New York, it would not deliver power to metropolitan New York City and would actually result in rate increases, while at the same time devaluing properties along the right-of-way and displacing productive farms.

The New York Public Service Commission currently is conducting hearings on NYRI’s application, and the outcome is uncertain.

The issues grow even more complex when a proposed transmission line project would cross several states.

That means multiple, independent permitting decisions and, frequently, state regulators are reluctant to give up their veto rights when a project might have more impact than benefit in their jurisdiction, such as when a state is merely the conduit for power used by another state’s residents. Nor are there any guarantees that a transmission line only would carry renewable energy.

For example, the Eastern Plains Transmission Project is a proposed network of high-voltage lines that would run more than 1,000 miles from a proposed coal-fired power plant in Kansas to southeastern Colorado and Denver.

While wind projects might be able to take advantage of those proposed new lines, no wind farms have been built yet and, absent a reservation of space on the lines for renewable power, there may not be excess capacity available if and when such projects are proposed.

Renewable Energy Zones

Some efforts are underway to overcome these barriers.

In the 11 Western states that comprise the Western Regional Interconnect, the member states' governors and DOE are attempting to identify where the best resources are located and aggregate them into renewable energy zones, develop a conceptual transmission plan to deliver energy from those zones to the urban centers that use the power, coordinate the timing and regulatory approval of procurement, build cooperation to reduce barriers to permitting multistate generation-transmission projects and address cost allocation issues.

Completion of the first phase (identifying the renewable energy zones) is expected this summer; with the second phase (the conceptual transmission planning report) to be completed this fall.

Texas, which leads the nation in wind generation and is responsible for its own transmission, already has put the transmission horse before the renewable generation cart by creating what it calls Competitive Renewable Energy Zones ("CREZ") in the most likely areas of the state for wind projects.

Last year, the Texas Public Utility Commission adopted five CREZs in central west Texas and the Panhandle, and proposes building transmission lines in anticipation of siting projects in those areas.

Colorado is using the energy resource zone concept to spur planning and development of transmission capacity ahead of new generation projects.

The federal Department of Interior also is moving in a similar direction by establishing a task force to identify and prioritize zones on public lands where the agency can speed up expansion of renewable energy production and work on removing obstacles to permitting, siting, development and production.

Federal Preemption

In the meantime, an appellate court decision has closed off one regulatory path that was considered a potential way through the thicket of state-by-state and local processes.

Under authority of the Energy Policy Act of 2005 ("EPAAct"), the DOE had identified Critical Congestion Areas and designated the Mid-Atlantic and Southwest as National Interest Electric Transmission Corridors, which included the counties through which Green Path North and NYRI would pass.

The EPAAct also gave the Federal Energy Regulatory Commission ("FERC") authority to consider and issue permits for new transmission facilities within a designated National Corridor under certain circumstances, including when a state has withheld approval of a permit application for more than one year, which FERC interpreted to include state denials of a permit for new transmission.

In *Piedmont Environmental Council v. Public Service Comm'n of the State of N.Y.*, No. 07-1651 (available at 2009 WL 388737), the U.S. Fourth Circuit Court of Appeals held last month that FERC's interpretation was contrary to the plain meaning of the statute and that FERC did not have permitting authority when a state affirmatively denied a permit application within the one-year deadline.

According to the court:

"The commission's reading would mean that Congress has told state commissions that they will lose jurisdiction unless they approve every permit application in a national interest corridor. Under such a reading it would be futile for a state commission to deny a permit based on traditional considerations like cost and benefit, land use and environmental impacts, and health and safety. It would be futile, in other words, for a commission to do its normal work."

Even before the Piedmont decision, Congress was considering what role the states and federal government should play in transmission siting.

Perhaps in part because of NYRI, Sen. Charles Schumer, D-N.Y., proposed a bill last year that would have allowed states to supersede the federal government's energy corridor designations.

By contrast, in early March 2009, Majority Leader Sen. Harry Reid, D-Nev., introduced the Clean Renewable Energy and Economic Development Act that would allow FERC to act as a backstop for approval of transmission projects.

The bill would create renewable energy zones, similar to the Western Interconnect, Texas and Colorado approaches, and require reservation of 75 percent of the line capacity for renewable energy.

The bill also would designate FERC as the lead agency for environmental review of transmission line projects, with authority to issue construction permits, and the right of eminent domain, for qualifying projects.

For states that participate in interconnection-wide planning, FERC would be required to consider state recommendations on siting and work with states to resolve differences.

Each transmission project developer would have to demonstrate that its line has sufficient capacity for connecting several renewable sources in a renewable energy zone so that future renewable generators do not have to build additional transmission lines in the same area.

Senate Energy and Natural Resources Committee chair Jeff Bingaman, D-N.M., has proposed a third alternative, which does not require creation of renewable energy zones or reservation of a portion of the transmission lines for renewable energy, but would give FERC authority to issue a certificate for construction, acquisition or operation of any new high-voltage transmission project and make FERC the lead agency for environmental reviews.

Conclusion

When Sen. Schumer proposed his bill last year, he emphasized the need to protect the interests of citizens and states' rights. Sen. Reid, however, said his bill is intended to prevent "231 state regulators hold[ing] up progress."

Which approach will prevail is unclear right now, but the drive to increase renewable energy means that vigorous debates and tough decisions about transmission lines cannot be avoided for long.

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