RENEWABLE ENERGY

KENTUCKY'S LIMITED RENEWABLE ENERGY INCENTIVES

by Mark D. Lansing

Incentive Program

In August 2007, Kentucky enacted the Incentives for Energy Independence Act (IEIA) program (KRS 154.27-010 through 154.27-090). As with any Kentucky administered tax incentive programs, the inducements under the IEIA are negotiated by the Cabinet for Economic Development (subject to approval by the Kentucky Economic Development Finance Authority (KEDFA)). For renewable energy facilities, the incentives may include:

- up to 100% of the Kentucky income tax or the limited liability entity tax
- sales and use tax incentives of up to 100%
- a wage assessment of up to 4% for associated employees

Eligible companies include any company that constructs, retrofits, or upgrades a facility to:

- Increase the production and sale of alternative transportation fuels;
- Increase the production and sale of synthetic natural gas, chemicals, chemical feed stocks, or liquid fuels, from coal, biomass resources, or waste coal through a gasification process;
- Increase the production and sale of energy-efficient alternative fuels; and/or
- Generate electricity for sale through alternative methods such as solar power, wind power, biomass resources, landfill methane gas, hydropower, or other renewable resources.

To qualify, the facility must be:

- An alternative fuel facility or gasification facility that is carbon capture ready and uses oil shale, tar sands, or coal as the primary feedstock. The minimum capital investment is $100,000,000.
- An alternative fuel facility or gasification facility that is carbon capture ready and uses biomass resources as the primary feedstock. The minimum capital investment is $25,000,000.
- An energy-efficient alternative fuel facility that produces a homogeneous fuel from processes designed to densify feedstock coal, waste coal, or biomass resources. The minimum capital investment is $25,000,000.
- An alternative fuel facility that uses natural gas or natural gas liquids as the primary feedstock. The minimum capital investment is $1,000,000.
- A renewable energy facility that meets the minimum electrical output requirement of at least one megawatt of power for: wind, hydro, biomass, landfill methane; or generation of 50 kilowatts for solar. The minimum capital investment is $1,000,000. The electricity from a renewable energy facility must be sold to an unrelated party.
- A carbon dioxide transmission pipeline. The minimum capital investment is $50,000,000.

Tax incentives are available for up to 25 years for the following:

- *Sales and Use Tax Refunds*: Up to 100 percent of tax paid on tangible personal property made to construct, retrofit or upgrade a facility, on materials, machinery and equipment used to construct, retrofit or upgrade an eligible project.
- *Severance Tax*: Incentives up to 80 percent of taxes paid on the purchase or severance of coal or natural gas.
- *Tax Credits*: Up to 100 percent of corporate income or Limited Liability Entity Tax liability arising from the project.
- *Wage Assessment*: Approved companies may require employees, whose jobs were created as a result of the associated project, to pay a wage assessment of up to 4% of their gross wages. Employees will be allowed a Kentucky income tax credit equal to the assessment withheld from their wages. Thus, incentives up to four percent (4%) of gross wages of each employee. Additionally, Advanced Disbursement of post construction incentives using a formula based on percentage of labor component in construction and the utilization of Kentucky residents in construction phase may be available. Advance disbursements repayments may be based upon incentives earned in the future.

The maximum recovery for a single project from all incentives may not exceed 50% of the capital investment.

Application Process

Prior to making any capital investments, the company must submit an application to KEDFA, with a $1,000 application fee. Each incentive is negotiated on a case-by-case basis, but not to exceed 25 years from the project's activation date. There is also a 0.25% administrative fee assessed after the final incentives package is settled (capped at $50,000). The process is as follows:

1. Application is made to KEDFA, which verifies:

   i. Applicant has met all statutory and regulatory requirements.

ii. Applicant has secured or is in process of securing all necessary permits, certificates or approvals.
iii. Proposed facility is carbon capture ready, if applicable.
iv. Applicant has a plan that includes a projected number of Kentucky residents to be employed at the facility after completion and during construction.

2. Application is forwarded to the Office of Energy Policy and Department of Revenue for review.

3. Application may also be forwarded to independent consultants, as necessary.

4. Comments are received from external reviews.

5. KEDFA determines whether project appears to be eligible for the program and, if so, grants preliminary approval. Prior to final approval, the applicant must provide all supporting data requested by KEDFA, secure all required permits or take appropriate steps to do so, and cooperate with KEDFA to obtain opinions or recommendations from any outside consultants.

6. A labor market analysis must be prepared by a Kentucky Post-Secondary Education Institution in the region where the project will be located.

7. A Memorandum of Agreement is entered into between KEDFA and Applicant.

8. Terms of a tax incentive agreement (TIA) are negotiated to include the type of incentive and amount and the agreement activation date is established for a period not to exceed five years from final approval.

9. Final Resolution must then be approved by KEDFA authorizing the execution of the tax incentive agreement.

10. Once the Agreement activation occurs, the company begins incurring recoverable costs or engaging in recoverable activity and, then, incentives are available at the appropriate time.

As with most Kentucky tax programs, there are no specific property tax incentives. KRS § 154.27-010 et seq.

In addition, there is also the TVA's Renewable Standard Offer program, which provides power purchase plans of up to 20 years to developers of renewable projects (biomass combustion, biomass gasification, methane recovery, wind and solar) greater than 50 kW and up to 20 MW in size. To be eligible, the project must have gone online after October 1, 2010. The energy seller must provide TVA with project financing and interconnection agreements as well as metering installation plans, and must sign over title to RECs and other environmental attributes generated by the system.

While federal customers do not pay taxes, and thus, cannot utilize the Kentucky incentive directly, contractors that develop renewable projects at federal sites with power purchase agreements may be able to take advantage of the credit and share the benefit with their federal customers.

Renewable and Efficiency Portfolio Standard (REPS)

By 2025, the renewable energy proposal standard provides for twenty-five (25%) percent of Kentucky's energy needs being met by reductions through energy efficiency and conservation and through the use of renewable resources (1,000 mw). Kentucky's strategy has been residential and commercial building solar development. However, a proposed solar farm may arise. As to wind, Kentucky identified 19 square miles of class 3+ areas that were not under land-use or environmental restrictions. Developing these areas, and the potential of small wind systems, may result in the capacity to generate 34 megawatts of wind energy power.

Kentucky has other tax incentive programs; however, these programs are not specific to renewables.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of renewable energy law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered in here.

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