ENERGY & SUSTAINABILITY LEGAL NEWS

NEVADA'S RENEWABLE ENERGY PROGRAM GETTING THE PARTIAL ABATEMENTS/EXEMPTIONS

by Mark Lansing

Nevada enacted a Renewable Energy Tax Abatement program in 2009, which it operates under the Governor's Office of Energy ("GOE"). For eligible renewable energy facilities, the program awards partial abatements for sales and use tax, and property tax. Application must be made to the Energy Office, whose staff reviews the abatement applications, conducts public hearings to determine eligibility, enters into abatement agreements, and then, reviews annual compliance audits.

Property and Sales Tax Abatement

The application for the property tax abatement may be made for real and personal property used to generate electricity from renewable energy resources, including solar, wind, biomass,[1] fuel cells, geothermal or hydro. Generation facilities must have a capacity of at least 10 megawatts (MW), and plan to operate for at least 10 years. Facilities that use solar energy must generate at least 25,840,000 British thermal units of process heat per hour to qualify for the abatement.

Depending on the population of the county or city where the project is sought to be located, there are job creation, job quality requirements and minimum capital investments ($10 million or $3 million). In addition:

- The average hourly wage for employees at the facility, excluding management and administrative employees, must be at least 110 percent of the average statewide hourly wage;
- The average hourly wage for construction employees, excluding management and administrative employees, must be at least 175 percent of the average statewide hourly wage; and
- The employees working on the construction of the facility must be provided a health insurance plan from a third-party administrator that includes coverage for dependents.

The GOE Director may approve partial abatements for property and sales taxes. The *Property tax abatement* can be for a duration of 20 fiscal years and equal to 55 percent of the taxes on real and personal property; but the abatement is not applicable for any period the facility receives another abatement or exemption from property taxes. As to the sales tax abatement, its duration is only 3 years and equal to that portion of the combined rate of all local sales and use taxes payable by the facility that exceeds 0.6 percent; but, such abatement is not applicable during any period the facility receives another abatement or exemption from local sales and use taxes.

Approval is encapsulated in an "Abatement Agreement". The partial abatement of taxes approved by the GOE director is prospective only. It cannot be applied retroactively to any tax imposed before the execution of the Abatement Agreement.

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IN THIS ISSUE

Application Process

The Application must be filed electronically, attaching a PDF and Excel workbook of the confidential application, and a PDF of the redacted application with the GOE. The application fee must be sent either via wire or mail before an application can be considered filed.

As abatement applications are contested cases under Nevada's Administrative Procedures Act, NRS Chapter 233B, the GOE must hold a public hearing on the abatement application. The Act prohibits members or employees assigned to render a decision or to make findings of fact and conclusions of law from communicating, directly or indirectly, with any person or party, or the party's representative, except upon notice and opportunity to all parties to participate.

Upon receipt of an application:

1. The Director reviews the application for timeliness and completeness. Timely filed application means that the Director received a completed application on or before the facility's commercial operation date. If an application is not timely and filed in bad faith, or the timing frustrates the statutory purpose, the Director may reject the application. If an application is rejected, written notice is provided to the applicant.

2. If the application is incomplete, written notice is provided to the applicant identifying the information necessary to complete the application. An applicant has 10 business days to provide the missing information; otherwise, Director rejects the application with written notice to the applicant.

3. The Director will provide a copy to the governing body of each city or town in which the facility is proposed to be located.

4. Not later than 15 business days after any substantive change to the information provided in an application, the applicant must submit an amended application.

Unless otherwise indicated by the applicant, all information submitted to the Director is a public record. Thus, if confidentiality is sought for an application, the applicant must: (1) submit with the original application a redacted copy of the application which clearly identifies each item that is claimed to be confidential and (2) provide legal authority citation for why each particular item is claimed as confidential.

For each identified item, the Director determines if the item is confidential and provides written notice of that determination. Within 3 business days, the applicant must, in writing, concur or object to each item, including the legal basis for an objection. If the Director again rejects the request that the item not be made public, the applicant must either withdraw the application or seek a court order protecting the item from publication. For items determined to be confidential (ether by Director or court), the Director prepares a redacted copy of the application and provides it statutorily defined governmental entities. Thereafter, the Director sets a date for a hearing, providing statutorily defined notice.

At the hearing, the applicant has the burden, by reasonable evidence, to demonstrate eligibility for the partial abatement of taxes. The Director will issue findings of facts, conclusions of law and a final decision within 10 business days of the hearing's conclusion. The Director may condition the approval of an application upon terms determined necessary. If eligible for a partial abatement of taxes, the Director executes an abatement agreement with the applicant.

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[1] Biomass is defined as any organic matter that is available on a renewable basis, including, without limitation, agricultural crops and agricultural wastes and residues; wood and wood wastes and residues; animal wastes; municipal wastes; and aquatic plants. Owner cannot be receiving another abatement of property tax and/or sales as use tax at the time the abatement is granted

ANOTHER STATE ATTACKS COAL! VIRGINIA PROPOSES TO JOIN RGGI STATES

The Virginia State Air Pollution Control Board approved draft regulations intended to cut Greenhouse Gas Emissions, and that would make Virginia the tenth state to join the Regional Greenhouse Gas Initiative. Presently, those states include Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island and Vermont. The draft regulations set a cap on carbon emissions, and draw down that cap by thirty percent (30%) by 2030. The stated reason for the cap is that Virginia plants have had increased carbon emissions since 2011, and the State wants to both curb and redirect

that trend. Like the other RGGI states, Virginia's proposal uses a carbon cap and trade system to reduce carbon emissions, starting with a cap of 33 to 34 million in 2020, and declining by 3% per year until 2030. Virginia Republican Legislators have suggested the need for legislation to preclude the rule's adoption, or that the rule itself lacks authority (meaning possible litigation should the rule be adopted). Clearly, there is more to come on this proposal.

NY AND FERC REDEFINING STATE AND FEDERAL RELATIONS?

Under the Natural Gas Act ("NGA"), the Federal Energy Regulatory Energy Commission ("FERC") has jurisdiction over development of interstate natural gas pipelines, except that a state may grant or deny a water quality certification application; provided the State acts timely. Millennium seeks to build a 9-mile pipeline from its main pipeline to the CPV combined cycle natural gas fired electric plant in Orange County, NY (called the Valley Lateral Project). Millennium Pipeline Company sued the New York State Department of Environmental Conservation (DEC), arguing it dragged its feet in ultimately denying its application. At issue was a delay by the DEC to issue a Section 401 Water Quality Certification or denial for the pipeline project. By section 401 of the Clean Water Act, a State must grant or deny the certification application "within a reasonable period of time (which shall not exceed one year) after receipt of [a] request." Id. *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (quoting 33 U.S.C. § 1341(a)(1)). If the State fails to act within that time period, the Act's "certification requirements" are deemed "waived." The U.S. Court of Appeals for the District of Columbia Circuit dismissed the lawsuit by Millennium, reasoning FERC had the power to override the DEC and issue the permits. Thereafter, finding the DEC had waived its authority under Section 401, the FERC ordered the pipeline construction by Millennium to go forward. The FERC found the DEC acted untimely. The FERC also denied New York's request for rehearing and stay, assuring that a federal court would determine the issue. It appears that FERC is taking a more proactive approach to State review. If it prevails, FERC may issue a similar order for the Constitution pipeline, possibly finding the DEC again acted untimely and their waived its authority to review its application. The DEC claims the FERC has misinterpreted when the time period for its review commences, contending the one year period did not commence until it deemed the application to be "complete". The pipeline companies have asserted that the DEC review of water certification applications has become politicized to preclude pipeline development in NYS that might involve the transport of hdyrofracked natural gas. The Millennium matter presently resides with the United States Court of Appeals for the Second Circuit, which recently denied New York's motion to stay construction.