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Major Headwinds

Lawsuit leaves renewable energy developers at a standstill

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This time last year, all appeared to be on track for a large-scale, \$75-million installation of a dozen wind turbines on the Douglas-Webster town line.

Testing had been done to prove there is enough wind to support the more than 300-foot towers. The Weymouth-based development firm pushing the project, American Pro Wind, had a contract to sell the 27.5 megawatts of power the turbines would produce to NStar for 15 years. American Pro Wind officials had investors lined up and were close to being ready to put shovels in the ground.

Then, rather suddenly, the entire project came to a standstill.

TransCanada, a Canadian power marketing and generation firm, filed a lawsuit against the state related to the 2008 Massachusetts Green Communities Act, claiming the legislation violates the U.S. Constitution's interstate commerce clause. The bill requires that utility companies like NStar purchase a small percentage of their energy from renewable sources located within Massachusetts.

Spurring Investment

The Green Communities Act was meant in part to encourage renewable energy projects in the commonwealth, like the Douglas project.

But TransCanada said the law restricting out-of-state entities from selling renewable energy in Massachusetts violates federal law. Apparently the state agreed.

Within three months of TransCanada filing the suit, the state issued emergency regulations in June 2010 that effectively opened up the market to out-of-state renewable energy projects.

All of a sudden Douglas Woods Wind Farm project found itself competing with developments in Maine and New Hampshire, which put it at a disadvantage

because projects in higher-elevation areas have more wind and less-expensive development costs, making the power cheaper.

NStar issued a second round of bids to buy renewable energy, and when the winners were announced in December of last year, Douglas Woods was left out in the cold.

So the project went from basically being ready to begin construction to being on indefinite hold.

“There are several projects in the state, like the Douglas Woods Wind Farm, which are very viable projects, that have done everything right in terms of developing the project, following the state’s lead in selling the power through long-term contracts, executing those contracts and then being left out,” said Rod Jané, who has been advising American Pro Wind as a business consultant through his firm, New England Expansion Strategies in Westborough. He also serves on the Westborough Board of Selectmen.

State officials say they sympathize with American Pro Wind.

“I’m frustrated too,” said Philip Giudice, the energy undersecretary for the state Executive Office of Energy and Environmental Affairs, who was named in the TransCanada lawsuit.

Other states, he said, have similar laws that require utility companies to purchase in-state renewable energy, but they have not been challenged in a suit.

“We were hopeful we wouldn’t be challenged,” he said.

But they were wrong.

Officials with TransCanada, which has a local office in Westborough, said they filed the suit out of a matter of fairness. Massachusetts regulations were the most “egregious,” violations of the interstate commerce clause, which disallows states from restricting commerce in and between other states. Connecticut is considering implementing a similar in-state requirement, said TransCanada’s Mike Hachey, director of eastern commercial markets for the company. Hachey said he’s advised Connecticut officials not to implement the restriction there too.

When there are in-state restrictions, it prevents TransCanada from being able to sell power from the company’s Kibby Wind project in Maine, the largest wind farm in New England, producing 132 megawatts of electricity.

Plus, Hachey said, when the state opened up the bidding to out-of-state projects, utility companies received bids that were on average 40 percent lower.

NStar officials said they could not discuss details of the bids.

"This is an issue about getting the best price for the consumer," Hachey said.

Collateral Damage

While the lawsuit may have been beneficial for NStar customers, it's put various projects around the state on hold.

Minuteman Wind LLC is a Framingham-based entity that is looking to construct five wind turbines in Savoy, a small town in northwestern Massachusetts.

Like Douglas Woods, the project was short-listed by a local utility, but when new state regulations were issued allowing out-of-state bidders, the project lost out. It's currently on indefinite hold, according to Dennis Loria, a vice president and partner at Minuteman Wind.

None of this comes as a big surprise to Vincent DeVito, a lawyer who specializes in renewable energy law for the Worcester-based law firm of Bowditch & Dewey.

The only constant in the world of renewable energy regulation is that incentives and regulations will change, he said.

"As a developer in this state, especially in the clean energy field, the regulatory framework is always changing," he said. "The constant adjustment is intended to solely meet the policy du jour."

DeVito said it's best practice for agreements to compensate for regulatory changes by including language that addresses what will happen to the contract if regulatory changes do occur.

Jané, who advised American Pro Wind, said they had no reason to believe a lawsuit would be coming.

"We assume that when legislation is created and there is an open bidding process that we're playing by the rules," Jané said. "We leave it up to the state to ensure the rules are set up properly."

Giudice said that if the state can't order utility companies to buy in-state power, perhaps it could buy the power for use at the hundreds of state-owned buildings around the commonwealth.

There are other incentives for renewable energy projects as well, Giudice noted, including grants, loans and tax credits from the Massachusetts Clean Energy Center and the federal government.

But in the end what these projects really need are long-term contracts to sell the power, which American Pro Wind had before the deal was nixed.

NStar officials said they plan on issuing future RFPs, which American Pro Wind and Minuteman Wind would be eligible to apply for.