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THERE BUT FOR THE GRACE...

Burges Salmon evaluate the transition process from Renewables Obligation to Contracts for Difference in the wind and marine energy industry.



Words:
Ross Fairley
Burges Salmon

The Government is currently putting the finishing touches to the transition process from Renewables Obligation to Contracts for Difference (CfDs) support as well as the whole CfD timetable and allocation procedure. Finalising all this has taken much longer than first thought and renewables developers across the country are having to come to terms with a new system of financial support and the constant need to re-evaluate their projects to see whether they will meet the Renewables Obligation deadline or fall under CfDs.

One aspect of the transition process is the comfort being offered through the concept of 'grace periods' for the Renewables Obligation. The Government has recently published its final proposals for these grace periods and there are some issues to consider for the wind and marine energy industry.

For wind and marine technology, the Renewables Obligation will close to new projects on 31st March 2017. There is clearly a risk that some projects will miss this March 2017 deadline for one reason or another, despite having finalised all of their contracts and having proceeded to build-out. As a result, the Government has conceded that, in limited circumstances, it will still allow support for those projects under the Renewables Obligation provided they meet certain criteria. The Government has effectively introduced four grace periods:

- (i) A 12-month grace period running to the end of March 2018 where a project has not been built out by 31st March 2017 due to radar or grid connection delays. In order to rely on the grid connection limb of this grace period the developer will have to demonstrate that it had a valid and accepted grid connection offer for connection before 1st April 2017 and a letter from the network operator in question, clarifying that the failure to connect by that time is not due to a breach of the connection agreement by the project.

If relying on the radar grace period, developers will need to provide a copy of a radar works agreement with a third party showing the works were due to have been completed by 31st March 2017, and confirmation from that third party that the delay in carrying out the works was not due to a breach by the project.

There is clearly a risk that some projects will miss that March 2017 deadline for one reason or another, despite having finalised all of their contracts and having proceeded to build-out.

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- (ii) A 12-month grace period to 31st March 2018 for projects that have signed investment contracts under FID Enabling, should these contracts fall away or be terminated for reasons relating to State Aid. The Government appreciates that if State Aid intervenes and the investment contract falls away through no fault of the generator, these projects should be able to access a grace period. There are, of course, a number of offshore wind farms that have been awarded FID Enabling contracts so this is highly relevant for the offshore wind industry. In order to benefit from this grace period the developer will have to show a letter from DECC confirming that an investment contract was held by the developer;
- (iii) A so-called 'enabling financial decisions' grace period. This is a 12-month grace period to 31st March 2018, which will apply only to advanced combustion technologies (gasification and pyrolysis) and offshore wind projects. To take advantage of this 12-month grace period, the developer will have to have applied to Ofgem by 31st October this year. They will also need to produce four pieces of evidence: a valid grid connection offer which sets a grid connection date on or before 31st March 2017; evidence of relevant planning consents; evidence of all land use rights in order for the project to be constructed (and in the case of offshore wind, a lease from The Crown Estate); and a certificate from an 'appropriate

individual' (e.g. a director) confirming that the project will have sufficient resources to build out the project for an expected commissioning date on or prior to 31st March 2017; and

- (iv) A grace period applying to a dedicated biomass and biomass CHP giving those projects potentially an 18-month grace period window.

There are no specific references in the grace period procedures to marine energy although any project could use the grace period in (i) above. Obviously the wave and tidal technologies are still at an early stage and many of the projects that are likely to be built in the Renewables Obligation period are likely to be small demonstration projects. The industry and Government are expecting the larger projects to clearly fall under the CfD.

Much has been made of the evidence requirements to access the grace periods. To obtain formal letters from DNOs (Distribution Network Operators) confirming that the reason the grid connection date has been missed is not down to the project, may not be so simple. There is little evidence of the use of these letters up to now for grace periods that have been associated with Renewables Obligation banding. DNOs in particular will be wary of the potential for claims against them in respect of delays. More than ever before they are facing the risk of legal proceedings by developers over connection delays, mainly from the solar sector. One can anticipate that they will, therefore, be reticent to provide anything which might, on the face of it, illustrate or infer fault on their part.

Concern has also been voiced around what form the appropriate individual certificate should take as evidence that there is sufficient resources to build out the project by the March 2017 deadline. Although there is now draft Ofgem guidance on this, the details are still relatively vague. At present it seems that all that is required is a certificate signed by an appropriate individual stating that, to the best of their knowledge and belief,

the resources are available. One can anticipate that for a director to be able to give this certificate in good faith, he or she will need to have the reassurance of committed mandates or term sheets from funders to back up the assessment but no guidance is given on this.

The 31st October 2014 deadline to access the 'enabling financial decisions' grace period for offshore wind is looming. In order to qualify, the project will need to be significantly advanced by that stage. So, for example, it is likely that the developer will need to have clear construction contracts being progressed and good visibility on overall Capex in order to understand what 'resources' are needed.

Where does this leave wave and tidal technologies? Support is still available for those technologies under the Renewables Obligation and there are a number of projects that are looking to qualify. If there is a delay to the build-out of the first phase of the project as a result of grid delays, there is a potential for a 12-month grace period (radar is less of an issue for marine).

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Biography

Ross Fairley is a partner and Head of Renewable Energy at Burges Salmon solicitors.

The team advises on all types of renewable energy projects including wind (onshore and offshore), wave and tidal, hydro, solar, biomass, geothermal and innovative waste to energy technologies.

Ross advises clients on legal/regulatory aspects of the energy sector including incentives, grid, fuel procurement and power sales. He has substantial experience in marine renewables and offshore wind, covering projects in all Crown Estate rounds.

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