Extenders Bill – a small victory for Wind and a loss for Solar

December 2019

Authors: Hagai Zaifman, Michael Rodgers

The production tax credit for renewable wind projects under Section 45 of the Internal Revenue Code of 1986 (the "PTC" and "Code") has been extended by one year pursuant to a 2019 year-end federal government budget appropriations bill (the "Extenders Bill"). The Extenders Bill was passed by the US. House of Representatives on Tuesday, December 17, 2019, approved by the Senate on Thursday, December 19, 2019, and then signed into law by President Trump on December 20, 2019 (as part of the broader spending bill), preventing a would-be federal government shutdown.

PTC for Wind Projects

The PTC, most commonly associated with renewable wind energy projects, provides taxpayers a tax credit of 2.5 cents (as of 2019) for each kilowatt hour of electricity produced and sold to an unrelated taxpayer during a 10-year period after the date the wind project is originally placed in service.

Consistent with the theme that the PTC (as well as other similar renewable energy tax credits) was designed to be a temporary benefit aimed to help jumpstart a crucial, albeit nascent, renewables industry, the PTC has been scheduled to phase-down over time and ultimately expire. Prior to the Extenders Bill, this scheduled phase-down has involved reducing the PTC rate by 20% each year for wind facilities the construction of which begins after December 31, 2016, with the PTC completely expiring with respect to wind facilities the construction for which had not begun before January 1, 2020.

The Extenders Bill extended such phase-down by an additional year, allowing wind facilities the construction of which begins in 2020 to be eligible for 60% PTC. Following the Extenders Bill, the current updated PTC eligibility is as shown below:

- 100% PTC if construction of the project began during 2016 (or earlier)
- 80% PTC if construction of the project began during 2017
- 60% PTC if construction of the project began during 2018
- 40% PTC if construction of the project began during 2019
- 60% PTC if construction of the project begins during 2020
- No PTC for projects the construction of which begins on or after January 1, 2021

Because the revised phase-down schedule actually phases the credit "up" for projects beginning construction in 2020 (when compared to projects beginning construction in 2019), taxpayers who may have taken steps to begin construction on projects during 2019 to secure the 40% credit prior to the ultimate PTC expiration date, are likely to be frustrated to learn that they would have been better off delaying their construction efforts until 2020.

Nonetheless, because the determination of when construction of a project has begun is intensely factual and is subject to extensive IRS guidance, taxpayers overseeing projects that are otherwise on the cusp of the "beginning of construction threshold" may be able, with a careful planning, to structure their project and future transactions, so as to allow construction associated therewith to be treated as having begun in 2020 rather than 2019. Successful planning in this regard could translate to significant benefits associated with use of a 60% PTC rather than a 40% PTC.

PTC for other Renewable Projects

In addition to PTCs associated with wind projects, the Extenders Bill provides for a retroactive reinstatement of the full amount of the PTC through tax year 2020 for projects relating to:

- Closed loop biomass
- Open loop biomass
- Geothermal plants
- Landfill gas (municipal solid waste)
- Trash (municipal solid waste)
- Marine and hydrokinetic facilities
- Hydropower

Prior to enactment of the Extenders Bill, these non-wind PTC incentives generally would be unavailable in the case of projects for which construction began in 2018 or later. Moreover, certain hydropower technologies and certain closed-loop biomass projects would need to have been placed service prior to 2018 in order to generate PTCs.

ITC

The investment tax credit under Section 48 of the Code (the "ITC"), most commonly associated with solar projects, allows taxpayers to claim a credit as a percentage of the cost associated with investment in certain qualified energy property. In the case of solar projects, a 30% ITC is available in cases where construction begins prior to December 31, 2019, with this amount phasing down to 26% and 22% for construction beginning in 2020 and 2021, respectively. Further, the ITC phases down to only 10% in cases where construction begins before 2022 but is not placed in service before 2024. Commercial and utility scale projects, the construction of which begins in (or after) 2022 could be eligible for a 10% ITC.

Unfortunately for the solar industry, the PTC and other benefits under the Extenders Bill apparently came at the expense of a much-desired corresponding extension to the ITC for solar facilities, which was not included. In addition, tax credits for standalone energy storage batteries and offshore wind facilities were also ultimately left out of the Extenders Bill, in spite of broad industry support.

One exception to the above is the extension for ITC in lieu of PTC, which is generally available for wind facilities and certain other renewable projects. Under the Extenders Bill, taxpayers may now claim an ITC, in lieu of the PTC, also for such certain projects the construction of which began in 2020.

Wind facilities eligible for such ITC, in lieu of PTC, where construction begins prior to 2021, would be subject to the same percentage phase-down applicable to PTC for similar wind projects (i.e., such projects would be eligible for 24% ITC for projects that began construction in 2017; 18% ITC for projects that began construction in 2018; 12% ITC for projects that began construction in 2019 and now, following the Extenders Bill, to 18% of ITC if the wind project begins construction in 2020).

New Market Tax Credits and other credits

The Extenders Bill also includes a one year extension to the new markets tax credit under Section 45D of the Code, as well as similar extensions to certain other energy related incentives (e.g., credits for qualified fuel cell motor vehicles (Section 30B of the Code), alternative fuel vehicles (Section 30C of the Code), energy efficient homes (Section 45L of the Code), and the deduction for energy efficient commercial building deduction (Section 179D of the Code)).

Conclusion

On the whole, although the Extenders Bill provides a small victory for onshore wind developers and investors, it represents a loss for the solar and offshore wind industries. Many industry commentators and tax advisors had been expecting that it would have been the ITC for standalone battery storage, solar projects and possibly offshore wind credits, rather than the PTC, that would be extended. That being said, as the ITC for solar energy projects would only start phasing-down next year, we expect the solar industry to continue pushing for such extensions in the years to come.

White & Case LLP
1221 Avenue of the Americas
New York, New York 10020-1095
United States

T +1 212 819 8200

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