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Renewable Energy Alert

December 4, 2014

House Passes PTC Extension Through End of 2014

Today, the House passed H.R. 5771. To become law, H.R. 5771 must still pass the Senate and be signed by the president. We expect both of those steps to occur by the end of the year.

H.R. 5771 would extend the 50 tax incentives that expired at the end of 2013 through the end of 2014. For the production tax credit (PTC), Section 155 of the bill provides that a wind project must "start construction" **prior** to January 1, 2015, to be eligible for tax credits. This would be a change from the current deadline of January 1, 2014.

The Senate would like to have a more meaningful extension of the various extender provisions; however, the House has communicated that this is a "take it or leave it" bill. Given the few legislative days remaining in the year, we expect that the Senate will reluctantly pass the bill and send it to the president's desk. We expect the president to sign the bill because, unlike a prior proposal, it does not favor the extenders that benefit the business community over the extenders that benefit low-income individuals.

As is the case with current law, H.R. 5771 does not have a deadline for wind projects to be placed in service (i.e., operational) in order to qualify for tax credits, so long as the project **started construction** prior to January 1, 2015. The Internal Revenue Service (IRS) in Notice 2013-29 took the position that it would not consider a project to have started construction by the deadline, unless the project owner engaged in "continuous" activity toward completing construction through the date the project is placed in service. A discussion of Notice 2013-29 is available here and here.

Last year, taxpayers and their advisors were concerned about meeting the "continuous" standard and requested clarification from the IRS. The IRS provided that clarification in Notice 2013-60. That notice provides that the IRS will not scrutinize as to whether a project satisfied the "continuous" standard, so long as the project is placed in service by the end of 2015. Assuming the one-year extension becomes law, we expect that the IRS will interpret the deadline in Notice 2013-60 to require a project to be placed in service by the end of 2016. That is, the extension, if enacted, should give projects another year to be completed.

Another benefit of the extension would be that it enables project owners who might have had some foot faults in their efforts to start construction by the end of 2013 to have a second bite at the apple. That is, if a project's start-of-construction documentation has any challenges with respect to meeting the technical standards set forth in the IRS guidance, the project owner would be able to rely on its activity in 2014 to make its case that construction started prior to the end of 2014.

Further, we may see project owners that have projects on which they did not "start construction" at the end of 2013 now qualify their projects under this legislation for the end of 2014. The IRS in Notice 2014-

46 clarified that there is no minimum level of work that must be done to “start construction,” so long as the work done is of the right nature (i.e., physical work for the project and not engineering or financial planning). A discussion of Notice 2014-46 is available here. Nonetheless, it seems unlikely that more than a handful of projects would be starting construction for the first time prior to the end of 2014.

H.R. 5771 would also extend the election for wind projects to claim either the PTC or the 30 percent investment tax credit.

In a true windfall, Section 125 of the bill would extend 50 percent bonus depreciation through the end of the year, even for assets purchased earlier this year when bonus depreciation had lapsed. Thus, taxpayers that purchased assets earlier this year not counting on bonus depreciation would be entitled to bonus depreciation. Bonus depreciation is often waived in renewable-energy, tax-equity transactions due to partnership “capital account” constraints and investors’ preference to use their tax appetite to absorb tax credits rather than depreciation deductions, so the renewable energy industry is less interested in this gift than other segments of the economy may be.

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