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BEYOND EXTENDERS - WHAT MIGHT THE "BLUE WAVE" MEAN FOR RENEWABLES TAX LEGISLATION? (PART 2)

By Judy Kwok

The following is Part Two of a three part guest post by Judy Kwok, a Member at Mintz's Energy and Sustainability practice, specializing in tax-efficient strategies for renewable energy developers and investors. Prior to joining Mintz, she served as Vice President, Tax Planning and Tax Counsel for GE Energy Financial Services.

Energy Storage

A somewhat surprising aspect of the COVID-19 Economic Relief Bill was its silence on energy storage technologies. Like offshore wind turbines, energy storage is a technology that originally existed on the periphery of the mainstream market but is now rapidly becoming a key part of the renewables industry; because energy storage has the potential to smooth imbalances between supply and demand that occasionally afflict renewables facilities, many consider batteries and other storage modalities to be crucial to a clean-energy transition.



At least three bills proposed in 2020 (the GREEN Act, the Wyden Amendment, and the Clean Energy Innovation and Deployment Act of 2020), as well as the proposed Energy Storage Tax Incentive and Deployment Act of 2019, contained a separate 30% ITC for "energy storage equipment," which is broadly defined in all four bills to include equipment which stores energy for conversion to electricity using batteries, compressed air, pumped hydropower, hydrogen storage (including hydrolysis), thermal energy storage, regenerative fuel cells, flywheels, capacitors, superconducting magnets, or other technologies identified by the Secretary in consultation with the Secretary of Energy, and which has a capacity of not less than 5 kilowatt hours.

Energy storage is not entirely absent from the renewable tax credits regime: the current Regulations under Treas. Reg. § 1.48-9 explicitly include "storage devices" in solar energy property, but a storage device is ITCeligible under the "dual-use rules" only if its use of non-solar sources does not exceed 25% of its total energy input during an annual measuring period. If the use of non-solar sources is 25% or less of total energy input but above 0%, the ITC is prorated accordingly. The same Regulations also include "storage devices" in wind energy property, thus suggesting that storage equipment drawing energy from an ITC-electing wind project may be eligible for the ITC, but as such regulatory language relates to a prior version of section 48(I) that was repealed in 1990, the status of wind-powered energy storage property), would be eliminated under an expanded energy storage ITC regime. Merely adding an ITC for energy storage does not eliminate all of the tax uncertainty that comes from attaching storage solutions to renewables facilities. At the time that the ITC and PTC statutes were written, the rules simply did not contemplate hybrid solutions where different components of a project generated both ITCs and PTCs.



Thus, section 45(b)(3) reduces the PTC by reference to "the amount of any other credit allowable with respect to any property which is part of the project" and a PTC-eligible facility for which the ITC is elected can qualify for the ITC only if "no credit has been allowed under section 45" with respect to the facility. It is hoped that an energy storage ITC would be accompanied by specific statutory language clarifying that a renewables facility can remain eligible for the PTC even if it includes energy storage equipment for which an ITC is claimed.



Refundability

The dream of receiving cold, hard cash in lieu of ITCs and PTCs dates back to the American Recovery and Reinvestment Tax Act of 2009, which provided, during the 2008 economic crisis, for a cash grant equal to 30% of the basis of qualifying wind and solar "energy property." The original Section 1603 Grant applied only to energy property that either (1) was placed in service in 2009 or 2010, or (2) was placed in service after 2010 but before January 1, 2013 (for wind projects) or January 1, 2017 (for solar projects), and had a 2009 or 2010 beginning of construction. The Section 1603 Grant was also permitted for certain other renewable energy projects listed in section 45(d) and section 48, in some cases reduced to 10% of the energy property basis. While the Section 1603 Grant expired in 2010, even in 2019 the Promoting Sustainable Energy Projects for Tribal Communities Act of 2019 was proposing refundable ITCs and PTCs for tribal governments. More significantly, the pandemic, with the resulting expected reduction in tax capacity of tax equity investors, has triggered fervent hopes that the cash-for-credits paradigm will return from the dead to revitalize the industry in a time of need.





At least four bills were proposed in 2020 that would give taxpayers cash in lieu of ITCs and PTCs. The most straightforward of these, the Energy Tax Credit Direct Payment Act of 2020, essentially reinstates Section 1603 with minimal changes to the statutory language. The revived Section 1603 Grant would apply to energy property that either (1) is placed in service in 2020, or (2) in the case of solar projects, is placed in service in 2021 and has a 2020 or 2021 beginning of construction; the application must be received before October 1, 2022.

By contrast, the other three bills do not give Treasury the power to administrate a cash grant, but rather add a new section 6431 that would allow a taxpayer to elect, in lieu of claiming an ITC or PTC, to be considered to have paid taxes equal to part or all of such credit—thus effectively creating an electively refundable credit that is administered by the IRS. These three bills exhibit a range of possible formulations. The Solar Jobs Preservation Act of 2020 provides a dollar-for-dollar exchange of cash for ITCs from projects that begin construction before January 1, 2022, but does not apply to PTCs or section 45Q carbon capture credits. By contrast, each of the GREEN Act, the Clean Energy Innovation and Deployment Act of 2020, and the Renewable Energy Investment Act of 2019 provides for cash payments equal to only 85% of the tax credit, but that apply for PTCs as well as ITCs; the GREEN Act provides for a refundable section 45Q carbon capture credit, while both the GREEN Act and the Renewable Energy Investment Act of 2019 provide 100% monetization for Indian tribal governments. While the GREEN Act and the Renewable Energy Investment Act of 2019 set no apparent deadline for refundability, the version of section 6431 in the Clean Energy Innovation and Deployment Act of 2020 applies only to credits from property placed in service from 2020-2024 and to credit carryforwards for taxable years ending during that window. In each of the GREEN Act and the Clean Energy Innovation and Deployment Act of 2020, section 50(b)(3) and (4)(A)(i) — which decrease the section 48 ITC in cases where the property is used by a tax-exempt entity or certain governmental bodies—do not apply for purposes of applying section 6431.

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Transferability

Transferability—a paradigm whereby equity investors in a renewables project can transfer the corresponding tax credits to persons with no equity stake in the project—is something of a fringe concept, but has appeared in two bills over the last two years. The Clean Energy Innovation and Deployment Act of 2020, which applies to PTC-eligible projects, ITC-electing projects described in section 45(d), and solar ITC projects, would allow a tax-payer to transfer all or part of its ITC or PTC to a specific "eligible project partner," which term includes not only persons with ownership interests in the energy property or facility, but also construction services or equipment providers, electric transmission or distribution services providers, power purchase agreement offtakers, and lenders. Only one transfer of an ITC or PTC, not later than the due date for the electing taxpayer's tax return for the year of placed in service, is permitted. The Renewable Energy Transferability Act contains a broader transferability provision in that it permits transferability for ITCs generally, as well as for section 45Q carbon capture credits, and permits a deduction for consideration paid for a transfer of credits.



If actually implemented, transferability would likely obsolete much of the tax analysis surrounding the structuring of tax equity interests, which traditionally must qualify as equity. It would also drastically reconfigure the relationships between the economic actors in renewables projects in ways that are not yet clearly understood. Whether transferability is a pleasant dream for some—or a nightmare for others—remains to be seen.

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