



February 9, 2015

Peter C. Friedman
Office of Associate Chief Counsel
1111 Constitution Ave., NW
Washington, DC 20224

Dear Mr. Friedman:

Re: Wind PTC - IRS Guidance Nos. 2013-29, 2013-60 and 2014-46

The purpose of this letter is to pronounce our strong opposition to any amendment or extension of the “guidance” that the Internal Revenue Service (“IRS”) issued in 2013 and 2014 respecting the “begin construction” language used in the recent renewals of the wind production tax credit (“PTC”). Should the IRS consider such action, we ask that it do so in full compliance with the Administrative Procedure Act (“APA”)ⁱ, including Federal Register notice and a period for public comment.

IRS Bypassed Public Comment When Adopting Wind-PTC Rules

In October, 2013, we expressed our concerns to you that IRS Notice Nos. 2013-29 and 2013-60 were released without providing any opportunity for public comment pursuant to the APA. Since then, the IRS issued its third notice (2014-46) on the topic.

This action is particularly troubling given the extent to which the 2013-14 Guidance materially alters the plain language of the statute to which it relates (Section 407 of the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 – “ATRA”). As you know, ATRA extended the availability of the wind energy PTC for facilities that began “construction” by the end of 2013. Reduced to essentials, the Guidance allows for wind-powered facilities to be PTC-qualified if they simply expend money or enter certain contracts for the purchase of equipment, without any construction underway at all.ⁱⁱ

IRS Rules Governing Wind-PTC Exceed Congressional Intent

The IRS' rules governing “begin construction” are not a mere “interpretation” but amount to legislative action that provides a broader foundation for conferral of PTC benefits than that specified in the statute the IRS purports to interpret.^{iii iv}

In December, Congress extended the PTC through to the end of 2014. Accordingly, we anticipate participants in the wind energy industry to seek amendments to the Guidance. Any action to this end would be inappropriate. If compelled to amend the guidance, the IRS should comply fully with the APA.

Thank you in advance for your careful consideration of our concerns. We look forward to your response. In the meantime, we have taken the liberty of copying the chairs and ranking minority members of the House and Senate committees with oversight responsibility for these matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa Linowes", with a stylized flourish at the end.

Lisa Linowes
Executive Director

cc:

SPEAKER John Boehner
MINORITY LEADER Nancy Pelosi
HOUSE MAJORITY LEADER Kevin McCarthy
HOUSE MAJORITY WHIP Steve Scalise
SENATE MAJORITY LEADER Mitch McConnell
SENATE MINORITY LEADER Harry Reid

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Ranking Member Nita Lowey (D-NY)
Ander Crenshaw (R-FL)
José Serrano (D-NY)

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Ranking Member Frank Pallone, Jr. (D-NJ)
Tim Murphy (R-PA)
Diana DeGette (D-CO)

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Ranking Member Raul Grijalva (D-AZ)
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Gerry Connolly (D-VA)

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Ranking Member Eddie Bernice Johnson
(D-TX)
Cynthia Lummis (R-WY)
Randy Weber (R-TX)
Barry Loudermilk (R-Ga.)

HOUSE WAYS and MEANS
Chair Paul Ryan (R-WI)
Ranking Member Sander Levin (D-MI)
Pat Tiberi (R-OH)

SENATE FINANCE COMMITTEE
Senator Orrin Hatch (R-UT)
Senator Ron Wyden (D-OR)

ⁱ Pub.L. 79–404, 60 Stat. 237, enacted June 11, 1946

ⁱⁱ Following the October 21 meeting we sent IRS attorney, Brian J. Americus, Esq., a letter dated November 20, 2013 (copy attached) in which we brought to your attention two specific situations illustrating the extent to which developers with projects that were far from commencing construction indicated their intent to seek to qualify for the PTC notwithstanding the “begin construction” requirement.

ⁱⁱⁱ In its recent decision in *Cohen v. United States*, 578 F.3d 1, 6–7 (D.C. Cir. 2009), *aff’d en banc*, 650 F.3d 717, 723 (D.C. Cir. 2011), the U.S. Court of Appeals for the District of Columbia Circuit held that an IRS “notice” is final agency action and thus justiciable under the APA. In that opinion, the Court said that “[t]he IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal government—from suit under the APA.”

^{iv} The D.C. Circuit and several others have held that an agency is engaged in “legislative” activity subject to the APA if its action is necessary to provide legislative basis for conferral of benefits. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir.1993); *see also*, e.g., *Sweet v. Sheahan*, 235 F.3d 80, 92–93 (2d Cir. 2000) (characterizing a rule as legislative on this basis); *Warder v. Shalala*, 149 F.3d 73, 80–81 (1st Cir. 1998) (applying this factor).



November 20, 2013

Brian J. Americus, Esq.
Attorney, Office of Chief Counsel
P&SI Division, Energy Branch
Room 5110 CC:PSI:6
1111 Constitution Ave., NW
Washington, DC 20224

Dear Mr. Americus:

Re: Wind PTC - IRS guidance on “commencing construction” Notices 2013-29 and 60

First, I wanted to thank you and your colleagues for taking the time to meet last month to discuss the “commence construction” issue. It is very helpful to understand how and why the Service came to act on this matter without the Federal Register notice and opportunity for formal input that we had anticipated. It also was helpful to understand the extent to which you and your colleagues necessarily must rely on the Service’s auditing process to detect the potential, and perhaps inevitable, abuses that a statutory incentive system (in this case, the end of the wind PTC at midnight on December 31, 2013) can encourage.

In this connection, I thought it would be worthwhile to highlight two specific examples that appear to us fraught with a potential for abuse. Both of them involve a possible assertion of reliance on the “safe harbor” language of Section 5 of Notice 2013-29, as clarified in Notice 2013-60.

The first of these involves a proposed site in central Wyoming known as “Pioneer Wind Park I”. On October 2, 2013, the developer filed a petition with the Federal Energy Regulatory Commission (FERC) seeking an expedited declaratory order that would compel PacifiCorp, a public utility, to enter into a PURPA-mandated contract under terms PacifiCorp believes would not comply with its legal obligation to protect ratepayers (*FERC Docket No. EL14-1-000*). The developer asked for a ruling by November 1 and specifically cited expiry of the wind-energy production tax credit (PTC) at the end of the year as the reason it requested expedited treatment. No ruling has been issued, and PacifiCorp is vigorously opposing the petition.

At present, based on the documents submitted to FERC, the developer has no power purchase agreement and no financing for the project. Moreover, despite having had permission from the regulating authorities in Wyoming since 2011, there has been no apparent action by the developer to begin physical construction.

The second example involves a response to RFPs issued by the State of Connecticut this summer. According to publicly available documents¹, the RFPs sought energy and renewable energy certificates (“RECs”) for approximately 174 MW of installed capacity, or 525 MW of wind-

¹<http://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/8525797c00471adb85257bbe0065b439?OpenDocument> (redacted version)

equivalent installed capacity. A wind developer, First Wind of Boston, MA, proposed constructing five wind energy facilities to be located in Maine and Connecticut for a total of 410 megawatts. According to our information and belief, none of the five projects identified in First Wind's proposal have been permitted, and the State of Connecticut recently renewed its moratorium on industrial-scale wind projects.

It is unlikely that any of these First Wind projects will begin physical construction anytime soon, yet in the proposal submitted, the company urges Connecticut's Department of Energy and Environmental Protection (DEEP) to act quickly in order for the projects to take advantage of the PTC/ITC. The text of First Wind's proposal suggests the company has identified a path toward ensuring the proposed projects qualify for the PTC even after acknowledging that the subsidy is likely to end this year without further renewals by Congress.

We anticipate in both of these examples that if the developers can secure power purchase agreements prior to January 1, 2014, they will seek to claim the PTC under the safe harbor provision of Section 5 of Notice 2013-29.

I am certain that you will understand our concern with the clear potential for overreaching in the foregoing instances, and in others like them, and will want to ensure that developers adhere to both the letter and intent of the "commence construction" requirement in the PTC statute as renewed at the beginning of this year.

Once again, thank you very much for your time and careful consideration.

Sincerely,



Lisa Linowes
Executive Director

cc:

Rep. Dave Camp, Chairman House Ways and Means Committee
Rep. Sander Levin, Ranking Member House Ways and Means Committee
Senator Max Baucus, Chairman Senate Finance Committee
Senator Orrin Hatch, Ranking Member Senate Finance Committee