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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B07
PLR-125829-12

Date:
December 12, 2012

Re: Request for Private Letter Ruling Under Sections 45, 167, and 168

LEGEND

Taxpayer	=
Holdco	=
Project Company	=
State1	=
State2	=
City1	=
City2	=
County1	=
County2	=
Location	=
Project	=
Line	=
Switchyard	=
A	=
B	=
C	=
D	=
E	=
Number1	=
Number2	=
Number3	=
Number4	=
Number5	=
Number6	=

Number7 =
Number8 =
Number9 =
Number10 =
Number11 =
Number12 =
Number13 =
Number14 =
Number15 =
Number16 =
Year1 =
Year2 =
Date1 =
Date2 =
Date3 =
Date4 =
Date5 =
Date6 =
Date7 =
Date8 =
Month1 =
Month2 =

Dear :

This letter responds to a letter dated June 12, 2012, and supplemental correspondence, submitted by Taxpayer requesting a private letter ruling that certain circumstances will not prevent the Project from being placed in service in Year1 for purposes of section 45, 167, and 168 of the Internal Revenue Code.

FACTS

Taxpayer represents that the facts relating to its request are as follows:

Taxpayer, a State1 limited liability company that is a corporation for Federal income tax purposes, is a developer of renewable energy projects. Taxpayer uses the accrual method of accounting and files its federal income tax return on a calendar-year basis.

Through two tiers of subsidiaries, Taxpayer owns a wind farm in State2 that is referred to as the Project. Taxpayer owns an intermediate State1 limited liability company called Holdco that is a disregarded entity. Holdco owns Project Company, another State1 limited liability company that is also a disregarded entity. Project Company owns the Project.

Taxpayer is building the Project, a Number1-megawatt wind farm in County1 and County2 of State2. The main components of the Project include (i) the wind turbine generators and their attendant parts, and (ii) the electrical gathering and transmission facilities, including electrical substations. The Project will have Number2 Number3-megawatt wind turbine generators ("WTG"). Each WTG will be a self-contained unit capable of operating independently of all other WTGs.

By Date1, physical construction will have been completed on all WTGs, all of the WTGs will have been individually commissioned and accepted, a final commissioning certificate will have been issued for the Project as a whole, the Project Company will have all the permits and licenses needed to operate, each WTG will be synchronized to the power grid, and legal title and control over the Project will have been conveyed to the Project Company by the WTG supplier and the balance-of-plant construction contractor.

The electricity generated by the Project will be transmitted over the Line, a Number4-mile transmission line that will have a southern terminus at a City1 substation owned by B and a northern terminus at a City2 substation owned by C. The Project will be interconnected to the Line at the Switchyard, which is near the mid-point of the Line. Construction of the Switchyard is expected to be completed in the fourth quarter of Year1. The Line is being built by D and is expected to be completed in the first quarter of Year2.

Because the interconnection between the Project and the Line will not be completed by the end of Year1 (that is, by Date1), the Project Company has arranged to interconnect to the power grid through a temporary arrangement that would allow the electricity produced by the Project to be transmitted through a temporary intertie that was energized, tested, and went into operation as of Date2. Under this temporary arrangement, electricity from the Project moves west to tap into the Line at Location, travels south along a Number5-mile segment of the Line that has been completed, and then links to an existing intertie from a Number6-megawatt wind farm called E, an affiliate, that is connected to an existing substation owned by B.

This temporary arrangement allows for up to Number7 megawatts of combined production from the Project and E to enter the B system at the existing E interconnect with the B's existing substation. Under this arrangement, even if the E is operating at maximum capacity, the temporary intertie would give the Project the ability to deliver at least Number8 megawatts of output, or about Number9 percent of the Project's capacity, to market. Production at the two wind farms would have to be coordinated to ensure that the combined limit of Number7 megawatts from both the Project and E is observed. The temporary intertie will remain in place for an indefinite period until the Line is fully constructed.

The Project Company will rotate the Project's WTGs across the temporary intertie so that each is operating a reasonably consistent number of hours. Each and every individual WTG is separately remotely monitored and controlled by an interconnected fiber optic communications system that provides continuous, real-time WTG output and other operating and performance information separately for each and every WTG to the Project's system operators. In addition to other output and operating data, the system will keep a record of the number of minutes that each WTG is in operation and the resulting power output generated by each WTG. When using the system's controller, the system automatically cycles through the list of WTGs when selecting which WTG to operate or stop, if and when generation limits are close to being reached.

Each and every WTG of the Project separately and independently completes a rigorous testing and acceptance process that involves both mechanical completion and electrical commissioning certification of each individual WTG. Each WTG is started up, tested, certified, commissioned, and synchronized separately and independently of all other WTGs.

As part of the commissioning process: (1) each WTG is connected to the electrical gathering system and transmission facilities, and will be fully operational; (2) all of the components that make up each and every WTG will be tested to ensure that each component has been properly installed and is working correctly and that the WTG as a whole is fully functional; and (3) a performance test is completed for each and every WTG, including actual generation of electrical power and synchronization of that WTG to the power grid. In addition, as part of the acceptance process, each WTG is required to pass a Number10-hour operation test to demonstrate that it is capable of operating continuously. It is expected that the Number10-hour operation test will be completed for each and every WTG separately on or before Date3. Furthermore, mechanical completion of each and every WTG occurs before the date that WTG is commissioned, with scheduled mechanical completion of the last WTG to occur on Date4.

When each of the Project's WTGs is commissioned, it is connected to the electrical system and synchronized to the power grid. As such, each and every WTG is available to produce electricity for sale and transmission on the power grid as of its commissioning date, and is fully expected to do so. Each and every WTG of the Project has either been commissioned or is scheduled to be commissioned on or before Date5, which is during Year1. As of Date6, Number11 of Number2 WTGs have been commissioned, fully synchronized to the power grid, and are generating output, and Number12 of Number2 WTGs have been energized but not yet commissioned.

As of Date3 (which is during Year1), each and every WTG of the Project is scheduled to be in commercial operation and generating electricity on a commercial basis. Once each WTG is in commercial operation, given the expected capacity factor

at the Project during the months of Month1 and Month2 (in the Number13 percent to Number14 percent range), it is expected that at least Number15 MWhs will be generated and sold from the Project on a monthly basis, during each of Date7 and Date8.

Holdco is expected to convert to a partnership for Federal income tax purposes after an unrelated party, A, acquires an interest in Holdco. Taxpayer represents that this partnership will comply with the safe harbor described in section 4 of Rev. Proc. 2007-65, 2007-2 C.B. 967

In its letter dated June 12, 2012, requesting a private letter ruling, Taxpayer also requested a letter ruling that Taxpayer and Holdco could rely upon the below-stated ruling subsequent to the conversion of Holdco to a partnership. By letter dated November , 20 , Taxpayer withdrew this ruling request.

RULING REQUESTED

Taxpayer requests the following ruling:

The Project will not be precluded from being in placed service in Year1 for purposes of sections 45, 167, and 168 if the Line has not been completed by then, as long as the Project is able to deliver at least Number16 percent of its capacity to market in Year1 via a temporary intertie and it rotates turbines across the temporary intertie so that each is operating on a regular basis.

LAW AND ANALYSIS

Section 45 provides for a renewable electricity production credit in an amount equal to the product of 1.5 cents multiplied by the kilowatt hours of electricity produced by the taxpayer from qualified energy resources at a qualified facility during the 10-year period beginning on the date the facility was originally placed in service, and sold by the taxpayer to an unrelated person during the taxable year.

Section 45(c)(1) defines “qualified energy resources” to include wind. Section 45(d)(1) defines a “qualified facility” in the case of a facility using wind to produce electricity as any facility owned by the taxpayer that is originally placed in service after December 31, 1993, and before January 1, 2013.

Under Rev. Rul. 94-31, 1994-1 C.B. 16, with respect to electricity produced from wind energy, the term “facility” under section 45(d)(1) means each separate wind turbine, together with the tower on which the turbine is mounted and the supporting pad on which the tower is situated. Although section 45 does not define “placed in service,” the term has been defined for purposes of the deduction for depreciation and the investment tax credit.

Section 167(a) provides a depreciation deduction for the exhaustion, wear and tear, and obsolescence of property used in a trade or business or held for the production of income. The depreciation deduction provided by section 167 for tangible property placed in service after 1986 generally is determined under section 168. This section prescribes two methods for determining depreciation allowances. One method is the general depreciation system in section 168(a) and the other method is the alternative depreciation system in section 168(g). Under either depreciation system, the depreciation deduction is computed by using a prescribed depreciation method, recovery period, and convention.

For purposes of the general depreciation system, the depreciation method, recovery period, and convention are determined by the property's classification under section 168(e). Section 168(e)(3)(B)(vi) provides that 5-year property includes any property (modifying the language of section 48(a)(3)(A)(i)) which is equipment which uses solar or wind energy to generate electricity.

Section 1.167(a)-11(e)(1)(i) of the Income Tax Regulations provides, in part, that property is first placed in service when first placed in a condition or state of readiness and availability for a specifically designed function. It further provides that the provisions of section 1.46-3(d)(1)(ii) and (d)(2) generally apply for purposes of determining the date on which property is placed in service.

In general, property is placed in service in the taxable year the property is placed in a condition or state of readiness and availability for a specifically designed function. See sections 1.46-3(d)(1)(ii) and 1.167(a)-11(e)(1)(i). Placed in service is construed as having the same meaning for purposes of the investment tax credit under section 46 and depreciation under section 167. Section 1.46-3(d)(2) provides examples of when property is in a condition of readiness and availability. One of those examples is equipment that is acquired for a specifically assigned function and is operational but undergoing tests to eliminate any defects. See also Rev. Rul. 79-40, 1979-1 C.B. 13, where machinery and equipment were placed in service in the year critical tests (with appropriate materials) and operational tests were completed. Another example in section 1.46-3(d)(2) involved operational farm equipment acquired and placed in service in a taxable year even though it was not practical to use such equipment for its specifically designed function in the taxpayer's business of farming until the following year.

Several Tax Court cases have addressed placed in service questions in the context of electric power plants. In Olgethorpe Power Corp. v. Commissioner, T.C. Memo. 1990-505, and Consumers Power Co. v. Commissioner, 89 T.C. 710 (1987), facilities can be deemed placed in service upon sustained power generation near rated capacity. However, if the facility operates on a regular basis but does not produce the projected output, it may still be considered placed in service. Sealy Power, Ltd v.

Commissioner, 46 F.3d 382 (5th Cir. 1995), nonacq. 1995-2 C.B. 2. In the Action on Decision for Sealy Power, the Service stated that at a minimum, the property would have to have been in a state of readiness sufficient to produce electricity on a sustained and reliable basis in commercial quantities. AOD 1995-010. Finally, in Rev. Rul. 84-85, 1984-1 C.B. 10, a solid waste facility that was experiencing operational problems such that it was unable to operate at its rated capacity was nonetheless considered to have been placed in service since it was being operated on a regular basis and saleable steam was being produced. However, if a facility is merely operating on a test basis, it is not placed in service until it is available for service on a regular basis. Consumers Power v. Commissioner, 89 T.C. at 724.

The above-referenced cases and revenue rulings provide that the following are common factors to be considered in determining placed in service dates for power plants:

(1) approval of required licenses and permits;
(2) passage of control of the facility to taxpayer;
(3) completion of critical tests;
(4) commencement of daily or regular operations; and,
(5) synchronization into a power grid for generating electricity to produce income.

See generally, Rev. Rul. 76-256, 1976-2 C.B. 46, and Rev. Rul. 76-428, 1976-2 C.B. 47. These factors are not exclusive – they are used as guideposts to determine whether, looking at the totality of the facts and circumstances, a facility has been placed in service.

The focus in determining a placed in service date is on ascertaining from the relevant facts and circumstances the date the unit begins supplying product in such a manner that it is routinely available and is consistent with the unit's design. It is necessary to examine relevant factors occurring both before and after the claimed placed in service date so that the date can be verified. However, a facility does not have to achieve full design output to be placed in service as long as it is in the process of ramping up its production levels. Subject to exceptions that are beyond the taxpayer's control, the Service has generally required actual operational use as a prerequisite for an asset to be deemed placed in service. See, e.g., SMC Corp. v. United States, 675 F.2d 113 (6th Cir. 1982).

To be a qualified facility for wind credit purposes, the facility (each WTG) must be placed in service before January , 20 . In addition, the wind energy credit is available for a ten-year period which starts on the date the qualified facility is originally placed in service. Similarly, the period for tax depreciation of 5-year property such as the WTG begins when the depreciable wind equipment is placed in service. For purposes of the wind energy credit, a facility is placed in service when it would be placed in service for depreciation purposes. Thus, each WTG is placed in service when

it is placed in a condition or state of readiness and availability for a specifically assigned function, that is, to produce and deliver electricity generated from wind energy.

Based on the facts provided and applying those facts to the factors delineated in Rev. Rul. 76-256, the Taxpayer represents that, as of Date 1:

(1) all necessary permits and licenses with respect to the WTGs will have been obtained;
(2) each of the WTGs will have been synchronized to the power grid for its function of generating electricity for production of income;
(3) the critical tests for the various components of the WTGs will have been completed;
(4) the WTGs will have been placed in the control of the Project Company by the WTG supplier and the contractor; and,
(5) Taxpayer expects to have sold a non-de minimis amount of electricity generated by the Project and each of the WTGs.

Taxpayer further represents that in the event of a delay in the completion of the Line by Date1, Taxpayer will rotate the WTGs across the temporary intertie so that each is operating a reasonably consistent number of hours. This would result in the Project being able to deliver about Number9 percent of its capacity to market.

Daily operation at full rated capacity is not necessary to establish that the WTGs are placed in service. Even without the temporary delivery limitations or curtailments, the site-specific wind conditions could dramatically reduce daily WTG or Project output. As long as the WTGs are ready and available for use and producing commercial output on a regular basis, operating at full rated capacity is not necessary to establish that the WTGs are placed in service. See Sealy Power, supra.

CONCLUSIONS

Accordingly, based solely on the representations submitted by Taxpayer and the applicable law discussion above, we conclude that the Project will not be precluded from being in placed service in Year1 for purposes of sections 45, 167, and 168 if the Line has not been completed by then, as long as the Project is able to deliver at least Number16 percent of its capacity to market in Year1 via a temporary intertie and it rotates turbines across the temporary intertie so that each is operating on a regular basis.

The above ruling is expressly conditioned upon Taxpayer otherwise meeting the placed in service factors of Rev. Rul. 76-256 for each of the WTGs before January , 20 , and upon the operation of the WTGs in accordance with Taxpayer's representations.

Except as specifically set forth above, we express no opinion concerning the federal tax consequences of the facts described above under any other provisions of the Code. Specifically, no opinion is expressed or implied on the federal tax consequences of the possible conversion of either of the disregarded entities into a partnership, or on when the Project is placed in service by Taxpayer.

This letter ruling is directed only to Taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the power of attorney, we are sending a copy of this letter to Taxpayer's authorized representative. We are also sending a copy of the letter ruling to the appropriate operating division director.

Sincerely,

Kathleen Reed

Kathleen Reed
Chief, Branch 7
Office of Associate Chief Counsel
(Income Tax and Accounting)

Enclosures (2):
copy of this letter
copy for section 6110 purposes