
TROUTMAN SANDERS LLP

A T T O R N E Y S A T L A W
A LIMITED LIABILITY PARTNERSHIP

THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NEW YORK 10174
www.troutmansanders.com
TELEPHONE: 212-704-6000
FACSIMILE: 212-704-6288

July 2009

Treasury Grant Program for Specified Energy Projects

The Department of the Treasury and the Department of Energy have issued guidance for obtaining a cash grant from Treasury in lieu of a production tax credit under section 45 of the Internal Revenue Code (“Code”) or an investment tax credit under Code section 48. Under this grant program, which was enacted as part of the American Recovery and Reinvestment Act, the Department of the Treasury makes payments to eligible persons who place in service specified energy projects and apply for such payments.

By receiving grant payments for investment in qualified projects, applicants forego all federal tax credits with respect to the project. Applicants must agree to the terms and conditions applicable to the program. The Program Guidance establishes eligibility requirements and procedures for applying for payments under the grant program.

Copies of the Program Guidance, the Terms and Conditions and the draft Application can be found at <http://www.treasury.gov/recovery/1603.shtml>. Final applications will be available from Treasury on or about August 1, 2009. At that point, taxpayers will be able to begin submitting online applications to Treasury. Written applications will not be accepted. To assist taxpayers who wish to begin work on an application now, Treasury included with the guidance a “near final” draft application.

Treasury has solicited questions about the program and the application process, which can be submitted at 1603Questions@do.treas.gov.

Treasury and DOE officials estimate they will provide \$3 billion to an estimated 5,000 qualifying renewable energy projects under the program, which they estimate will allow \$10 billion to \$14 billion in private capital investment to move forward. These figures, however, were developed only for budgeting purposes—there is no cap on available funds for qualifying property.

Summary of Federal Tax Credits and Depreciation Deductions

Investment in renewable energy property is eligible for federal tax credits (or a cash grant in lieu of credits) and accelerated depreciation deductions.

Production Tax Credit. The renewable electricity production credit (PTC) is based on actual energy produced by qualifying wind, closed-loop and open-loop biomass, geothermal deposits, hydroelectric dams, and marine and hydrokinetic power facilities. For wind, geothermal and closed-loop biomass, the PTC is 1.5¢ per kilowatt-hour (indexed for inflation) of electricity produced by the facility over the 10-year period beginning when the facility is placed in service. PTCs for electricity produced at a facility placed in service after 2004 can be used to offset alternative minimum tax (AMT) liability for the first four years of production. The PTC is reduced on a proportionate basis for grants, tax-exempt bonds, subsidized energy financing, and other credits allowable with respect to the facility.

Investment Tax Credit. The investment tax credit or energy credit (ITC), equal to 30% of the cost of the facility, is available to the owner of a qualifying solar facility placed in service before 2017. The 30% ITC is also available for certain fuel cells. The ITC is taken entirely in the year the project is placed in service. The ITC is available to the owner of the property (including regulated utilities), whether or not the owner is engaged in the production of electricity, and regardless of the levels of production of electricity. Thus, the ITC is available to the lessor of a project under a net lease. Moreover, as discussed below, the lessor of a project that is eligible for the ITC can elect to pass the ITC back to the lessee. In that case, the lessor would claim the depreciation deductions, and the lessee would claim the ITC.

In addition to the 30% ITC for solar, a 10% ITC is available for geothermal energy property, geothermal heat pumps, combined heat and power (CHP) systems (“co-generation facilities”), qualified microturbine plants, and small commercial wind energy property, in each case, placed in service before 2017.

For purposes of calculating depreciation deductions, the tax basis of property for which the ITC is claimed is reduced by 50% of the amount of the credit (i.e., the depreciable basis is reduced to 85% of original asset cost). The ITC may be used to offset the alternative minimum tax. ITC tax basis is not reduced by tax-exempt private activity bond financing or subsidized financing provided by the federal or any state or local government.

The ITC is subject to recapture in the event the property is disposed of or ceases to be qualifying property during the five-year period after the property is placed in service. Effectively, 20% of the ITC “vests” in each of the five years following placement in service. In the event of a recapture event, the tax basis of the property is increased for depreciation purposes by 50% of the recapture amount.

Wind, geothermal, biomass and marine energy developers have the option to forego production tax credits and claim a 30% investment tax credit instead. The election is available for those components of a facility eligible for five-year MACRS tax depreciation. For wind projects the option is available only on projects placed in service during 2009 through 2012. For geothermal, biomass and marine energy projects the ITC election can be exercised for projects placed in service during 2009 through 2013. Electing the investment credit will allow wind and other facilities that used the PTC and partnership structures, to use sale-leaseback and related structures that were formerly reserved to ITC solar facilities. On June 5, 2009, the IRS issued Notice 2009-52 providing guidance on the process for into a cash grant.

Depreciation Deductions. Most equipment that uses renewable energy to generate electricity is eligible for MACRS accelerated cost recovery deductions over five years using the 200-percent declining-balance method (switching to the straight line method for the first taxable year for which using the straight line method will yield a larger depreciation deduction). In addition, a project may qualify for an additional “bonus depreciation” allowance if the project is placed in service in 2009 (with a further extension for certain longer-lived assets). This provision allows a deduction of 50% of project cost in the year the project is placed in service. The remaining tax basis is recovered under MACRS over the remaining five-year period. As noted above, the tax basis for computing depreciation deductions (including bonus depreciation) is reduced by 50% of the ITC.

Treasury Grants In Lieu of Tax Credits

Developers have the option to forego federal tax credits (PTC and ITC) and instead receive a nontaxable cash grant from the U.S. government in an amount equal to a specified percentage of project cost (30% in the case of large wind, solar and most other renewable energy projects).

Application Deadline. The cash grant option is available for projects placed in service in 2009 or 2010 or that begin construction during 2009 or 2010 and are completed by a deadline. The deadline is 2012 for wind projects, 2013 for biomass and marine energy projects, and 2016 for solar and fuel cell projects. The deadline for submitting applications is October 1, 2011 for projects that were placed in service or commenced construction in 2009 or 2010.

Application Contents. A complete application includes (i) a completed and signed application form, (ii) a signed Terms and Conditions statement, (iii) engineering design documents and commissioning report for the project, (iv) a detailed breakdown of all costs included in the basis of the property (plus an independent accountant’s certification for property with a basis in excess of \$500,000) and (v) other specified supporting documentation.

Approval and Payment Process. For property not placed in service in 2009 or 2010 but for which construction began in 2009 or 2010, applications must be submitted after construction commences but before October 1, 2011. If the property has been placed in service at the time of the application, Treasury will make payments to qualified applicants within 60 days from the date the completed application is received. For property not yet placed in service at the time of the application, Treasury will review the application and notify the applicant if all eligibility requirements that can be determined prior to the property being placed in service have been met. If so notified, applicants must then submit, within 90 days after the date the property is placed in service, supplemental information sufficient for Treasury to make a final determination. Treasury will conduct a final review of the application at that time and make payment to qualified applicants within 60 days after the supplemental information is received by Treasury.

When Treasury determines that an application is approved, it will send a notice to the applicant. The notice informs the applicant that the payment will be made and incorporates the information contained in the applicant’s completed application form and the Terms and Conditions. Treasury makes payment to the applicant no later than five days from the date of the notice. In cases where an applicant has not submitted sufficient information upon which a

determination can be based, the applicant will be so notified and given 21 days from the date of the notice to submit additional information. If additional information is not received within the 21 day period, the application will be denied.

Applicants must register with the Central Contractor Registration (CCR) before grant payments can be made. To register, go to www.ccr.gov/startregistration.aspx

Qualified Property. To qualify to obtain a grant under the section 1603 program, property must be originally placed in service between January 1, 2009, and December 31, 2010 (regardless of when construction begins), or placed in service after 2010 and before the credit termination date if construction of the property begins between January 1, 2009, and December 31, 2010. The credit termination date and the grant rate for different types of property are set forth in the table below:

Specified Energy Property	Credit Termination Date	Applicable Percentage of Eligible Cost Basis
Large Wind	Jan 1, 2013	30%
Closed-Loop Biomass Facility	Jan 1, 2014	30%
Open-loop Biomass Facility	Jan 1, 2014	30%
Geothermal under section 45	Jan 1, 2014	30%
Landfill Gas Facility	Jan 1, 2014	30%
Trash Facility	Jan 1, 2014	30%
Qualified Hydropower Facility	Jan 1, 2014	30%
Marine & Hydrokinetic	Jan 1, 2014	30%
Solar	Jan 1, 2017	30%
Geothermal under section 48	Jan 1, 2017	10%
Fuel Cells	Jan 1, 2017	30%
Microturbines	Jan 1, 2017	10%
Combined Heat & Power	Jan 1, 2017	10%
Small Wind	Jan 1, 2017	30%
Geothermal Heat Pumps	Jan 1, 2017	10%

Placed In Service. Under the guidance, applications may only be submitted after the project to which the application relates is “placed in service” in 2009 or 2010 or commenced “construction” in 2009 or 2010. “Placed in service” means that the project is ready and available for its specific use. The applicant must submit with the application a report of an independent engineer (or other qualified person) certifying that the project is installed, tested and ready and capable of being used for its intended purpose.

Commencement of Construction. Construction “begins” when physical work of a significant nature begins. The Program Guidance provides examples for property constructed by the applicant, and for property constructed under a contract. Under a safe harbor, the test is deemed met where the applicant has incurred more than five percent of the total cost of the property.

For *self-constructed property*, preliminary activities such as planning or designing, securing financing, exploring or researching, are not taken into account. Generally, only physical work at the project site is considered. However, off-site physical work on modular units that are manufactured elsewhere and delivered to the site for assembly may constitute commencement of construction.

For property that is *manufactured or constructed for the applicant by another person under a written binding contract*, construction “begins” when physical work of a significant nature begins under the contract. Rules are provided for determining when a contract is “binding.”

For either self-constructed or contracted property, under a “*safe harbor*” an applicant may treat physical work of a significant nature as having begun once the applicant has incurred (or paid) more than 5 percent of the (projected) total cost of the project (excluding land and any preliminary activities). When property is manufactured under contract with another party, this test must be met by the applicant (by reference to performance under the contract), not the other party.

Units of Property. For purposes of determining when property is placed in service or construction begins, all components of a larger property are a single unit of property if the components are functionally interdependent (i.e., placing one in service is dependent on placing the other in service). For example, in the case of a planned wind farm consisting of 50 wind turbines that each can be separately operated and metered and can begin producing electricity individually, each such wind turbine (along with its tower and supporting pad) is considered a single unit of property (as to which a separate application is made).

However, an applicant that owns multiple units of property that are located at the same site and that will be operated as a larger unit may elect to treat all the units eligible for a grant payment as a single unit of property (together with any property, such as a computer control system, that serves some or all such units and that is eligible for a grant payment). For example, in the case of the 50-turbine wind farm described above, an applicant may elect to treat all the wind turbines (along with their towers and supporting pads) and any property that serves some or all of the wind turbines, collectively, as a single unit of property. The date on which construction of the first turbine commences will mark the construction commencement date for all 50 turbines, and the date on which a turbine is first placed in service will mark the placed in service date for all 50 turbines. Failure to complete and place in service all 50 units by the credit termination date (January 1, 2013 for wind) does not preclude a grant payment. If only 40 of the planned 50 turbines were placed in service by that date, the applicant would be eligible for a grant payment for the 40 turbines placed in service.

Leasing. Leasing rules applicable to the investment tax credit are generally applicable to grant payments.

A lessor who is eligible to receive a grant payment with respect to property may irrevocably *elect to pass-through* the grant payment to an eligible lessee of that property. In such a case, the lessee is treated as having acquired the property for an amount equal to the independently assessed fair market value on the date the property is leased. The lessee must include in income ratably over 5 years an amount equal to 50% of the grant payment. Certain lessors are precluded from making the pass-through election (mutual savings banks, RICs and REITs). The election is made by written agreement between lessor and lessee containing certain required information. The election to allow the lessee to claim the grant payment is also available in a sale-leaseback transaction, provided the lessee originally places the property in service and the property is sold and leased back within 3 months of being originally placed in service.

Alternatively, the lessor in a sale-leaseback transaction is also eligible to claim the grant payment. If property originally placed in service by a lessee person is sold and leased back to the lessee within 3 months, so long as lessor and lessee do not make the election described above, lessor will be considered the owner and original user of the property and the property will be considered placed in service no earlier than the date of the leaseback.

Disqualified Persons. Certain persons (“disqualified persons”) are not eligible to apply for grant payments. These include:

- any Federal, state or local government, including any political subdivision, agency or instrumentality thereof
- any tax-exempt organization that is described in Code section 501(c)
- cooperative electric companies
- clean renewable energy bond (CREB) lenders
- Indian tribal governments
- any partnership or other pass-thru entity, any direct or indirect partner of which is an organization or entity described above unless this person only owns an indirect interest in the applicant through a taxable C corporation.

A person’s status as “disqualified” is tested on the application filing date.

Foreign persons are not “disqualified persons.” However, they are not eligible to apply for grant payments unless more than 50% of their income is subject to U.S. taxation (either because the foreign person is engaged in a U.S. trade or business or because the foreign person is a controlled foreign corporation (CFC)).

Recapture Rules. Although the recapture rules applicable to grant payments are in many respects identical to those applicable to the investment tax credit, they are more liberal in some

key respects. As with the ITC, the recapture period is the 5 years following the placed in service date, and the recapture amount is 100% prior to the 1st anniversary of the placed in service date, 80% prior to the 2nd anniversary of the placed in service date, 60% prior to the 3rd anniversary of the placed in service date, etc.

Under the recapture provisions, certain dispositions cause a recapture of (and an obligation to repay) the payment. These “disqualifying events” include any sale to a “disqualified person” of any interest in the property, the applicant, or in any partnership or pass-thru entity that owns an interest in the applicant. Unlike the ITC recapture rules, selling or otherwise disposing of the property to an entity other than a disqualified person does not result in recapture of the grant, provided the transferee agrees to be jointly liable with the applicant for any future recapture.

Grant payments will also be recaptured if, within the recapture period, the property ceases to qualify as eligible property. Property will not cease to qualify as eligible property if the property’s production of energy temporarily ceases and, at that time, the owner intends to resume production. Permanent cessation of energy production, however, will result in recapture unless the permanent cessation is due to a natural disaster and the property is not replaced with property with respect to which a grant payment is allowed.

Recapture payments may be collected from: the applicant; an entity that has purchased an interest in the property and has agreed to be jointly liable with the applicant for recapture; or the lessee of the property, if an election has been made to pass-through the grant to such lessee (as discussed above). Applicants are not required to post any bond. Receipt of a grant payment does not create a lien on the property. However, if recapture is triggered, the amount due will be considered a debt owed to the United States, which may be enforced by the Department of Justice.

Miscellaneous Provisions. The tax basis of a project for purposes of calculating depreciation deductions is reduced by 50% of the amount of the grant. Applicants may assign grant payments to lenders or other third parties. Receipt of grant payments with respect to property will not cause such property to be subject to the requirements of: National Environmental Protection Act; or Davis-Bacon Act. Grant payments are not taxable income. REITs eligible for grant payments only to the extent allowed under the investment tax credit rules. Grant payments made to regulated utilities are subject to normalization rules. Applicants are required to provide annual reports to Treasury describing the use of grant monies received.

Structuring Renewable Energy Projects under the Grant Program

Developers and other owners of renewable energy assets generally lack the taxable income – “tax capacity” – to efficiently use federal tax credits and deductions. Many developers have realized the value of the incentives by entering into partnership-flip and sale-leaseback transactions, whereby institutional investors (who *do* have tax capacity and funding capability) leverage the tax benefits and share the spoils with developers.

The economic downturn and credit crisis, however, have severely curtailed many investors’ project development activity. Some investors – many of whom have financed myriad

renewable energy projects in the last several years – simply do not currently have the confidence about future profits and future tax capacity to finance new transactions. Others’ appetites for claiming the tax incentives are a bit tempered now, given the current economic conditions.

The key purpose of the grant program is to allow the value of the ITC to be monetized in the form of a grant, instead of requiring “tax capacity” for its use. Thus, instead of depending on an institutional tax equity investor (and a complicated partnership or sale-leaseback financing structure), a developer can now simply forgo that capital and instead collect the cash grant in an amount equivalent to the ITC and otherwise finance projects through more traditional sources (e.g. debt).

One reason why developers may not choose to “go it alone” is that cash grants are paid in lieu of tax credits, not depreciation deductions. Accordingly, a developer choosing a grant will be left with depreciation deductions that it probably cannot use efficiently. These deductions can result in net operating losses that can be carried forward for up to 20 years and used when the developer has income against which to offset it. Alternatively, a developer might enter into a tax equity transaction to try to convert the depreciation into cash. A partnership flip or inverted lease structure generally must fund before the project is placed in service. Any sale-leaseback of the project -- including a sale-leaseback where the lessor chooses to leave the grant with the developer-lessee -- must be completed within three months after the project is placed in service.

Only 85% of the cost of any project on which a grant is paid can be depreciated. However, in cases where a project is leased and the parties choose to leave the grant with the lessee, the lessor can depreciate 100% of the project cost, but the lessee must report half the grant as income. The income would be reported ratably over the period the project is depreciated.

Sale-Leaseback Financing Structure

Because tax depreciation deductions are available only to the owner of a facility, traditional secured financing techniques, including leasing, can be used to monetize depreciation deductions for qualifying projects.

Under a sale-leaseback structure (*see Diagram 1*), a developer of an energy project constructs and agrees to operate the project and to sell the electricity produced to a utility, or to a business or institution on whose property the project is built (e.g., a retail “big box” store or a school) under a long-term power purchase agreement (PPA). The PPA would require the store or the school (the “power purchaser”) to buy all of the power produced, generally at a fixed price, thereby ensuring a stream of revenue over the term of the PPA.

The developer sells the project to a bank or other tax equity investor (“lessor”) which leases the property back to the developer (“lessee”) under a long-term net lease. The lease cannot run longer than 80% of the expected life and value of the project. The developer-lessee shares in the depreciation tax benefits through reduced rents. Either the lessor or the lessee will claim the ITC (or grant). To secure its rent payment obligations, the lessee grants to the lessor a collateral assignment of the PPA and other revenues (such as funds from the sale of RECs). To qualify for the ITC or grant, the sale-leaseback transaction must be completed within three months after the project is placed in service.

If the developer-lessee wants to continue using the project after the lease ends, then it must either negotiate an extension at then current market rent or buy the project. It can have an option to buy back the project for a fixed price negotiated in advance, but the price will be the expected value of the project -- unlike a “partnership flip” (below) where the developer gets back 95% of the project without any additional cash outlay and has to pay the market value of only a 5% interest to recover the balance of the project. From the tax equity-lessor’s perspective, the residual value of the property at the end of the lease term, combined with the rents, the ITC and the tax depreciation deductions, will generate a target after-tax yield to the lessor. The transaction can be structured to also generate a positive pre-tax yield and cash-on-cash return without regard to tax benefits.

The main advantage of a sale-leaseback is it provides 100% financing. The lessor investor pays the full market value for the project at the time it is placed in service. The downside of doing a sale-leaseback versus a partnership flip is it costs more for the developer to get the project back. After the lease ends, the developer can only continue using the project by purchasing it from the investor for fair market value. Another advantage of the sale-leaseback is that it divorces project ownership from project operations, and largely insulates the investor from operational risk.

Inverted Passthrough Lease

As noted above, the tax rules allow the ITC (or grant) to be “passed through” to the lessee in the context of a lease of energy property. This provision is the basis for a structure known as the inverted passthrough lease. The developer is the lessor and the tax equity investor is the lessee. The developer-lessor leases the project to a tax equity investor. The tax equity lessee (which may be a partnership in which the developer owns a nominal interest) sells the electricity and pays most of the electricity revenue to the developer in the form of rent. The developer elects to pass through the ITC (or grant) to the tax equity investor-lessee. The developer-lessor retains the depreciation deductions and uses it to shelter tax on the rents. The tax equity investor claims the ITC (or grant) and deductions for rent due under the lease. The rent schedule may be designed to match the depreciation deductions that the investor would have claimed had it owned the project. At the end of the lease, the developer, as owner and lessor of the project, takes back the project without any additional cash outlay.

Partnership “Flip” Structure

The partnership “flip” structure has been the predominant financing vehicle for wind and other projects eligible for the PTC. This is so mainly because the sale-leaseback structure could not be used to shift PTCs to a project owner, because the PTC is available only to the party producing the electricity. The law now allows the conversion of PTCs into an ITC, and further allows the ITC to be converted into a cash grant. Investors and developers now have more flexibility in the choice of financing structures.

The partnership structure maximizes the benefit of the tax benefits by using the partnership tax rules to allocate the tax benefits to tax equity investors (*see Diagram 2*). The developer and the equity investor form a partnership or LLC as a project company that owns the project. Partnerships and limited liability companies are “pass-through” entities for tax purposes

(rather than separate taxable entities), so the members of the partnership are treated as the owners of the project. The construction of the project is financed by funding commitments from the developer (and/or third-party construction period debt providers). Once the project is placed in service, the tax equity contribution repays all or a portion of the construction period financing.

The partnership agreement allocates between the parties taxable income or loss and cash distributions in a manner designed to optimize the after-tax economics. Once the project is placed in service and the tax equity has funded its contribution, 99% of the tax benefits are allocated to the tax equity. The cash flow is typically allocated 99% to the investor after the developer has recovered some or all of its equity investment. Those allocations remain in place until the investor has achieved an agreed yield on its investment (generally this occurs around year 10, when all of the tax benefits have been accrued). At that point, the allocations “flip,” with the developer taking up to 95% of the cash and tax attributes. The developer then has a fair market value option to buy out the tax equity’s remaining 5% interest in the project.

Unlike the sale-leaseback structure, where the back-end residual in the project can be retained by the tax equity, the “flip” structure reserves to the developer the upside potential and downside risk in the residual. By the same token, the developer’s return on its investment is delayed and more dependent on the residual in the partnership, whereas in the sale-leaseback, the developer realizes a large up-front profit on the sale of the project to the tax equity (and that sale steps up the basis of the project in the hands of the tax equity for ITC (or grant) and depreciation purposes).

In October 2007 the IRS issued guidance for financing of wind projects using the “partnership flip” structure. The IRS ruling (Rev. Proc. 2007-65) provides that unless the following guidelines are met, the IRS will closely scrutinize the validity of wind energy partnerships.

- The developer must maintain a minimum 1% interest in tax attributes, and the investor must maintain a 5% minimum interest in tax items after the “flip.”
- The tax equity investor must maintain a capital investment at least equal to 20% of the sum of its fixed capital contributions plus anticipated contingent capital contributions. The initial investment can be delayed until the project is placed in service.
- At least 75% of an investor’s total capital contributions must be fixed and determinable obligations that are not contingent either in amount or in certainty of payment.
- The exercise price of any purchase option held by the developer, the investor or any related party to purchase the project or any interest in the partnership must be at fair market value as determined on the date of exercise of the option. Developer purchase options are not permitted during the first five years.
- The partnership may not have a right to require any party to buy the project, and the investor may not have a right to require any party to buy its partnership interest.
- Neither the developer nor a related party may loan any funds to the investor to invest in the partnership, or may guarantee any debt connected to that investment.

- There can be no guarantee to the investor of any amount of or allocation of the PTC, except the investor may obtain a third-party guarantee of wind resource availability.
- The tax benefits must be allocated the same way gross income from sale of electricity is allocated.

The IRS ruling by its terms applies only to wind partnerships, but it will inform the structuring of “flip” structures used for solar and other renewable energy assets. While the IRS ruling generously allows an allocation of as little as 1% of the tax attributes to the developer, the investor capital maintenance requirement will restrict so-called “pay-as-you-go” structures for the timing of capital contributions. One question not answered by the ruling is whether the IRS would challenge a transaction that satisfies the ruling but fails to generate a positive pre-tax return for the investor. The ruling is silent on pre-tax profit. The ruling also does not address the use of use of leverage (non-recourse debt) in the partnership.

Choosing the Right Financing Structure

Developers (particularly wind developers) should reevaluate the partnership flip structure relative to a sale-leaseback now that the PTCs can be converted into ITCs (and grants). One question is the value of the available ITC or grant relative to the present value of the expected PTCs. Financial modeling is required to make that determination, and the answer will vary by project. Projects with higher project cost (the cost basis on which the ITC and depreciation deductions are calculated) will make the ITC (or grant) more valuable. Projects with higher project capacity (greater expected future energy production) will make PTCs more valuable. The ability to “step up” project tax basis in the case of a sale-leaseback may make that structure more attractive than the partnership. And as noted above, a sale-leaseback is likely to be more attractive than forgoing third-party tax equity investment entirely, because it allows monetization of the tax depreciation deductions.

Regulated Utilities

One class of investor for whom the partnership flip may remain attractive is a regulated utility that itself is the project offtaker (power purchaser) and that has the tax capacity to use the PTCs (or ITC) and the tax depreciation. Utilities generally prefer owning projects so they can include their capital costs in the rate base on which they earn a regulated return. They also can have tax capacity. Before last year, however, utilities could not claim PTCs from projects in which the utility was the offtaker because of a rule requiring that the power be sold to an “unrelated party.” Under IRS guidance issued last year, however, power is deemed sold to an unrelated party so long as the party that produces it is not related to the ultimate purchaser of the power (e.g, the retail customer). Thus, a utility that purchases a project’s output and resells it to customers can be an owner (or a partner in a partnership or other entity that is the owner) of the project without jeopardizing the PTCs, ITCs or grants.

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Troutman Sanders LLP represents U.S. equity investors, lenders, developers and utilities in a variety of asset and project finance and leasing transactions encompassing a wide range of industries and transaction structures. Our commercial, tax and energy lawyers concentrate on these transactions in New York, Atlanta and Washington D.C.

Our energy practice integrates the know-how of Troutman Sanders LLP lawyers skilled in business and law, particularly in businesses related to electricity, renewables, natural gas, oil, thermal energy and nuclear power, with lawyers having expertise in tax, energy regulation, project finance, public finance, corporate law, bankruptcy, real estate and environmental law.

<p>Philip H. Spector Troutman Sanders LLP 405 Lexington Avenue New York, NY 10174 (212) 704-6004 phil.spector@troutmansanders.com</p>	<p>Howard A. Cooper Troutman Sanders LLP 401 9th Street, N. W. - Suite 1000 Washington, DC 20004-2134 (202) 274-2878 howard.cooper@troutmansanders.com</p>
<p>Craig M. Kline Troutman Sanders LLP 405 Lexington Avenue New York, NY 10174 (212) 704-6150 craig.kline@troutmansanders.com</p>	<p>Todd R. Coles Troutman Sanders LLP 401 9th Street, N.W. Washington, DC 20004-2134 (202) 274-2810 todd.coles@troutmansanders.com</p>
<p>Ronald R. Ross Troutman Sanders LLP 401 9th Street, N.W. Washington, DC 20004-2134 (202) 274-2963 ronald.ross@troutmansanders.com</p>	<p>Brian C. Harms Troutman Sanders LLP 600 Peachtree Street, NE Atlanta, GA 30308-2216 (404) 885-3682 brian.harms@troutmansanders.com</p>

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Diagram 1:
Sale-Leaseback of Solar Equipment

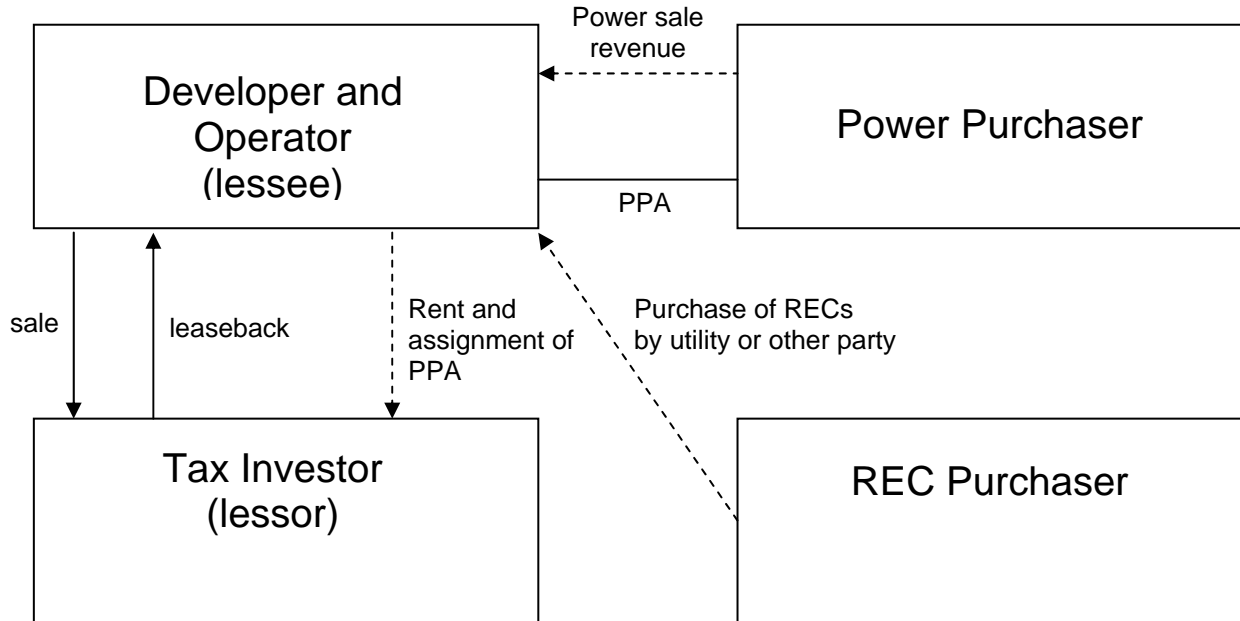


Diagram 2: Partnership Flip Structure

