Articles + Publications | April 3, 2024

Locke Lord QuickStudy: Latest Energy Communities Guidance Buoys Offshore Wind, but Navigation Hazards ?Remain

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On March 22, 2024, the IRS issued additional guidance (Notice 2024-30) on the energy communities provision of the Inflation Reduction Act. This latest guidance is narrowly focused on two topics: (1) expanding the "hook" by which offshore wind projects can qualify for the EC bonus credit from onshore substations to ports, and (2) expanding the industries included for purposes of the fossil fuel employment rate calculation in the Statistical Area Category. This QuickStudy provides a closer look at the effect of the new guidance, with a particular focus on what it means for offshore wind projects. For further background on issues surrounding the IRA and offshore wind, see our previous QuickStudies, *Bridging the Gaps: Will the IRA Really Be a Game Changer for Offshore Wind?*, *Brownfields and the Deep Blue Sea: Offshore Wind Development and the IRA's Energy Communities Provisions*, and *That Sinking Feeling: IRS Energy Communities Guidance May Limit Eligibility of Many Offshore Wind Projects*.

Revisions to Nameplate Capacity Attribution Rule

Congress included the energy communities bonus credit in the IRA to incentivize the development of renewable energy projects in certain economically disadvantaged areas, including brownfields, statistical areas with a certain level of employment in the fossil fuel industry and unemployment at or above the national average (the "Statistical Area Category"), and census tracts in which or adjacent to which a coal mine has closed or a coal-fired generating unit has been retired since 1999 (the "Coal Closure Category"). Because offshore wind energy is generated, well, offshore, the industry is not an obvious fit for any of these categories of energy communities. Nevertheless, offshore wind projects have substantial onshore components and operations that may generate jobs and economic activity in any of these areas, providing ample justification for their eligibility for the bonus credit. In its previous energy communities guidance, Notice 2023-29, the IRS acknowledged this by announcing the "Nameplate Capacity Attribution Rule," which stated that projects with offshore energy generating units could attribute the entire nameplate capacity of the project to any land-based power conditioning equipment that conditions the energy generated by the project for transmission, distribution or use before the point of interconnection. In essence, this meant that if the onshore substation was located within any category of energy community, and the project otherwise qualified for the energy communities bonus credit, then the entire offshore wind project could claim the bonus credit.

While the Nameplate Capacity Attribution Rule provided an eligibility lifeline for offshore wind projects, it failed to account for the substantial economic benefits that offshore wind projects provide through the expansion or redevelopment of ports, which are frequently located in or constitute energy communities. For example, offshore wind projects are driving major new development at ports in New Bedford and Salem, Massachusetts, and Sparrows Point in Baltimore, as well as revitalizing smaller ports such as one in Montauk, NY that will service the recently-completed South Fork Wind Farm. Placing these ports in energy communities meets the rationale behind the bonus credit—but under the previous guidance, offshore wind projects driving port redevelopment were not eligible.

The new guidance partly corrects this omission by expanding the Nameplate Capacity Attribution Rule to certain offshore wind ports. Under the new guidance, an offshore wind project's nameplate capacity can be attributed to any SCADA equipment located in an "EC Project Port." The Notice defines an EC Project Port as (i) a port used on either a full or part-time basis to facilitate maritime operations necessary for installation, operation or maintenance of the offshore project, that (ii) has a "significant long-term relationship" with the project. Additionally, staff employed by or working as independent contractors for the project owner/taxpayer must be based at the port in question and must perform functions essential to the project's operations.

The IRS will consider a port to have a "significant long-term relationship" to an offshore wind project only if the taxpayer that owns the project also owns the port in whole or in part, or leases a portion of the port for a term of at least 10 years. The requirement for staff to be based at the EC Project Port and perform operations essential to the project's operations means that the staff must perform *all* of the following functions: management of marine operations, inventory and handling of spare parts and consumables, and berthing and dispatch of operation and maintenance vessels and associated crews and technicians. Provided that all of these conditions are met, an offshore wind project with SCADA equipment located at a port that is in an energy community area can now qualify for the bonus credit. We note, however, that the requirement for operations staff performing all of these functions to be based at the EC Project Port could be difficult to meet given the current dearth of Jones Act qualified vessels available for operations and maintenance. Industry may wish to flag this issue for the IRS to avoid a situation where the limited availability of Jones Act qualified vessels undermines the ability to qualify for this credit.

This expanded definition of energy communities clearly contemplates inclusion of operations and maintenance ports dedicated to a specific offshore wind project during its energy generation (i.e., operations) phase. However, the requirement for a significant long-term relationship with the project for a port to qualify as an EC Project Port would seem to exclude pre-assembly ports used only to stage offshore wind components during the *construction* phase of projects, something industry and a coalition of states had expressly asked to be included. These groups argued that offshore wind projects catalyze significant and sustained economic activity at pre-assembly ports that satisfies the purpose of the energy communities bonus credit, but the IRS seems not to have accommodated that point. This is another area where industry may push the IRS for changes in the eventual energy communities regulations.

The new guidance also expands the Nameplate Capacity Attribution Rule for offshore wind projects with multiple points of interconnection. For such projects, *all* of the nameplate capacity of the project is attributed to *any* land-based power conditioning equipment at *one* of the multiple points of interconnection. Thus, only one of the onshore substations needs be located in an energy community area for the entire project to qualify for the energy communities bonus credit. Given that offshore wind projects often plan for multiple cable landing locations, this clarification should increase the opportunities for offshore wind projects to qualify for the energy communities bonus credit.

Expansion of Industries Considered in Fossil Fuel Employment Rate Determination

Notice 2024-30 also expands the availability of the energy communities bonus credit in another way, this one relating to determination of metropolitan statistical areas (MSAs) and non-metropolitan statistical areas (non-MSAs) that qualify for the Statistical Area Category. The Notice adds two NAICS codes to the list of covered industries: 2212 – Natural Gas Distribution, and 23712 – Oil and Gas Pipeline and Related Structures Construction. Although pipeline transportation of both crude oil (NAICS 4861) and natural gas (NAICS 4862) had already been included in the list of covered industries, the inclusion of these additional SIC codes greatly expands the list of MSAs and non-MSAs designated as energy communities. The Notice includes an Appendix 1 identifying the list of additional MSAs and non-MSAs meeting with Fossil Fuel Employment threshold, and Appendix 2 listing the additional MSAs and non-MSAs that qualify as energy communities based on the inclusion of these additional NAICS codes. As those appendices indicate, the result of this seemingly minor addition is a major expansion of eligible areas. Developers should consult these appendices in addition to the original guidance when determining if their project is in an energy community.

Conclusion

With this latest guidance, the IRS has taken an important step to bring parity to the treatment of offshore wind projects under the IRA, while also expanding the geographic reach of the energy communities provision by including certain midstream fossil fuel operations as eligibility triggers. The IRS has not embraced the full range of onshore facilities that could, and arguably should, be eligible for the energy communities bonus credit, and traps for the unwary remain. Nonetheless, this most recent guidance represents a vast improvement that should greatly increase the number of planned projects that qualify—and make it easier for future projects to be sited in ways that provide the desired economic benefits for energy communities. While offshore wind developers may rely on this guidance, they should be aware that there are multiple opportunities to provide feedback to the IRS on ways it can be further improved, including commenting on both this most recent guidance and the IRS's forthcoming proposed regulations.

Please contact the authors if you have any questions regarding the energy communities provision.

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