

Beginning of construction rules issued for the energy investment tax credit

Situation presented:

The Internal Revenue Service ("IRS") and U.S. Department of Treasury ("Treasury") released Notice 2018-59 ("the Notice") on June 22, 2018¹, providing guidance to determine when construction has begun on solar, fuel cell, combined heat and power, microturbine, geothermal and small wind energy property, to allow taxpayers to qualify for the investment tax credit ("ITC"). The guidance applies industry-favorable rules similar to those for the beginning of construction of production tax credit ("PTC") facilities including wind, biomass, and hydropower facilities.

Issue:

On December 18, 2015, the Protecting American from Tax Hikes Act of 2015, Public Law 114-113 (the "PATH Act") and Consolidated Appropriations Act of 2015, extended and modified the ITC for solar energy property under section 48 of the Internal Revenue Code. As modified, section 48 phases down the ITC for solar energy property the construction of which begins after December 31, 2019, and before January 1, 2022, and further limits the amount of the section 48 credit available for solar energy property that is not placed in service before January 1, 2024.

On February 9, 2018, Bipartisan Budget Act of 2018, Public Law 115-123, ("Budget Act"), extended and modified the ITC for other energy property under section 48 by requiring that construction of energy property must begin before January 1, 2022. This modification had the effect of retroactively extending by five years the ITC for fiber-optic solar, qualified fuel cell, qualified microturbine, combined heat and power system ("CHP"), qualified small wind, and geothermal heat pump property, the construction of which begins before January 1, 2022. The amendments also phase out the ITC for fiber-optic solar, qualified fuel cell, and qualified small wind energy property over five years. For these energy properties, regardless of when construction begins, the projects must be placed in service before January 1, 2024.

In Notice 2018-59, the IRS and Treasury provided specific rules on how construction is begun to allow taxpayers to qualify for the ITC for investments in these types of energy property.

Notice 2018-59

To establish the beginning of construction for ITC energy property, taxpayers must satisfy either the Physical Work Test or the 5% Safe Harbor. Once construction has begun, taxpayers must maintain a continuous program of construction to satisfy the Continuity Requirement through means of either the Continuous Construction Test or the Continuous Efforts Test depending on the manner in which the beginning of construction was established. The Notice also provides guidance for other rules applicable to the Physical Work Test and the 5% Safe Harbor. Furthermore, the Notice addresses rules for the transfer of energy property among other considerations.

The Notice provides guidance for various types of energy property including solar, fiber-optic solar, geothermal, qualified fuel cell, qualified microturbine, combined heat and power system ("CHP"), qualified small wind, and geothermal heat pump.

Physical Work Test

Construction of energy property begins when physical work of a significant nature begins (the "Physical Work Test").

- Physical work of a significant nature
 - The Physical Work Test focuses on the nature of the work performed, not the amount or cost. There is no fixed minimum threshold or percentage for work or monetary value utilized.² Off-site and on-site physical work may be considered for the purpose of demonstrating physical work of a significant nature has begun.
 - Generally, off-site physical work of a significant nature "**may include** the manufacture of components, mounting equipment, support structures such as racks and rails, inverters, and **transformers and other power conditioning equipment**" (emphasis added).³
- On-site physical work of a significant nature examples for installation of different **types of energy property include:**⁴
 - Solar energy – installation of racks or other structures to affix photovoltaic panels, collectors, or solar cells to a site.
 - Fiber-optic solar – installation of collectors, concentrators, tracking systems, bundles of optical fibers, or fixtures within a structure.
 - Geothermal – installation of piping, turbines, generators, flash tanks, or heat exchangers after a valid discovery.
 - Qualified fuel cell – installation of components of a fuel cell stack assembly such as electrodes, gas diffusion layers, membranes, gasketing, or plates.

- Qualified microturbine – installation of a gas turbine engine, combustor, recuperator, regenerator, generator, alternator, or other plant components.
- Combined heat and power system – installation of a heat engine, generator, heat recovery components, or electrical interconnections.
- Qualified small wind energy property – installation of a foundation, tower, wiring, or grounding systems.
- Geothermal heat pump – installation of ground heat exchangers, heat pump units, or air delivery systems (ductwork).
- Does not include preliminary activities
 - Even if the cost of those preliminary activities is properly included in the depreciable basis of the energy property.
 - Examples of preliminary activities that do not qualify as physical work of a significant nature include planning and designing; securing financing; exploring; researching; etc.⁵
- Does not include work to produce **components of energy property** that are either in existing **inventory** or are normally held in inventory by a vendor.

Deloitte Observation:

The Physical Work Test is generally applied in the same manner as in the PTC notices (“PTC Notices”).⁶ The IRS and Treasury provided specific examples of on-site physical work activities for each type of technology.⁷ The language also mirrors the PTC Notices and indicates that in determining whether physical work is of a significant nature, the Physical Work Test “focuses on the **nature of the work performed, not the amount or cost. There is no fixed minimum threshold or percentage for work or monetary value utilized**” (emphasis added).⁸

When initially released on the IRS website on June 22, 2018⁹, the Notice introduced the beginning of off-site physical work on transformers that step up the voltage of electricity to less than 69 kilovolts to satisfy the Physical Work Test. Despite that language, the Notice was clear that physical work of a significant nature may include the manufacture of “other power conditioning equipment”¹⁰ and provided the example of beginning off-site construction of a step up transformer (**69 kilovolts or greater**) **that is power conditioning equipment eligible for the ITC.**¹¹ It appears that the Notice initially used 69 kilovolts as the threshold voltage because, as stated in the Notice, transmission property is not energy property, and a common view holds that **for depreciation purposes**, “transmission” is defined as any voltage in excess of 69 kilovolts based upon language in section 168(e)(3)(E)(vii), which provides a 15-year MACRS recovery period for: “any section 1245 property (as defined in section 1245(a)(3)) used in the transmission at 69 or more kilovolts of electricity for sale and the original use of which commences with the taxpayer after April 11, 2005.”¹² Because ITC, PTC and 1603 Grant guidance do not consider step-up transformers as transmission property regardless of the voltage,¹³ and because the Notice generally follows the PTC Notices (and

thus, 1603 Grant guidance) from a policy perspective, the removal of all references to a limitation on the voltage of step up transformers by the IRS and Treasury from the final Notice published in the IRB makes the Notice consistent with other ITC and PTC guidance.¹⁴

Not only does the removal of limitations on the voltage of step-up transformers prevent confusion in departing from prior guidance, but taxpayers may reasonably interpret this action as affirming the IRS viewpoint that beginning physical work offsite on a step-up transformer is a viable method for beginning construction in certain circumstances. This may provide further comfort to taxpayers relying on such physical work in the context of claiming the ITC or PTC.

Regarding the language prohibiting physical work of a significant nature from beginning on property that is inventory, Notice 2018-59 provides that, physical work of a significant nature does not include work to **“produce components of energy property”** that are either in existing inventory or are normally held in inventory by a vendor. It is noteworthy that this language is slightly different than the language in the same provision in Notice 2013-29 that provides that, physical work of a significant nature does not include work to **“produce property”** that is either in existing inventory or is normally held in inventory by a vendor. Although the ITC Notice relates to a different unit of property than the PTC Notices and it is possible that the IRS and Treasury did not intend to expand the prohibition on beginning physical work on inventory to any component of the energy property, the resulting language may lend itself to an expanded prohibition. Taxpayers may want to consider this limitation and plan such that that physical work does not begin on components of energy property that are normally held in inventory by a vendor, even when the property contracted for is not itself inventory.

5% Safe Harbor Test

Construction of energy property will be considered as having begun if a taxpayer pays or incurs five percent or more of the total cost of the energy property.

- **Total cost of energy property**

- All costs properly capitalized in the basis of the energy property are considered to determine whether the 5% Safe Harbor has been met, but does not include the cost of the land (including lease payments) or any property not integral to the energy property.¹⁵

- **Cost overruns**

- **Single project**

- If the total cost of an energy property exceeds its anticipated total cost, so that the amount a taxpayer paid or incurred with respect to the single project turns out to be less than five percent of the total cost of the single project (at the time it is placed in service), the 5% Safe Harbor is not satisfied for the entire project.
- The project may satisfy the 5% Safe Harbor and claim the section 48 credit with respect to some, but not all, of the energy properties as long as the total

aggregate cost of those energy properties is not more than twenty times greater than the amount the taxpayer paid or incurred.¹⁶

- **Single energy property**
 - o If the total cost of a single energy property exceeds its anticipated total cost so that the amount a taxpayer paid or incurred with respect to the single energy property as of an earlier year is less than five percent of the total cost of the single energy property (at the time the property is placed in service), the 5% Safe Harbor is not satisfied for any portion of the single energy property because the energy property is inseparable.
 - o A taxpayer would instead need to satisfy the Physical Work Test to qualify for the ITC.¹⁷

Deloitte Observation:

The 5% Safe Harbor in the Notice applies in the same manner as in the PTC Notices. Regarding the cost overruns provision, some distributed generation solar installations, including certain rooftop installations, may be treated as a single energy property rather than as a single project. As a result, these solar installations cannot be disaggregated into more than one energy property to take advantage of the forgiving cost overrun provision.¹⁸ Those taxpayers should consider the relative implications to their potential ITC qualification.

Interestingly, the Notice does not contain a provision that was included in section 5 of Notice 2014-46,¹⁹ allowing a taxpayer to qualify for the PTC, where the taxpayer incurred less than 5% of the total cost of the facility if the taxpayer paid or incurred at least three percent of the total cost of such a facility, for some, but not all, of the individual facilities (as described in section 4.04(1) of Notice 2013-29) comprising the project. It was not clear from that guidance whether this "3% Safe Harbor" had the effect of providing a floor to the cost overrun provision.

Continuity Requirement

After satisfying the Physical Work Test or 5% Safe Harbor, a taxpayer must meet the Continuous Construction Test or Continuous Efforts Test accordingly.

• Continuous Construction Test

- Relevant facts and circumstances are used to determine whether a taxpayer maintains a continuous program of construction that involves continuing physical work of a significant nature to satisfy the Continuity Requirement.²⁰

• Continuous Efforts Test

- Relevant facts and circumstances are used to determine whether a taxpayer maintains continuous efforts to advance towards completion of an energy property to satisfy the Continuity Requirement.²¹
- Examples of Continuous Efforts include paying or incurring additional amounts included in the total cost of the energy property; entering into binding written contracts for the manufacture, construction, or

production of components of property or for future work to construct the energy property; obtaining necessary permits; and performing physical work of a significant nature.

- **Excusable Disruptions** to Continuous Construction and Continuous Efforts
 - Events beyond the control of the taxpayer may disrupt Continuous Construction and Continuous Efforts. In such situations, the construction disruptions will not be considered as an indication the taxpayer has failed to satisfy the Continuity Requirement.²² However, **the disruptions will not extend the Continuity Safe Harbor deadline.** The Notice provided numerous examples of excusable disruptions to the Continuous Construction and Continuous Efforts Tests.²³
- **Timing of Excusable Disruption Determination**
 - For a single project comprised of a single energy property, whether an excusable disruption has occurred (for purposes of the beginning of construction requirement of section 48) must be determined during the calendar year in which the energy property is placed in service.
 - For a single project comprised of multiple energy properties, whether an excusable disruption has occurred (for purposes of the beginning of construction requirement of section 48) must be determined during the calendar year in which the last of multiple energy properties is placed in service.
- **Continuity Safe Harbor** (Deemed satisfaction of Continuity Requirement).
 - Taxpayers must place energy property in service by the end of a calendar year that is no more than four calendar years after the calendar year in which construction of the energy property began.²⁴ This is known as the Continuity Safe Harbor Deadline. By placing the energy property in service before the Deadline, the energy property will satisfy the Continuity Safe Harbor. However, the Excusable Disruptions outlined above do not extend the Continuity Safe Harbor.
 - If an energy property is not placed in service before the end of the fourth calendar year after the calendar year in which construction began, then relevant facts and circumstances are used to determine whether the energy property satisfies the Continuity Requirement.²⁵

Deloitte Observation:

The Continuity Requirement's Continuous Construction Test and Continuous Efforts Test apply in the same manner as in the PTC Notices.²⁶ The Continuity Safe Harbor also applies in the same manner as in the PTC Notices, allowing a taxpayer at least four years to place energy property into service to be deemed to satisfy the Continuous Construction Test and Continuous Efforts Test.

The inclusion of the same 4-year Continuity Safe Harbor period may be favorable for the solar industry and other ITC technologies, especially those technologies with relatively

shorter construction cycles. Although the full 4-year Continuity Safe Harbor may not be as important for solar after 2023 as the permanent 10% ITC is available, the extended 4-year period may still be important going forward for the other types of energy property that must begin construction by 2022 (i.e., CHP, microturbine and geothermal).

The IRS and Treasury answered a common question, stating that an excusable disruption will not extend the Continuity Safe Harbor. As a result of industry questions related to interconnection-related delays, the Notice also slightly broadened the language to provide some flexibility for taxpayers facing interconnection-related distribution delays. Whereas the PTC Notices allow delays “relating to the completion of construction on a new transmission line or necessary transmission upgrades to resolve grid congestion issues that may be associated with a project’s planned interconnection”²⁷ this Notice allows delays “relating to the completion of construction on a new transmission **or distribution** line or necessary transmission **or distribution** upgrades to resolve grid congestion issues that may be associated with a project’s planned interconnection” (emphasis added).²⁸

Other Applicable Rules

Throughout the Notice, there are other rules applicable to the Physical Work Test and the 5% Safe Harbor.

- Energy Property
 - Generally, an **energy property includes all components of property that are functionally interdependent** unless such equipment is an addition or modification to an energy property.²⁹
 - The Notice provides an example of solar energy property: “Generally, energy property is comprised of all components of property necessary to generate electricity up to and including the inverter. This may include PV panels (or other arrangements of solar cells), fiber-optics, fuel cells, turbines, boilers, mounting equipment, support structures, tracking equipment, monitoring equipment, **transformers and other power conditioning equipment**, and inverters. For **rooftop solar energy property**, property integral to the generation of electrical energy that is installed on a single rooftop is considered a single unit of property.”³⁰
 - **Multiple energy properties** operated as part of a **single project** will be treated as a **single energy property** for purposes of determining whether construction of energy property has begun in relation to the ITC.³¹ Examples of factors indicating that multiple energy properties are operated as part of a single project are included in the Notice.³² The **timing determination must be made** in the calendar year in which the last of the multiple energy properties is placed in service.³³ Multiple energy properties operated as part of a single project and treated as a single energy property (as outlined above) may be **disaggregated** and treated as multiple separate energy properties for purposes of whether a separate energy property satisfies the Continuity Safe Harbor.³⁴

- Property integral to energy property
 - For purposes of determining whether construction has begun, tangible property must be **integral** to the activity performed by the energy property.³⁵
 - Physical work on, or costs paid or incurred for, a **custom-designed transformer** that steps up the voltage of electricity produced at an energy property to the voltage needed for transmission will be considered for purposes of determining whether a taxpayer has begun construction of the energy property because **power conditioning equipment** is an integral part of the activity performed by the energy property.³⁶
 - **Roads** used for operation and maintenance of the energy property may be integral, while roads used for visitors and employees to access the site may not be integral. If not integral, the roads cannot be considered to determine whether a taxpayer has begun construction. Most **buildings and fencing** are not an integral part of an energy property because they are not essential to the activity performed by the energy property. However, some structures may not be treated as buildings for this purpose.³⁷
- Construction by contract
 - The work performed as well as the amounts paid or incurred for components of energy property that are manufactured, constructed, or produced for the taxpayer by another person under a **binding written contract** *are* considered in determining when construction begins provided the contract is entered into prior to the work taking place or the amounts paid or incurred.³⁸ For the written contract to be binding, it must be enforceable under local law and must not limit damages less than five percent of the total contract price.³⁹
 - Work performed as well as the amounts paid or incurred from a **master contract** for a specific number of components of property that is assigned to an affiliated special purpose vehicle may be considered in determining when construction begins.⁴⁰
- Look-through Rule
 - When applied to the Physical Work Test, off-site and on-site work performed may be considered in demonstrating that physical work of a significant nature has begun.⁴¹ When applied to the 5% Safe Harbor, amounts paid or incurred—in relation to energy property (or components of energy property) that were manufactured, constructed, or produced for the taxpayer—are deemed paid or incurred when paid or incurred by the original manufacturer, constructor, or producer.⁴²
- Application of **80/20 Rule** to retrofitted energy property
 - If the fair market value of used components of property is not more than 20 percent of the energy property's total value, the property may qualify as originally placed in service.⁴³ For a single project comprised of multiple energy properties, the 80/20 Rule is applied to each energy property. To satisfy the beginning of

construction requirement, only the work performed (or the amount paid or incurred) for the new components are considered for the Physical Work Test or the 5% Safe Harbor.

Deloitte Observation:

The Notice differs from the PTC Notices in defining the unit of property on which construction begins. The PTC Notices require that construction begin on a “qualified facility” or a “single project” that is comprised of multiple qualified facilities. Under section 48, a taxpayer is eligible for the ITC for qualifying energy property. The Notice incorporates these concepts by providing that the unit of property is the equipment that is functionally-interdependent, that can be operated and metered together and can begin producing electricity separately from other components of property within a larger energy project.⁴⁴ The example provided of a solar project that is a single energy property draws a box around the unit of property that includes all the tangible property up to the point of transmission.

As mentioned above, the Notice initially introduced language that considered only transformers that step up voltage to less than 69 kilovolts as part of the single energy property.⁴⁵ The Notice also included power conditioning equipment as part of the single energy property. This language was clarified in the final Notice published in the IRB and thus, is consistent internally within the Notice and with other PTC and 1603 Grant beginning of construction guidance.

The Notice makes no mention of energy storage in this example (or in the following section), providing no views on how a battery might fit into the single energy property or property that is integral to the energy property. In fact, the Notice specifies that energy property only includes property up to and including the inverter. Common configurations of solar plus storage projects may include a battery located after the inverter. That battery may still be dedicated to the solar property, integral to the qualifying activity, and before the transmission level step up occurs. As the energy storage industry is seeking additional clarity on the ITC eligibility of storage paired with renewables, some may view this as a missed opportunity for the government to provide clarification.

The Notice lumps together components of energy property including boilers, turbines and fuel cells in stating that only components up to and including the inverter are energy property. Rarely would there be an inverter used in combination with those components, so this section may lead to questions about what components are energy property.

Aside from differing units of property, the Notice generally follows the PTC Notices in requiring the (non-elective) evaluation of multiple units of property as a single project, in making that determination in hindsight when the last unit of property is placed in service and in allowing the disaggregation of units of property for purposes of the Continuity Safe Harbor. One difference however, is that rooftop solar energy property installed on a single rooftop is a single unit of property that cannot be disaggregated.⁴⁶

The Notice includes other various provisions in order to address the same issues in the PTC Notices in the same manner (e.g., the construction by contract provisions, the Look-through Rule and 80/20 Rule).

Transfers

- The Notice generally allows for one taxpayer to transfer energy property that began construction to another taxpayer without that energy property losing its qualification.
 - A taxpayer can elect to claim the ITC related to an energy property if the taxpayer owns the property on the date the property is originally placed in service, even if the taxpayer did not own the property at the time that construction began, but the tax credit is limited to the taxpayer's basis in the energy property.⁴⁷ Therefore, **fully and partially developed energy properties can be transferred without losing their qualifications** under the Physical Work Test or the 5% Safe Harbor for purposes of the ITC.⁴⁸
 - Likewise, a taxpayer can begin construction of an energy property at one location and **transfer components of property** to another location followed by completing the energy property's development and placing the property in service at the new site.⁴⁹ In doing so, the work performed as well as the amounts paid or incurred prior to the site transfer may be taken into consideration to determine when the energy property satisfies the Physical Work Test or the 5% Safe Harbor.
 - For transfers of equipment (i.e., **solely tangible personal property including contractual rights to such property under a binding written contract**) between **unrelated parties**, the work performed as well as the amounts paid or incurred by the transferor will not be considered for the Physical Work Test or the 5% Safe Harbor.⁵⁰

Deloitte Observation:

The Notice provides the same rules relating to transfers as in the PTC Notices. The only significant transfer-related limitation consistent with the PTC Notices, is the prohibition on the transfer of solely tangible personal property to an unrelated party. One slight difference is that the cross-reference to the definition of a "related party" is more specific in the Notice. The Notice refers to a related party as defined within the meaning of section 197(f)(9)(C) **and Treas. Reg. § 1.197-2(h)(6)**. The PTC Notices did not include a reference to the specific related Treasury regulation.

It is also noteworthy that the Notice makes no mention of an exception for sale-leaseback transactions. Tax-equity transactions were contemplated as allowed and encouraged under the PTC Notices and this Notice.⁵¹ However, the PTC Notices did not address sale leasebacks because sale leasebacks structures are generally prohibited with PTC projects where the tax owner of the facility must also be the generator selling the electricity produced by the facility to a third party. This Notice does not include any reference to sale leasebacks even though ITC projects may be impacted by

leasing structures where tax ownership of the energy property is separated from the electric generation activities. Taxpayers may have to consider these transfer provisions when analyzing whether to move ahead with sale leaseback structures.

Other Considerations

The Notice provides various other considerations in determining a taxpayer's eligibility for the ITC.

- Related to the interaction of ITC with 1603 Grants, no PTC or ITC can be determined with respect to energy property for the taxable year in which a grant is made for such property or for any subsequent taxable year.
- The Notice specifically states that the **IRS will not issue private letter rulings or determination letters** to taxpayers regarding the application of this notice or the beginning of construction requirement of section 48.
- **Combination of methods** – Construction will be deemed to have begun on the date the taxpayer first satisfies either the Physical Work Test or the 5% Safe Harbor.
 - The Notice provides that construction will be deemed to have begun on **the date the taxpayer first satisfies one of the two methods.**⁵² **“For example, if a taxpayer performs physical work of a significant nature on energy property in 2019, and then pays or incurs five percent or more of the total cost of the energy property in 2020, construction will be deemed to begin in 2019 under the Physical Work Test, not in 2020 under the Five Percent Safe Harbor. Thus, the **Continuity Safe Harbor will be applied beginning in 2019, not in 2020. This section 3.02 applies to energy property the construction of which begins, as determined under the earlier of either the Physical Work Test or the Five Percent Safe Harbor, after December 31, 2018**”** (emphasis added).

Deloitte Observation:

The Notice includes a retroactive provision limiting the alternating of methods to begin construction in order to prevent taxpayers from switching qualification methods to change the year in which construction is considered to have begun. The provision requires a taxpayer to use the first date that it began construction in order to measure the Continuity Safe Harbor period. The PTC Notices included this same limitation in Notice 2016-31.⁵³ However, the retroactivity of this limitation was relaxed and the limitation was only applied to future projects as a result of Notice 2017-04.⁵⁴

In the last sentence of the provision on combining methods in the ITC Notice, the language says that the limitation only applies after December 31, 2018,⁵⁵ similar to the forward-looking application in Notice 2017-04.⁵⁶ Thus, the Notice is allowing taxpayers advance notice and not penalizing them (by starting the measurement of the Continuity Safe Harbor period) so that the limitation would only apply after 2018. In the initially-released version of the Notice, the example in that same provision contradicted that last sentence as it required measurement of the Continuity Safe Harbor period from 2018. The final published version of the Notice made a change to the years in the example (i.e., from 2018 to 2019 and 2019 to

2020) to fix the contradictory language and align with the intent of this provision.

Additional Resources:

An in-depth article providing detailed summaries of the PTC Notices, issues raised with the interpretation of the PTC beginning of construction rules, and related leading practices can be found at this [link](#).

Contact:

For more information please contact [Brian Americus](#), [Gary Hecimovich](#), or your Deloitte tax services engagement team.

[Back to top](#)

¹ Published in Internal Revenue Bulletin ("IRB") 2018-28 (July 9, 2018) (including clarifications to the original version that was released on the IRS website on June 22nd).

² IRS Notice 2018-59 at section 4.02.

³ *Id.* section 4.02(1). As originally released on June 22nd on the IRS website, the Notice read, "may include the manufacture of components, mounting equipment, support structures such as racks and rails, inverters, and transformers (**used in electrical generation that step up the voltage to less than 69 kilovolts**) and other power conditioning equipment" (emphasis added).

⁴ *Id.* at section 4.02(2).

⁵ *Id.* at section 4.03 explains that preliminary activities include, but are not limited to: planning or designing; securing financing; exploring; researching; conducting mapping and modeling to assess a resource; obtaining permits and licenses; conducting geophysical, gravity, magnetic, seismic and resistivity surveys; conducting environmental and engineering studies; performing activities to develop a geothermal deposit prior to valid discovery; clearing a site; conducting test drilling to determine soil condition (including to test the strength of a foundation); excavating to change the contour of the land (as distinguished from excavation for a foundation); and removing existing foundations, turbines, and towers, solar panels, or any components that will no longer be part of the energy property (including those on or attached to building structures).

⁶ See generally Notice 2013-29, 2013-20 IRB 1085; Notice 2013-60, 2013-44 IRB 431; Notice 2014-46, 2014-35 IRB 520; Notice 2015-25, 2015-13 IRB 814; Notice 2016-31, 2016-23 IRB 1025; and Notice 2017-04, 2017-4 IRB 541.

⁷ *Id.* at section 4.02(1) and (2).

⁸ *Id.* at section 4.02; see also Notice 2014-46 section 3 and Notice 2016-31 section 5.01 (explaining the Physical Work Test focuses on the nature of the work performed, not the amount or cost).

⁹ See initially-released version of Notice at <https://www.irs.gov/pub/irs-drop/n-18-59.pdf>.

¹⁰ *Id.* at section 4.02(1).

¹¹ *Id.* at section 7.02(1).

¹² Section 168(e)(3)(E)(v).

¹³ See Notice 2013-29 at section 4.05 (explaining physical work on a transmission tower located at the site is not physical work of a significant nature because the transmission is not an integral part of the activity performed by the facility. However, physical work on a custom-designed transformer that steps up the voltage of electricity produced at the facility to the voltage needed for transmission is physical work of a significant nature with respect to the facility because power conditioning equipment is an integral part of the activity performed by the facility); see also IRS CCA 201122018 (explaining the guidance and regulations under § 1.48-9 make clear that transmission equipment is not qualified property. The Service deemed "power conditioning" equipment to include the step-up transformer that increases the voltage of the electricity generated to the voltage of the high voltage transmission line. Equipment beyond the step-up transformer was considered qualified property if that property was related to the functioning of the transformer or of transfer equipment); see also *Payments for Specified Energy Property in Lieu of Tax Credits Under the American Recovery and Reinvestment Act of 2009 Frequently Asked Questions and Answers Begun Construction*, answer 3 (explaining that "physical work on a transformer that steps up the voltage of electricity produced at the facility to the voltage needed for transmission is physical work of a significant nature because power conditioning equipment is part of the qualified facility.").

¹⁴ The initially-released version of the Notice included language about transformers used in electrical generation that step up the voltage to "less than 69 kilovolts" in sections 4 and 7, but were removed from the final Notice published in the IRB.

¹⁵ Notice 2018-59 at sections 7.02 and 7.05(2).

¹⁶ See Notice 2018-59 at section 5.03, example 1.

¹⁷ See Notice 2018-59 at section 5.03, example 2. Note, the taxpayer would have satisfied the 5% Safe Harbor if the taxpayer paid or incurred 6% of the total estimated cost (\$5,000 more), thus providing 20% margin for increased actual costs.

¹⁸ See Other Applicable Rules [infra](#) for further discussion of the disaggregation rules.

¹⁹ Notice 2014-46 at section 5.

²⁰ See Notice 2018-59 at section 6.01.

²¹ *Id.* at section 6.02.

²² *Id.* at section 6.03.

²³ Id. at section 6.03 providing a non-exclusive list of construction disruptions that will not be considered as indicating that a taxpayer has failed to satisfy the Continuity Requirement: delays due to severe weather conditions; delays due to natural disasters; delays in obtaining permits or licenses from federal, state, local, or Indian tribal governments, including, but not limited to, delays in obtaining permits from licenses from the Federal Energy Regulatory Commission (FERC), the Environmental Protection Agency (EPA), the Bureau of Land Management (BLM), and the Federal Aviation Agency (FAA); delays at the written request of a federal, state, local, or Indian tribal government regarding matters of public safety, security, or similar concerns; interconnection-related delays, such as those relating to the completion of construction on a new transmission or distribution line or necessary transmission or distribution upgrades to resolve grid congestion issues that may be associated with a project's planned interconnection; delays in the manufacture of custom components; delays due to labor stoppages; delays due to the inability to obtain specialized equipment of limited availability; delays due to the presence of endangered species; financing delays; and delays due to supply shortages.

²⁴ Id. at section 6.05.

²⁵ Id.

²⁶ See generally Notices supra note 6.

²⁷ See Notice 2016-31, 2016-23 IRB 1025, at section 4.02(2)(e).

²⁸ See Notice 2018-59 at section 6.03(e).

²⁹ Id. at section 7.01(1); see also section 8.01 explaining section 48(a)(3)(B) provides that energy property is any property the construction, reconstruction, or erection of which is completed by the taxpayer, or which is acquired by the taxpayer if the original use of such property commences with the taxpayer.

³⁰ Id. Regarding transformers, as discussed supra, the initially-released version of the Notice stated, "transformers (**used in electrical generation that step up the voltage to less than 69 kilovolts**) and other power conditioning equipment" (emphasis added).

³¹ Id. at section 7.01(2).

³² Notice 2018-59, section 7.01(2)(a) provides factors indicating that multiple energy properties are operated as part of a single project including that the energy properties: are owned by a single legal entity; are constructed on contiguous pieces of land; are described in a common power purchase agreement or agreements; have a common intertie; share a common substation; are described in one or more common environmental or other regulatory permits; were constructed pursuant to a single master construction contract; or the construction of the energy properties was financed pursuant to the same loan agreement.

³³ Id. at section 7.01(3).

³⁴ Id. at section 7.01(4).

³⁵ Id. at section 7.02.

³⁶ Id. The initially-released version of the Notice, included the phrase "69 kilovolts or greater" for transmission, but was removed from the final published version of the Notice. "Physical work on, or costs paid or incurred for, a custom-designed transformer that steps up the voltage of electricity produced at an energy property to the voltage needed for transmission (**69 kilovolts or greater**) will be considered for purposes of determining whether a taxpayer has begun construction of the energy property because power conditioning equipment is an integral part of the activity performed by the energy property" (emphasis added).

³⁷ Id. See also Treas. Reg. § 1.48-1(e).

³⁸ Notice 2018-59 at section 7.03.

³⁹ Id. at section 7.03(1); see also Treas. Reg. § 1.168(k)-1(b)(4)(ii)(A)-(D).

⁴⁰ Notice 2018-59 at section 7.03(2).

⁴¹ Id. at section 7.04(1).

⁴² Id. at section 7.04(2).

⁴³ Id. at section 7.05.

⁴⁴ Id. at section 7.01; see also Rev. Rul. 94-31, 1994-1 C.B. 16.

⁴⁵ See initially-released version of the Notice supra note 9.

⁴⁶ Id. at sections 7.01(1) and 7.01(4).

⁴⁷ Id. at section 8.01.

⁴⁸ Id. (including examples).

⁴⁹ Id. at section 8.02.

⁵⁰ Id. at section 8.03 (including example).

⁵¹ Id. at section 8.01. See also Notice 2013-60 at section 5.

⁵² See Notice 2018-59 at section 3.02.

⁵³ See Notice 2016-31, supra note 6.

⁵⁴ Notice 2017-04, supra note 6.

⁵⁵ See Notice 2018-59, at section 3.02.

⁵⁶ Notice 2017-04, supra note 6.



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