

What The Midterm Elections Mean For The U.S. Wind Industry

By Allan T. Marks & Eusebius W. Luk

Politics, like comedy, is a matter of timing. The change of control from the Democrats to the Republicans in the U.S. Senate and an increased Republican majority in the U.S. House of Representatives due to the November 2014 midterm elections could mean headwinds lie ahead for renewable energy incentives. The election results also heighten the urgency for prompt action to extend the production tax credit (PTC) for wind energy projects before the window of opportunity closes.

The political calculus for extending the PTC is more nuanced than a simple map of red and blue seats. Traditionally, the PTC has enjoyed bipartisan support, with regional interests trumping party politics. Congressional supporters of including the PTC in a year-end tax “extender” bill intend to move the legislation before the end of the year, while Democrats have more clout ahead of the new Congress starting in January.

Hence, PTC renewal is nestled among 61 other tax extender provisions (many supported by each party) in the EXPIRE Act, which is expected to pass the Senate before year-end and, if passed by the House, would likely have President Obama’s support.

Nov. 5 proved a sobering day for Democrats as voters handed control of the Senate to the GOP. Both chambers of Congress are now under Republican control for the first time since 2006. The PTC lost a number of

outspoken supporters in these elections, among them Sen. Mark Udall, D-Colo., who early on led the way in urging passage of an extender. In the following days, a great deal of media attention focused on the coming elevation of Republicans to the chairs of their committees, such as Sens. Orrin Hatch, R-Utah, to finance, Paul



Ryan, R-Wis., to ways and means, Lisa Murkowski, R-Alaska, to energy and natural resources and Jim Inhofe, R-Okla., to environment and public works.

While these leaders are not all necessarily against wind energy, they have been decidedly against Democratic legislative efforts and will soon be in a position to make the PTC a target for easy political points and a costly prize for the Democrats should they pursue it. The election results dramatically cut short the time available to advance what is, for the time being, a politicized issue unlikely to survive

the agenda of a united Republican Congress.

The midterm elections largely left core Senate PTC supporters intact. In March 2014, Udall and Sen. Chuck Grassley, R-Iowa, led a convincingly bipartisan group of 26 senators in urging the Finance Committee to pass a PTC extender. Among the 26, only Sen. Mark Pryor, D-Ark., was defeated by an avowed opponent of federal tax credits for alternative energy sources. Three others are set to be replaced by those noncommittal or merely tepid toward this issue. The remainder is not up for re-election until 2016, appearing to provide a second shot at effecting renewal.

However, the more likely outcome is that the PTC will again be held hostage to deepening gridlock before the presidential election. This time, the conditions will be far less favorable. If those core Senate PTC supporters want to see an extension, they had best make it happen before the new year.

Historically, the PTC has been a survivor regardless of who controls the government. Congress has renewed it nine times since 1992 (allowing it to lapse only three times before 2013: in 2000, 2002 and 2004, the last two under a Republican-controlled Congress). This hardiness shows that the PTC has considerable support that crosses party lines. While wind energy tax incentives have lately been associated with the Democratic agenda,

they have long enjoyed universal support in many states.

In the most recent election, Rep. Bruce Braley, D-Iowa, the would-be successor to retiring Sen. Tom Harkin, was defeated by Joni Ernst, a Republican. Both candidates touted Iowa's leadership in wind energy and publicly supported continuation of the PTC.

Udall's successor, Rep. Cory Gardner, a Republican, campaigned with ads featuring him stumping from a field dotted with wind turbines in the background. (It remains to be seen how he will vote, however, as he was backed by staunch opponents of the PTC.)

As long as most U.S. states had active wind markets, whether for new plants or manufacturing jobs, the federal government incentivized wind energy growth through the PTC even when it came perilously close to, or even reached, expiration. That may no longer hold true.

The PTC extender is under a coordinated two-pronged attack from some conservatives who oppose either tax credits generally or green energy in particular. The oil billionaire Koch brothers pumped millions of dollars into Republican campaigns to protect the competitive edge of oil and gas by blocking any PTC extension in 2015. Groups like Americans for Prosperity and the American Energy Alliance are now targeting the lame-duck session, calling on Congress recently to flatly "reject any package that includes the expired [PTC]."

The last hope for renewal before 2015 sits on the lame-duck session

that will see a funding vote to keep the government's doors open beyond Dec. 11. On the one hand, this is the same body with which the extender struggled all year to pass amid determined Republican opposition.

Although the Senate Finance Committee had passed the EXPIRE Act to the floor, a procedural vote cast along party lines in May prevented the bill from moving any further. This maneuver can be chalked up to pre-election posturing.

Now that the elections are over, there is less reason for political grandstanding and more incentive to compromise. Senior staffers have commonly heard current senators express a desire to "clear the decks" before starting fresh in January, and Hatch has said of EXPIRE, "This is a bill that virtually everybody in this body wants, to a more or less degree."

Given the limited time for debate and amendment as the year is drawing to a close, the bill could likely pass with straight date extenders. The Republican House of Representatives would initially resist the PTC extender when addressing its own version of EXPIRE.

However, the Obama administration continues to support the PTC extension, and other provisions of the bill are popular enough to permit House and Senate Democrats to refuse moving the bill forward without an extended PTC. In the wake of a critical refunding bill, this lame-duck session may well see the passage of the PTC extender with the EXPIRE Act as Democrats try to squeeze in what they can and Republicans are willing to let

them do so to clear the slate before the session ends.

Just as important as the question of whether the PTC will be renewed is that of what form a renewal would take. To remain effective as an incentive, this extender must retain the 2013 extender's change from a connection deadline to a construction commencement deadline. Only then would projects have sufficient time to be finished. The current PTC extender provision in EXPIRE does just that, but it will take vigilance to ensure it is not changed.

Letting the PTC lapse threatens a fall-off in volume of capital available to finance projects by as much as 50%, and places as many as 37,000 jobs in jeopardy. In an industry where projects require years to develop, the recurring threat of tax credit expiration creates too much uncertainty and periodically chills investment in the American wind energy market.

An extension brings at least a little more regulatory stability to encourage further investment. The midterm legislative power shift raises the urgency of extending the PTC before this lame-duck session ends, and supporters remain reasonably optimistic of passage before year's end.

Allan T. Marks is a partner and Eusebius W. Luk is an associate in the Los Angeles office of Milbank, Tweed, Hadley & McCloy LLP, where they are members of the firm's Global Project Finance Group. Marks can be reached at amarks@milbank.com. Luk can be reached at eluk@milbank.com.