

Amish M. Shah

Georgia Tech
Clean Energy Speaker Series

March 31, 2010

Southeast Biomass: Project Development Incentives and Challenges

Attorneys Serving Clients Around the World

SUTHERLAND

ATLANTA AUSTIN HOUSTON NEW YORK TALLAHASSEE WASHINGTON DC

www.sutherland.com

©2010 Sutherland

- **Incentives for production of electricity from renewable resources**
 - Production tax credit (PTC) – Section 45
 - Investment tax credit (ITC) – Section 48
 - Treasury grant – ARRA section 1603

- **Credit for manufacture of renewable energy equipment – Section 48C**

- **Incentives for production and blending of renewable fuels**
 - Alcohol fuels credits – Sections 40, 6426, 6427
 - Biodiesel credits – Sections 40A, 6426, 6427
 - Alternative fuels credits – Sections 34, 6426, 6427

- **Other Incentives**
 - Depreciation
 - State Incentives
 - BCAP

PRODUCTION TAX CREDIT

Requirements

Must produce electricity:

1. using “qualified energy resources;”
 - Wind
 - Closed Loop Biomass
 - Open Loop Biomass
 - Geothermal Energy
 - Municipal Solid Waste
 - Qualified Hydropower
 - Marine & Hydrokinetic

2. at a “qualified facility”
 - Placed in service by either end of 2012 (wind) or 2013 (others)
 - Other requirements depending on type of facility

3. that is **sold by the taxpayer to an “unrelated person”** during the taxable year.
 - Sold for ultimate use by an unrelated person

PRODUCTION TAX CREDIT

SUTHERLAND

Amount

- 2.1¢ or 1.1¢ per kilowatt hour (depending on resource used).
- 10 year credit period.
- Possible reduction (up to 50%) for use of certain government financing used.

Person Entitled to Credit

- Generally, owner(s) of the facility are entitled to the tax credit.
- Tax credit allocated in proportion to each owners' interest in the gross sales from the facility.
- No benefit from tax credit if a developer has no tax liability (*i.e.*, no U.S. taxable income).
- Tax credit may be monetized using flip structure.
- Tax credit is nonrefundable, but may be carried forward or back.
- Purchaser of facility may claim PTCs.

INVESTMENT TAX CREDIT

Requirements

1. Must be “**Energy Property**”
 - Solar
 - Combined Heat and Power (CHP)
 - Qualified Microturbine
 - Qualified Fuel Cell
 - Qualified Small Wind
 - Geothermal
 - Section 45 Qualified Energy Property (Irrevocable Election Required)

2. Must be **Placed In Service** by particular date
 - Generally before 2017

INVESTMENT TAX CREDIT

Amount

- 30% of cost (10% for CHP and Microturbine).
- No reduction for use of government financing.
- Reduction of property basis required.

Person Entitled to Credit

- Owner of facility on date that it commences operations.
- Tax credit allocated in proportion to each owners' interest in the gross sales from the facility.
- No benefit from tax credit if a developer has no tax liability (*i.e.*, no U.S. taxable income).
- Tax credit may be monetized using flip structure or a sale-leaseback structure.
- Recapture of ITC if facility sold within 5 years.

Generally

- Claimed in lieu of claiming PTCs or ITCs.
- Obtained from the Department of Treasury.

Requirements

1. Must be type of property for which PTCs or ITCs are available.
2. Must be completed before placed in service date required for PTC or ITC.
3. Either (i) the property must be placed in service during 2009 or 2010 or (ii) construction must “begin” in 2009 or 2010 and must be completed before the relevant placed in service date requirement.

TREASURY GRANT

Amount

- 30% of cost (10% for CHP and Microturbine).
- No reduction for use of government financing.
- Reduction of property basis required.
- Payments of grants are to be made within the later of 60 days following the date of application or the date that the property is placed in service.
- Grant non-taxable.
- 50% reduction in property basis.
- Possible complete or partial recapture of grant.

TREASURY GRANT

Person Entitled to Grant

- Owner of facility on date that it commences operations.
- Need to use blocker corporations for certain non-taxable entities.
- Cash payment, therefore no need for monetization structure.
- No recapture of grant if facility sold within 5 years if sold to eligible person.

PTC/ ITC/ GRANT POLICY QUESTIONS

- Technology neutrality
 - Termination dates
 - Amount
 - Availability

- Inconsistencies
 - Sale to unrelated person requirement
 - Reduction for subsidized energy financing
 - Facility transferability
 - Tax-exempt entities

- Extension of Grant

MONETIZING TAX CREDIT- FLIP STRUCTURE

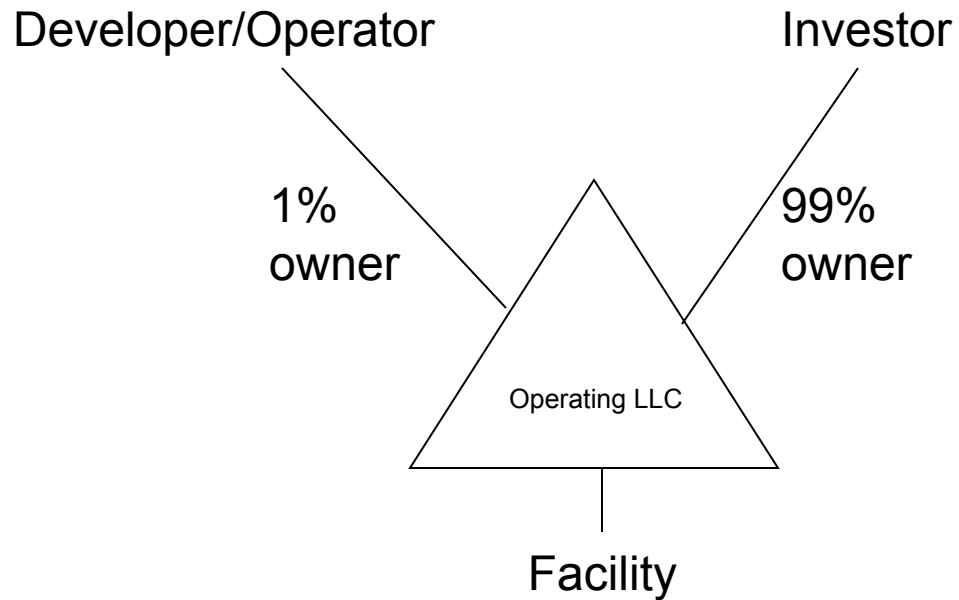
- Parties
 - Project Developer
 - Tax Equity Investor

- Goals
 - Funding of Project by TEI
 - 10+ year investment by TEI
 - Equity return plus expected IRR to TEI
 - Developer monetizes tax credits and other tax benefits
 - Developer operates facility
 - Developer ultimately wholly owns facility

MONETIZING TAX CREDIT- FLIP STRUCTURE

Example:

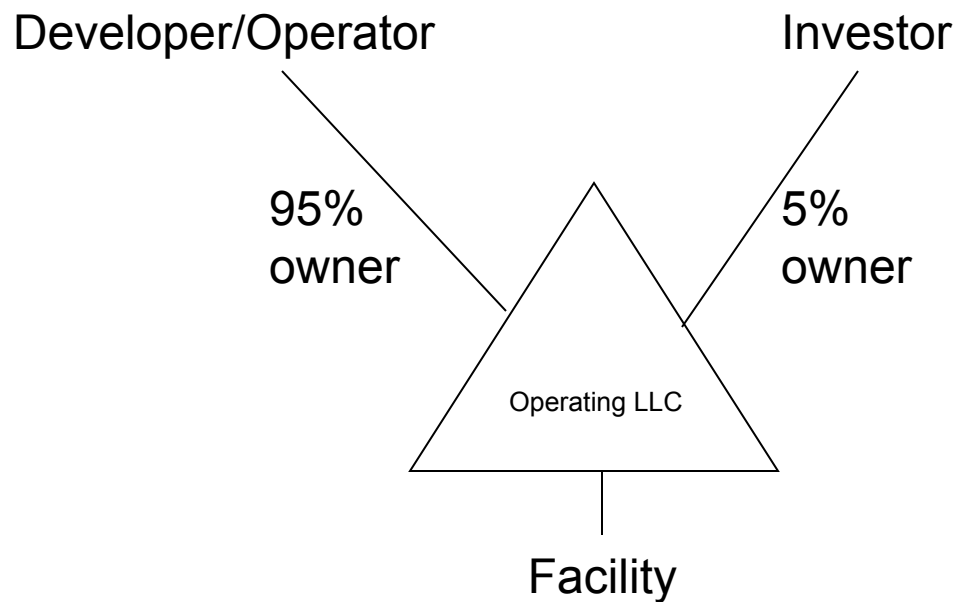
Period 1: 10 Years



MONETIZING TAX CREDIT- FLIP STRUCTURE

SUTHERLAND

Period 2: Beginning in Year 11



MONETIZING TAX CREDIT- SALE-LEASEBACK STRUCTURE

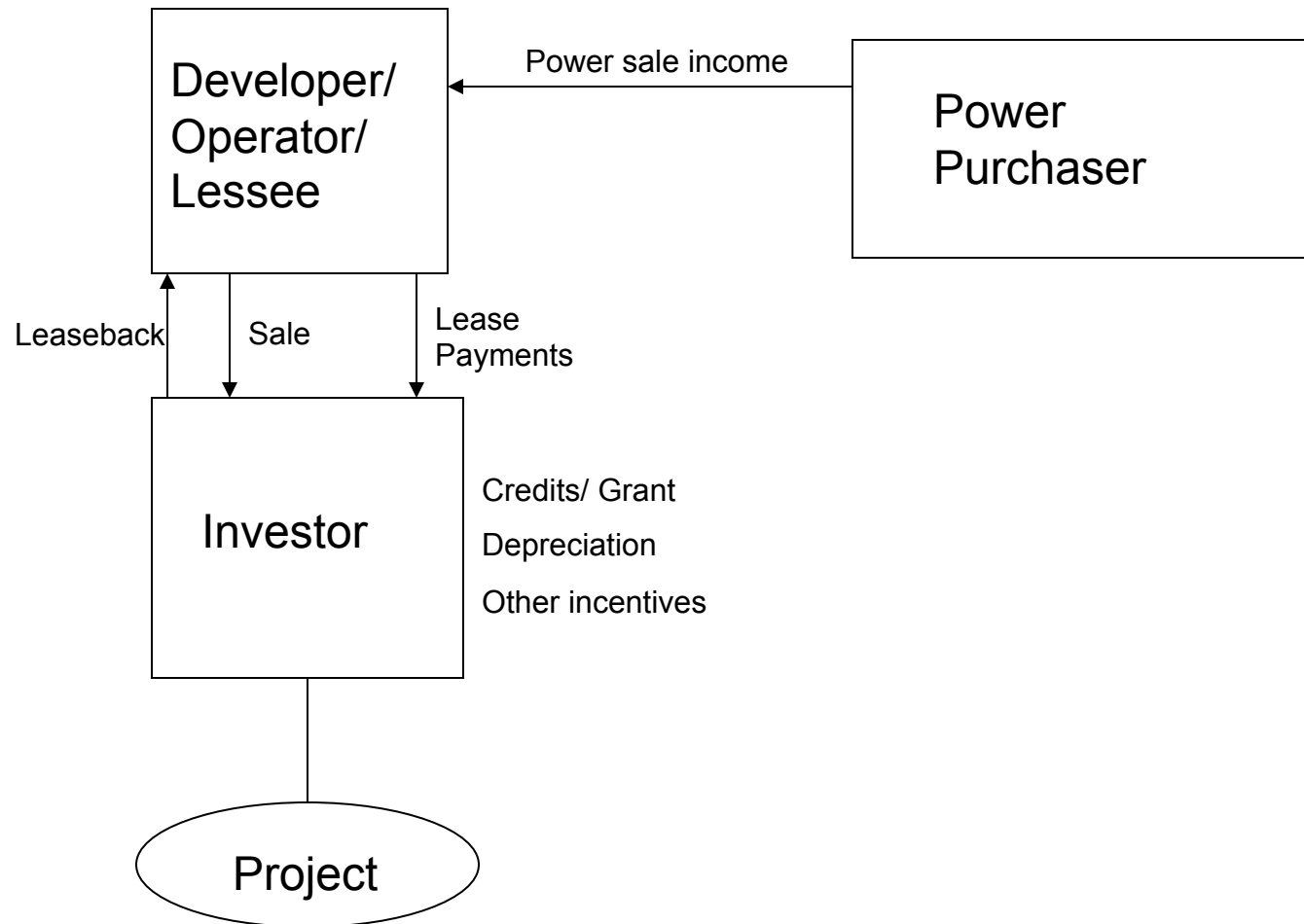
SUTHERLAND

- Developer sells the solar equipment to Investor; Investor in turn leases the equipment back to the Developer.

- Investor is entitled to:
 - Federal Tax Credits
 - Certain State Incentives
 - Depreciation Deductions
 - Fixed Lease Payments from Developer
- Developer:
 - Enters into power purchase agreement with Host (or may sell to grid).
 - PPA should provide payments in excess of lease payments.
 - Option to purchase panels at FMV at end of lease or extend lease.
- Host:
 - Fixed price for electricity or
 - Avoided cost (*i.e.*, 90% of what utility would have charged)

MONETIZING TAX CREDIT- SALE-LEASEBACK STRUCTURE

SUTHERLAND



QUALIFIED ADVANCED ENERGY PROJECTS

SUTHERLAND

- 30% investment tax credit.
- Must be designated by Treasury as eligible.
- Applies to costs for re-equipping, expanding manufacturing facility that produces renewable energy property.
- In Administration's budget for \$5 billion – will it be passed?
- Policy Issue – Possible “Buy American” requirement for grant/credits

- **Alcohol Fuels Credits**

- Alcohol Fuel Credit

- \$0.60 generally; \$0.45 for ethanol per gallon
 - Not in a mixture
 - Used as a fuel

- Alcohol Mixture Credit

- \$0.60 generally; \$0.45 for ethanol per gallon
 - In a mixture
 - Used as a fuel

- Small Ethanol Producer Credit

- \$0.10 per gallon

- Cellulosic Biofuels Credits for use or blending

- \$1.01 per gallon

- Expires 12/31/10

- **Biodiesel Credits**
 - Biodiesel Credit
 - \$1.00 per gallon
 - Not in a mixture
 - Used as a fuel
 - Biodiesel Mixture Credit
 - \$1.00 per gallon
 - Not in a mixture
 - Used as a fuel
 - Small Biodiesel Producer Credit
 - \$0.10 per gallon
 - Expired 12/31/09

- **Alternative Fuels Credits**
 - Alternative Fuels Credit
 - \$0.50 per gallon
 - Not in a mixture
 - Used as a fuel in a motor vehicle
 - Alternative Fuel Mixture Credit
 - \$0.50 per gallon
 - In a mixture
 - Used as a fuel in a motor vehicle
- Expired 12/31/09

BIOFUELS- POLICY QUESTIONS

SUTHERLAND

- Extension Periods
- Registration
- Innovation

OTHER BENEFITS

- Depreciation
 - Bonus depreciation - Possible extension?
 - Accelerated depreciation;
- State Tax Incentives
- Biomass Crop Assistance Program
 - Matching Payments
 - Establishment and Annual Payments
 - Policy questions regarding technology neutrality

Contact Information

Amish M. Shah

202.383.0456

Amish.Shah@Sutherland.com

CIRCULAR 230 DISCLOSURE: Any advice provided in this outline concerning a Federal tax issue is not intended or written to be used, and cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on a taxpayer.