NELSON SNUFFER DAHLE & POULSEN, P.C.

DENVER C. SNUFFER, JR.
J. DAVID NELSON
ROBERT D. DAHLE

ATTORNEYS AT LAW

10885 SOUTH STATE STREET
SANDY, UT 84070
TELEPHONE (801) 576-1400
TELEFAX (801) 576-1960

DANIEL B. GARRIOTT
STEVEN R. PAUL
JOSHUA D. EAGAN^

^ ALSO ADMITTED IN ARIZONA

September 9, 2019

Elisabeth A. Shumaker Clerk of Court
OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

Re: 18-4150, 18-4119, *United States v. RaPower-3, et al*
Dist/Ag docket: 2:15-CV-00828-DN-EJF

Dear Ladies and Gentlemen:

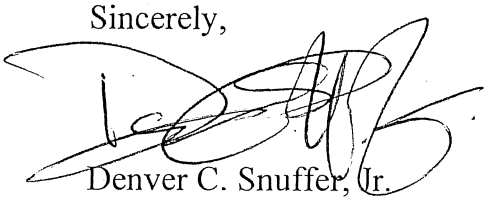
Pursuant to Federal Rules of Appellate Procedure 28(j) the Appellants bring the following supplemental matters to the Court's attention:

Two weeks following the close of briefing in this matter the District Court entered an Order (Doc. 680) which is attached to this letter. Appellee argued that Appellants failed to produce financial information during discovery. The attached Order clarifies that was not the case. In relevant part the District Court states: "The adverse inferences drawn at trial were **not a product of what transpired before trial. Nor were they a result of the defendants' failure to comply with an order related to discovery.**" (Id. p. 2, emphasis added.) This was argued in Appellee's Brief, p. 14 and rebutted in Appellants' Reply Brief, pp. 9-10.

On February 9, 2018, the Bipartisan Budget Act of 2018, Pub. L. 115-123, Div. D, Title I, § 40411, 132 Stat. 150 (BBA 2018), modified the investment tax credit under 26 USC § 48 by replacing the requirement to place energy property in service by a certain date with a requirement to begin construction by a certain future date. The prior version of the statute did not include any provision that allows later construction of the energy

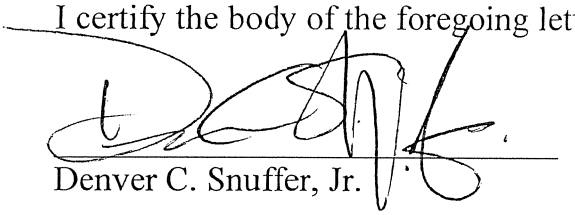
property to fulfill the placed in-service requirement. This Court should take notice of the current version of the statute. The issue of place in service is addressed in Appellant's Opening Brief pp. 16-19 and Appellee's Responsive Brief pp. 27-29.

Sincerely,



Denver C. Snuffer, Jr.

I certify the body of the foregoing letter is 239 words.



Denver C. Snuffer, Jr.

cc: Clint A. Carpenter
Attorney for the Appellee
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC, et al., Defendants.	**ORDER ON OBJECTIONS TO NOTICE RE: COMPLIANCE AND ADVERSE INFERENCES** Case No. 2:15-cv-00828-DN District Judge David Nuffer

On May 6, 2019, a Notice re: Compliance and Adverse Inferences ("Notice") was entered advising the defendants and respondents of the need to produce and protect certain information, records, and materials.[1] The Notice suggested that inferences might be drawn in the future from the defendants' and respondents' failure to produce documents and information required under the receivership order. In response, Defendant Neldon Johnson and the law firm of Nelson Snuffer Dahle & Poulsen ("NSDP") filed objections to the Notice (respectively, "Johnson's Objection" and "NSDP's Objection").[2]

Although NSDP is no longer counsel of record for any of the defendants in this case, all of the arguments in NSDP's Objection are made in favor of the defendants and appear to suggest that NSDP's withdrawal as counsel for the defendants was a withdrawal in form only.

[1] Docket no. 638, filed May 6, 2019.

[2] Response to Court's Notice re: Compliance and Adverse Inferences ("NSDP's Objection"), docket no. 644, filed May 8, 2019; Objection to Notice About Compliance and Adverse Inferences ("Johnson's Objection"), docket no. 645, filed May 9, 2019.

clm

In its objection, NSDP claims that the Notice "misstate[s] the record of the case,"[3] that "Defendants did not refuse to supply financial information" during the discovery process before trial,[4] and that the defendants did not "disobey[] any order requiring the production of financial information" either before or during trial.[5] These arguments miss the point.

The Notice compared the inferences that might be drawn in the future from the defendants' and respondents' failure to produce documents and information required under the receivership order, with the inferences that were drawn at trial as a result of the defendants' failure to meet their burden of proof regarding accounting issues at trial. The adverse inferences drawn at trial were not a product of what transpired before trial. Nor were they a result of the defendants' failure to comply with an order related to discovery. Rather, they were a result of the defendants' failure to introduce evidence on important issues at trial. Accordingly, NSDP's Objection is without merit and will be overruled.

Johnson's Objection contains many of the same arguments as NSDP's. In addition, it accuses the court of being biased, dishonest, abusive, ridiculous, unfair, unjust, and unreasonable.[6] Because "courts may strike . . . any redundant, immaterial, impertinent, or scandalous matter,"[7] Johnson's Objection will be stricken on this basis.

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[3] NSDP's Objection, *supra* note 2, at 1.

[4] *Id.* at 1-2.

[5] *Id.* at 3.

[6] *See* Johnson's Objection, *supra* note 2, at 1-4.

[7] *See* FED. R. CIV. P. 12(f).

ORDER

THEREFORE, IT IS HEREBY ORDERED that NSDP's Objection[8] is OVERRULED and Johnson's Objection[9] is STRICKEN.

Signed May 24, 2019.

BY THE COURT:

David Nuffer
United States District Judge

[8] Docket no. 644, filed May 8, 2019.

[9] Docket no. 645, filed May 9, 2019.

§ 48. Energy credit.

(a) Energy credit.

(1) In general. For purposes of section 46 [*26 USCS § 46*], except as provided in paragraphs (1)(B), (2)(B), and (3)(B) of subsection (c), the energy credit for any taxable year is the energy percentage of the basis of each energy property placed in service during such taxable year.

(2) Energy percentage.

(A) In general. Except as provided in paragraphs (6) and (7), the energy percentage is—

(i)30 percent in the case of—

(I)qualified fuel cell property,

(II)energy property described in paragraph (3)(A)(i) but only with respect to property the construction of which begins before January 1, 2022.

(III)energy property described in paragraph (3)(A)(ii), and

(IV)qualified small wind energy property, and

(ii)in the case of any energy property to which clause (i) does not apply, 10 percent.

(B) Coordination with rehabilitation credit. The energy percentage shall not apply to that portion of the basis of any property which is attributable to qualified rehabilitation expenditures.

(3) Energy property. For purposes of this subpart [*26 USCS §§ 46* et seq.], the term "energy property" means any property—

(A)which is—

(i)equipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat, excepting property used to generate energy for the purposes of heating a swimming pool,

(ii)equipment which uses solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight but only with respect to property the construction of which begins before January 1, 2022,

(iii)equipment used to produce, distribute, or use energy derived from a geothermal deposit (within the meaning of section 613(e)(2) [*26 USCS § 613(e)(2)*]), but only, in the case of electricity generated by geothermal power, up to (but not including) the electrical transmission stage,

(iv)qualified fuel cell property or qualified microturbine property,

(v)combined heat and power system property,

(vi)qualified small wind energy property, or

(vii)equipment which uses the ground or ground water as a thermal energy source to heat a structure or as a thermal energy sink to cool a structure, but only with respect to property the construction of which begins before January 1, 2022,

(B)

(i)the construction, reconstruction, or erection of which is completed by the taxpayer, or

(ii)which is acquired by the taxpayer if the original use of such property commences with the taxpayer,

(C)with respect to which depreciation (or amortization in lieu of depreciation) is allowable, and

(D)which meets the performance and quality standards (if any) which—

(i)have been prescribed by the Secretary by regulations (after consultation with the Secretary of Energy), and

(ii)are in effect at the time of the acquisition of the property.

Such term shall not include any property which is part of a facility the production from which is allowed as a credit under section 45 [*26 USCS § 45*] for the taxable year or any prior taxable year.

(4) Special rule for property financed by subsidized energy financing or industrial development bonds.

(A) Reduction of basis. For purposes of applying the energy percentage to any property, if such property is financed in whole or in part by—

(i)subsidized energy financing, or

(ii)the proceeds of a private activity bond (within the meaning of section 141 [*26 USCS § 141*]) the interest on which is exempt from tax under section 103 [*26 USCS § 103*],

the amount taken into account as the basis of such property shall not exceed the amount which (but for this subparagraph) would be so taken into account multiplied by the fraction determined under subparagraph (B).

(B) Determination of fraction. For purposes of subparagraph (A), the fraction determined under this subparagraph is 1 reduced by a fraction—

(i)the numerator of which is that portion of the basis of the property which is allocable to such financing or proceeds, and

(ii)the denominator of which is the basis of the property.

(C) Subsidized energy financing. For purposes of subparagraph (A), the term 'subsidized energy financing' means financing provided under a Federal, State, or local program a principal purpose of which is to provide subsidized financing for projects designed to conserve or produce energy.

(D) Termination. This paragraph shall not apply to periods after December 31, 2008, under rules similar to the rules of section 48(m) [*26 USCS § 48(m)*] (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990 [enacted Nov. 5, 1990]).

(5) Election to treat qualified facilities as energy property.

(A) In general. In the case of any qualified property which is part of a qualified investment credit facility—

(i)such property shall be treated as energy property for purposes of this section, and

(ii)the energy percentage with respect to such property shall be 30 percent.

(B) Denial of production credit. No credit shall be allowed under section 45 for any taxable year with respect to any qualified investment credit facility.

(C) Qualified investment credit facility. For purposes of this paragraph, the term "qualified investment credit facility" means any facility—

(i)which is a qualified facility (within the meaning of section 45 [26 USCS § 45]) described in paragraph (1), (2), (3), (4), (6), (7), (9), or (11) of section 45(d) [26 USCS § 45(d)],

(ii)which is placed in service after 2008 and the construction of which begins before January 1, 2018 (January 1, 2020, in the case of any facility which is described in paragraph (1) of section 45(d)), and

(iii)with respect to which—

(I)no credit has been allowed under section 45 [26 USCS § 45], and

(II)the taxpayer makes an irrevocable election to have this paragraph apply.

(D)Qualified property. For purposes of this paragraph, the term "qualified property" means property—

(i)which is—

(I)tangible personal property, or

(II)other tangible property (not including a building or its structural components), but only if such property is used as an integral part of the qualified investment credit facility,

(ii)with respect to which depreciation (or amortization in lieu of depreciation) is allowable,

(iii)which is constructed, reconstructed, erected, or acquired by the taxpayer, and

(iv)the original use of which commences with the taxpayer.

(E)Phaseout of credit for wind facilities. In the case of any facility using wind to produce electricity which is treated as energy property by reason of this paragraph, the amount of the credit determined under this section (determined after the application of paragraphs (1) and (2) and without regard to this subparagraph) shall be reduced by—

(i)in the case of any facility the construction of which begins after December 31, 2016, and before January 1, 2018, 20 percent,

(ii)in the case of any facility the construction of which begins after December 31, 2017, and before January 1, 2019, 40 percent, and

(iii)in the case of any facility the construction of which begins after December 31, 2018, and before January 1, 2020, 60 percent.

(6) Phaseout for solar energy property.

(A)In general. Subject to subparagraph (B), in the case of any energy property described in paragraph (3)(A)(i) the construction of which begins before January 1, 2022, the energy percentage determined under paragraph (2) shall be equal to—

(i)in the case of any property the construction of which begins after December 31, 2019, and before January 1, 2021, 26 percent, and

(ii)in the case of any property the construction of which begins after December 31, 2020, and before January 1, 2022, 22 percent.

(B)Placed in service deadline. In the case of any energy property described in paragraph (3)(A)(i) the construction of which begins before January 1, 2022, and which is not placed in service before January 1, 2024, the energy percentage determined under paragraph (2) shall be equal to 10 percent.

(7) Phaseout for fiber-optic solar, qualified fuel cell, and qualified small wind energy property.

(A)In general. Subject to subparagraph (B), in the case of any qualified fuel cell property, qualified small wind property, or energy property described in paragraph (3)(A)(ii), the energy percentage determined under paragraph (2) shall be equal to—

(i)in the case of any property the construction of which begins after December 31, 2019, and before January 1, 2021, 26 percent, and

(ii)in the case of any property the construction of which begins after December 31, 2020, and before January 1, 2022, 22 percent.

(B)Placed in service deadline. In the case of any energy property described in subparagraph (A) which is not placed in service before January 1, 2024, the energy percentage determined under paragraph (2) shall be equal to 0 percent.

(b) Certain progress expenditure rules made applicable. Rules similar to the rules of subsections (c)(4) and (d) of section 46 [*26 USCS § 46*] (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990 [enacted Nov. 5, 1990]) shall apply for purposes of subsection (a).

(c) Definitions. For purposes of this section—

(1) Qualified fuel cell property.

(A)In general. The term "qualified fuel cell property" means a fuel cell power plant which—

(i)has a nameplate capacity of at least 0.5 kilowatt of electricity using an electrochemical process, and

(ii)has an electricity-only generation efficiency greater than 30 percent.

(B)Limitation. In the case of qualified fuel cell property placed in service during the taxable year, the credit otherwise determined under subsection (a) for such year with respect to such property shall not exceed an amount equal to $1500 for each 0.5 kilowatt of capacity of such property.

(C)Fuel cell power plant. The term "fuel cell power plant" means an integrated system comprised of a fuel cell stack assembly and associated balance of plant components which converts a fuel into electricity using electrochemical means.

(D)Termination. The term "qualified fuel cell property" shall not include any property the construction of which does not begin before January 1, 2022.

(2) Qualified microturbine property.

(A)In general. The term "qualified microturbine property" means a stationary microturbine power plant which—

(i)has a nameplate capacity of less than 2,000 kilowatts, and

(ii)has an electricity-only generation efficiency of not less than 26 percent at International Standard Organization conditions.

(B)Limitation. In the case of qualified microturbine property placed in service during the taxable year, the credit otherwise determined under subsection (a) for such year with respect to such property shall not exceed an amount equal to $200 for each kilowatt of capacity of such property.

(C)Stationary microturbine power plant. The term "stationary microturbine power plant" means an integrated system comprised of a gas turbine engine, a combustor, a recuperator or regenerator, a generator or alternator, and associated balance of plant components which converts a fuel into electricity and thermal energy. Such term also includes all secondary components located between the existing infrastructure for fuel delivery and the existing infrastructure for power distribution, including equipment and controls for meeting relevant power standards, such as voltage, frequency, and power factors.

(D)Termination. The term "qualified microturbine property" shall not include any property the construction of which does not begin before January 1, 2022.

(3) Combined heat and power system property.

(A)Combined heat and power system property. The term "combined heat and power system property" means property comprising a system—

(i)which uses the same energy source for the simultaneous or sequential generation of electrical power, mechanical shaft power, or both, in combination with the generation of steam or other forms of useful thermal energy (including heating and cooling applications),

(ii)which produces—

(I)at least 20 percent of its total useful energy in the form of thermal energy which is not used to produce electrical or mechanical power (or combination thereof), and

(II)at least 20 percent of its total useful energy in the form of electrical or mechanical power (or combination thereof),

(iii)the energy efficiency percentage of which exceeds 60 percent, and

(iv)the construction of which begins before January 1, 2022.

(B) Limitation.

(i) In general. In the case of combined heat and power system property with an electrical capacity in excess of the applicable capacity placed in service during the taxable year, the credit under subsection (a)(1) (determined without regard to this paragraph) for such year shall be equal to the amount which bears the same ratio to such credit as the applicable capacity bears to the capacity of such property.

(ii) Applicable capacity. For purposes of clause (i), the term "applicable capacity" means 15 megawatts or a mechanical energy capacity of more than 20,000 horsepower or an equivalent combination of electrical and mechanical energy capacities.

(iii) Maximum capacity. The term "combined heat and power system property" shall not include any property comprising a system if such system has a capacity in excess of 50 megawatts or a mechanical energy capacity in excess of 67,000 horsepower or an equivalent combination of electrical and mechanical energy capacities.

(C) Special rules.

(i) Energy efficiency percentage. For purposes of this paragraph, the energy efficiency percentage of a system is the fraction—

(I)the numerator of which is the total useful electrical, thermal, and mechanical power produced by the system at normal operating rates, and expected to be consumed in its normal application, and

(II)the denominator of which is the lower heating value of the fuel sources for the system.

(ii) Determinations made on btu basis. The energy efficiency percentage and the percentages under subparagraph (A)(ii) shall be determined on a Btu basis.

(iii) Input and output property not included. The term "combined heat and power system property" does not include property used to transport the energy source to the facility or to distribute energy produced by the facility.

(D) Systems using biomass. If a system is designed to use biomass (within the meaning of paragraphs (2) and (3) of section 45(c) [*26 USCS § 45(c)*] without regard to the last sentence of paragraph (3)(A)) for at least 90 percent of the energy source—

(i)subparagraph (A)(iii) shall not apply, but

(ii)the amount of credit determined under subsection (a) with respect to such system shall not exceed the amount which bears the same ratio to such amount of credit (determined without regard to this subparagraph) as the energy efficiency percentage of such system bears to 60 percent.

(4) Qualified small wind energy property.

(A) In general. The term "qualified small wind energy property" means property which uses a qualifying small wind turbine to generate electricity.

(B) Qualifying small wind turbine. The term "qualifying small wind turbine" means a wind turbine which has a nameplate capacity of not more than 100 kilowatts.

(C) Termination. The term "qualified small wind energy property" shall not include any property the construction of which does not begin before January 1, 2022.

(d) Coordination with Department of Treasury grants. In the case of any property with respect to which the Secretary makes a grant under section 1603 of the American Recovery and Reinvestment Tax Act of 2009 [note to this section]—

(1) Denial of production and investment credits. No credit shall be determined under this section or section 45 [*26 USCS § 45*] with respect to such property for the taxable year in which such grant is made or any subsequent taxable year.

(2) Recapture of credits for progress expenditures made before grant. If a credit was determined under this section with respect to such property for any taxable year ending before such grant is made—

(A) the tax imposed under subtitle A [*26 USCS §§ 1* et seq.] on the taxpayer for the taxable year in which such grant is made shall be increased by so much of such credit as was allowed under section 38 [*26 USCS § 38*],

(B) the general business carryforwards under section 39 [*26 USCS § 39*] shall be adjusted so as to recapture the portion of such credit which was not so allowed, and

(C) the amount of such grant shall be determined without regard to any reduction in the basis of such property by reason of such credit.

(3) Treatment of grants. Any such grant —

(A) shall not be includible in the gross income or alternative minimum taxable income of the taxpayer, but

(B) shall be taken into account in determining the basis of the property to which such grant relates, except that the basis of such property shall be reduced under section 50(c) [*26 USCS § 50(c)*] in the same manner as a credit allowed under subsection (a).

History

HISTORY:

Added Oct. 16, 1962, P. L. 87-834, § 2(b), *76 Stat. 967*; Feb. 26, 1964, P. L. 88-272, Title II, § 203(a)(1), (3)(A), (b), (c), *78 Stat. 33*, *34*; Nov. 8, 1966, P. L. 89-800, § 1, *80 Stat. 1508*; Nov. 13, 1966, P. L. 89-809, Title II, § 201(a), *80 Stat. 1575*; June 13, 1967, P. L. 90-26, §§ 1, 2(a), 3, *81 Stat. 57*, *58*; Dec. 30, 1969, P. L. 91-172, Title I, § 121(d)(2)(A), Title IV, § 401(e)(2)–(4), *83 Stat. 547*, *603*; Dec. 10, 1971, P. L. 92-178, Title I, §§ 102(a)(2), 103, 104(a)(1), (b)–(f)(1), (g), 108(b), (c), *85 Stat. 499-502*, *507*; March 29, 1975, P. L. 94-12, Title III, §§ 301(c)(1), 302(c)(3), Title VI, § 604(a), *89 Stat. 38*, *44*, *65*; Oct. 4, 1976, P. L. 94-455, Title VIII, §§ 802(b)(6), 804(a), Title X, § 1051(h)(1), Title XIX, §§ 1901(a)(5), (b)(11)(A), 1906(b)(13)(A), Title XXI, § 2112(a)(1), *90 Stat. 1583*, *1591*, *1647*, *1764*, *1795*, *1834*, *1905*; Oct. 17, 1978, P. L. 95-473, § 2(a)(2)(A), *92 Stat. 1464*; Nov. 6, 1978, P. L. 95-600, Title I, § 141(b), Title III, §§ 312(c)(1)–(3), 314(a), (b), 315(a)–(c), Title VII, § 703(a)(3), (4), *92 Stat. 2791*, *2826-2829*, *2939*; Nov. 9, 1978, P. L. 95-618, Title III, § 301(b), (d)(1), (2), *92 Stat. 3195*, *3199*, *3200*; April 1, 1980, P. L. 96-222, Title I, §§ 101(a)(7)(G), (H), (L)(i)(I)–(IV), (ii)(III)–(VI), (iii)(II), (III), (v)(II)–(V), (M)(ii), (iii), 103(a)(2)(A), (4)(B), 108(c)(6), *94 Stat. 198-201*, *208*, *209*, *228*; April 2, 1980, P. L. 96-223, Title II, §§ 221(b), 222(a)–(e)(1), (f)–(i), 223(a)(1), (c)(1), *94 Stat. 261-266*; Oct. 14, 1980, P. L. 96-451, Title III, § 302(a), *94 Stat. 1991*; Dec. 28, 1980, P. L. 96-605, Title I, § 109(a), Title II, § 223(a), *94 Stat. 3525*, *3528*; Aug. 13, 1981, P. L. 97-34, Title II, §§ 211(a)(2), (c), (e)(3), (4), (h), 212(a)(3), (b), (c), (d)(2)(A), 213(a), 214(a), (b), Title III, § 332(b), *95 Stat. 227-229*, *235*, *236*, *239*, *240*, *296*; Sept. 3, 1982, P. L. 97-248, Title II, §§ 205(a)(1), (4), (5)(A), 209(c), *96 Stat. 427*, *429*, *447*; Oct. 19, 1982, P. L. 97-354, §§ 3(d), 5(a)(7), (8), *96 Stat. 1689*, *1692*; Oct. 25, 1982, P. L. 97-362, Title I, § 104(a), *96 Stat. 1729*; Jan. 6, 1983, P. L. 97-424, Title V, § 546(a), *96 Stat. 2198*; Jan. 12, 1983, P. L. 97-448, Title I, § 102(e)(2)(A), (f)(2), (3), (6), Title II, § 202(c), Title III, § 306(a)(3), *96 Stat. 2371*, *2372*, *2396*, *2400*; July 18, 1984, P. L. 98-369, Div A, Title I, §§ 11, 31(b), (c), 111(e)(8), 113(a)(1), (b)(3), (4), 114(a), Title IV, §§ 431(c), 474(o)(10)–(18), Title VII, §§ 712(b), 721(x)(1), 735(c)(1), Title X, § 1043(a), *98 Stat. 503*, *517*, *518*, *633*, *635*, *637*, *638*, *808*, *836*, *837*, *946*, *971*, *981*, *1044*; Oct. 11, 1985, P. L. 99-121, Title I, § 103(b)(5), *99 Stat. 510*; Oct. 22, 1986, P. L. 99-514, Title II, § 251(b), (c), Title VII, § 701(e)(4)(C), Title VIII, § 803(b)(2)(B), Title XII, §§ 1272(d)(5), 1275(c)(5), Title XV, § 1511(c)(3), Title XVIII, §§ 1802(a)(4)(C), (5)(B), (9)(A), (B), 1809(d)(2), (e),