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Internal Revenue Service
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Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

SUBMITTED ELECTRONICALLY via Federal eRulemaking Portal at www.regulations.gov

Re: Notice 2022-49

Request for Comments on Certain Energy Generation Incentives

The National Rural Electric Cooperative Association ("NRECA") respectfully submits the following comments in response to Notice 2022-49, the "Request for Comments on Certain Energy Generation Incentives". These comments are intended to provide the broad perspective of NRECA's member electric cooperatives to the energy generation incentives contained in the Inflation Reduction Act (IRA) of 2022.

NRECA is the national trade association representing nearly 900 local electric cooperatives and other rural electric utilities. America's electric cooperatives are built by and owned by the people that they serve and comprise a unique sector of the electric industry. Electric cooperatives operate at cost and without a profit incentive. From growing regions to remote farming communities, electric cooperatives serve 42 million people (one of every eight electric consumers), powering 21 million businesses, homes, schools, and farms in 48 states and across 56 percent of the nation's landmass.

NRECA's members include 831 distribution cooperatives and 63 generation and transmission (G&T) cooperatives. Distribution cooperatives are the foundation of the electric cooperative network; they were built by their communities and deliver electric service and other services to their consumer-members, who are the end-users of electric service. The G&T cooperatives generate or purchase wholesale power on behalf of their distribution-cooperative members. Collectively, G&T cooperatives serve 80 percent of the nation's distribution cooperatives. Other distribution cooperatives obtain wholesale power from other sources in the electric-power sector. Distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

Electric cooperatives are an integral part of the nation's transmission and distribution infrastructure. Cooperatives own and maintain 2.6 million miles, or 42 percent of the nation's electric transmission and distribution lines, including over 44,000 miles of transmission lines. In 2017, cooperatives served an average of eight customers per mile of line and collected annual revenue of approximately $19,000 per mile; other utility sectors averaged 32 customers and $79,000 in annual revenue per mile.

Electric cooperatives generate about five percent and deliver about 12 percent of the nation's electricity. Cooperatives rely on a broad portfolio of fuels, including clean and renewable resources, as well as energy-efficiency measures, to maintain safe, reliable, and affordable power for their communities. For 2020 (the latest complete year for which figures are available) cooperatives' aggregate retail sales of electricity were derived from a fuel mix consisting of 32 percent natural gas, 28 percent coal, 22 percent renewables, 16 percent nuclear, and two percent other.

Unlike the rest of the electric sector, cooperatives sell the majority of their electricity (54 percent of 2020 energy sales) to residential consumers rather than commercial businesses. It is vitally important to these households that electric system reliability be maintained and that electric rates remain affordable. Many consumers in rural communities depend on cooperative-delivered electricity for winter heating. Rural households often lack access to natural gas, and alternative fuels like propane and heating oil are comparatively expensive. Moreover, many consumers in rural communities are less affluent than those in other parts of the nation. In 2019, the median household income for electric cooperative consumer-members was 11 percent below the national average. Electric cooperatives serve consumer-members in 92 percent of the nation's 395 "persistent poverty" counties.

Passage of the IRA will, for the first time, provide electric cooperatives parity with for-profit utilities, which have long enjoyed tax credits to develop wind, solar and other renewable energy projects. Historically, not-for-profit electric cooperatives have not had access to those credits because most of them do not pay federal income taxes. Direct-pay incentives will have a major impact on electric cooperative plans to develop new energy technologies, including carbon capture, nuclear, energy storage, renewables; as well as maintain existing facilities as incentivized under the IRA.

Comments

.01 IRA Changes to the Renewable Electricity Production Credit (§ 45)

(1) Section 45(e)(13) provides that electricity produced by a taxpayer will be treated as sold by such taxpayer to an unrelated person during the taxable year if (A) such electricity is used during such taxable year by the taxpayer or a person related to the taxpayer at a qualified clean hydrogen production facility (as defined in § 45V(c)(3)) to produce qualified clean hydrogen (as defined in § 45V(c)(2)), and (B) such use and production is verified (in such form or manner as the Secretary may prescribe) by an unrelated third party.

(a) What existing industry standards, if any, should the Treasury Department and the IRS consider in establishing guidelines for how an unrelated third party will verify that electricity produced by a facility for which the taxpayer is claiming the § 45 credit has been used to produce qualified clean hydrogen?

The IRS should define what constitutes a "clean hydrogen production facility" and the amount of carbon dioxide remaining after the process should be based on actual data.

(b) The term "unrelated person" is used in section 45 (as well as other provisions discussed in this notice that were added or amended by the IRA). Is guidance needed to clarify the meaning of the term "unrelated person"? If so, how should that term be clarified?

There is a unique relationship between a G&T cooperative and its distribution cooperative members. As provided above, NRECA's members include 831 member-owned local distribution cooperative systems and 63 G&T cooperatives that supply wholesale power to their distribution cooperative owner-members. Approximately 20% of distribution cooperatives rely on other sources of supply from the electric utility industry. As a result of the G&T and distribution cooperative relationship, NRECA urges the IRS to consider a definition of unrelated person that accounts for the unique characteristics of its members and does not impair their eligibility to utilize direct pay tax credits under the IRA.

We believe the IRS should clarify that the term "unrelated person" will be interpreted consistent with existing provisions of the Code and with prior guidance that the IRS has issued in connection with other tax incentives for electric generation.

Specifically, the IRS has interpreted, and issued guidance regarding, the definition of "related person" contained in Section 45(e)(4) applicable in the context of the renewable electricity production credit. This tax credit is available

for sales of power, under Section 45(a)(2)(B), "by the taxpayer to an unrelated person." Section 45(e)(4) defines "related person" in the following terms:

> *"Persons shall be treated as related to each other if such persons would be treated as a single employer under the regulations prescribed under section 52(b). In the case of a corporation which is a member of an affiliated group of corporations filing a consolidated return, such corporation shall be treated as selling electricity to an unrelated person if such electricity is sold to such a person by another member of such group."*

Under this definition, two persons are related if they would be treated as a single employer under IRS regulations, with the additional caveat that two corporate entities filing a consolidated tax return will be treated as unrelated if one corporate entity sells power to the other corporate sibling. NRECA urges the IRS to clarify that the term "unrelated person" as used in Section 45 will be interpreted consistent with the definition of "related person" in Section 45(e)(4). While the implied double negative (defining "unrelated person" by what they are not) may be considered awkward, we believe this is the best alternative, in lieu of creating a new definition for this purpose. Importantly, adoption of this definition would clarify that a G&T cooperative and its distribution cooperative members to which it sells electricity are unrelated as they could not be considered a single employer under IRS regulations.

Regardless of what definition of "unrelated person" the IRS adopts, NRECA urges the IRS to explicitly affirm the same clarification for the Production Tax Credit under Section 45 that it has adopted in interpreting "unrelated person" in the context of other tax incentive programs. The IRS has issued guidance on what an "unrelated person" means in connection with at least two other tax benefits. In revising Notice 2006-40, IRS provided guidance on the definition of "unrelated person" in the context of Section 45J tax credits for the production of electricity at advanced nuclear power facilities, which were only available for sales to an "unrelated person." In this Notice, the IRS stated:

> *"Electricity will be treated as sold to an unrelated person for this purpose if the ultimate purchaser of the electricity is not related to the person that produces the electricity. The requirement of a sale to an unrelated person will be treated as satisfied in these circumstances even if the producer sells the electricity to a related person for resale by the related person to a person that is not related to the producer."*

Accordingly, the IRS has acknowledged that a sale to a related person would not necessarily disqualify the sale from the tax benefit so long as the related person was engaged in a resale to an unrelated person. With this revised Notice, the IRS also introduced the concept of an "ultimate purchaser" and whether the tax benefit beneficiary is related to the "ultimate purchaser." The IRS subsequently extended this logic to tax credits under Section 45 for electricity produced from open-loop biomass, citing its revision to Notice 2006-40, and applying that logic in Notice 2006-88.

Applying this guidance to the G&T cooperative model demonstrates that sales of electricity from a G&T cooperative to its distribution cooperative members constitute sales to an unrelated person. This is because a sale of electricity to a distribution cooperative by its G&T cooperative is made for the distribution cooperative to resell the electricity to its own members. Under this clarification, it is the end-use-member of the distribution cooperative who would serve as the "ultimate purchaser" of the electricity. The G&T cooperative would not be related to the "ultimate purchaser," thus confirming the eligibility of the G&T cooperative for this tax benefit. We urge the IRS to adopt this guidance requiring only that the "ultimate purchasers" of the electricity be unrelated to the producer of such electricity for purposes of the Production Tax Credit under section 45.

(2) Sections 45(b)(3), 48(a)(4), 45Y(g)(8), 48E(d)(2) and several other sections in the IRA include a reduction in the respective credit for tax-exempt bond financing. The reduction is calculated in accordance with § 45(b)(3) (or rules similar to the rule under § 45(b)(3)). What additional guidance would be helpful in determining how to calculate the reduction?

(3) Section 45(c)(10)(A)(v), as amended by the IRA, provides a modified definition of marine and hydrokinetic energy by adding pressurized water used in a pipeline (or similar man-made conveyance) that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. Is guidance needed to define these qualified facilities? If so, how should these qualified facilities be defined?

(4) Please provide comments on any other topics relating to the § 45 credit that may require guidance.

We would like the annual inflation adjustment for the PTC for the prior tax year to be done as promptly as possible.

We believe that qualified facilities under the PTC should be defined broadly. Broadening the concept of qualified facility for the PTC would be an incentive for entities to develop such facilities which are carbon free.

The IRS should clarify that a renewable generating unit claiming the PTC could also have a storage unit co-located at the same site which would qualify for the ITC.

The IRS should clarify the inflation adjustment for the PTC to stipulate in what order (i) the inflation adjustment, (ii) the 5x multiplier and (iii) the rounding adjustment are applied.

The IRS should consider issuing guidance concerning whether the repowering of shuttered or mothballed facilities would qualify for the PTC assuming the facilities are of a type mentioned in the statute.

The IRS should consider clarifying that capacity additions to existing qualified facilities which occur after 1/1/23 would be eligible for the PTC.

<u>.02 The Energy Investment Credit (§ 48)</u>

(1) IRA Changes to the Energy Investment Credit (§ 48)

(a) The IRA expanded the definition of energy property to include electrochromic glass, energy storage technology, qualified biogas property, and microgrid controllers.

(i) What should the Treasury Department and the IRS consider in determining what types of technologies are included in the definitions of these new types of energy property?

The amendment contained in Section 13302(b) Internal Revenue Code Section 25D(a)(6) to include "qualified battery storage technology expenditures" does not clearly define what qualifies as a battery storage technology. The grid will need a range of battery technologies, that can be equitably deployed to meet the storage demands associated with the transition to renewable energy sources. As written, the language does not include the technologies that are commercially available to immediately deliver battery functionality.
A Thermal Energy Storage device (as defined in 48(c)) capable of shifting greater than 3 kWh of electrical load should be a qualified battery storage technology.

We are concerned that, with the way the text of the statute is written, the new definition of 'energy storage technology' could mistakenly be interpreted to require the eligible technology to <u>both</u> store and discharge electricity (as an electrical battery does) <u>and</u> have thermal energy storage properties. However, no technology meets this requirement – a storage technology generally either discharges thermal energy or electricity, not both. We believe the intent of the law is to have both electrical batteries and thermal storage be eligible. Likewise, thermal energy storage property is defined in the law as needing to be "directly connected to a heating,

ventilation, or air conditioning system." However, many thermal storage systems directly function as heating systems. The language could unintentionally exclude these devices, and therefore guidance is needed to make it clear that devices that serve as heating, ventilation, or air-conditioning systems that have thermal storage property are eligible.

We believe that "energy storage technology" should include both devices that store and discharge electricity (as an electrical battery does) and devices that have characteristics of "thermal energy storage property."

(ii) What should the Treasury Department and the IRS consider in determining what components of those technologies are included in energy property?

(b) Section 48(a)(8) provides that for certain energy property amounts paid or incurred for qualified interconnection property may be included in basis.

(i) For interconnection property, what types of additions, modifications, or upgrades to the transmission or distribution system are required for the purpose of accommodating interconnection?

We believe that qualified interconnection property as described in Section 48(a)(8) should be interpreted broadly.

Under Section 48(a)(8), the term "qualified interconnection property" means, with respect to an energy project which is not a microgrid controller, any tangible property— (i) which is part of an <u>addition, modification, or upgrade to a transmission or distribution system</u> which is required at or beyond the point at which the energy project interconnects to such transmission or distribution system in order to accommodate such interconnection, (ii) either— (I) which is <u>constructed, reconstructed, or erected by the taxpayer</u>, or (II) for which the cost with respect to the construction, reconstruction, or erection of such property is paid or incurred by such taxpayer, and (iii) the original use of which, pursuant to an interconnection agreement, commences with a utility.

The term "interconnection agreement" means an agreement with a utility for the purposes of interconnecting the energy property owned by such taxpayer to the transmission or distribution system of such utility. The term "utility" means the owner or operator of an electrical transmission or distribution system which is subject to the regulatory authority of a State or political subdivision thereof, any agency or instrumentality of the United States, a public service or public utility commission or other similar body of any State or political subdivision thereof, or the governing or ratemaking body of an electric cooperative.

In the above explanation from Section 48(a)(8), it should be noted that for purposes of defining an "interconnection agreement", that the taxpayer may be a utility as well. This is implied in the statutory language but not explicitly stated.

(ii) For interconnection property, what type of documentation, in addition to interconnection agreements and cost certification reports, is readily available for a taxpayer to demonstrate that they have paid or incurred interconnection costs?

(iii) For interconnection property, is guidance needed to define energy property that has a maximum net output of not greater than 5 megawatts (as measured in alternating current)?

(c) Please provide comments on any other topics relating to the § 48 credit that may require guidance.

We would like guidance on what constitutes a "facility" and a "project". Applicable entities may not be familiar with such terms. The IRS should issue guidance on what constitutes a "facility" and a "project" that takes into account the broad use of those terms in the industry. We believe the IRS should define the concept of facility and project broadly.

We need the IRS to specifically define "placed in service" for renewables, carbon capture, storage, and other assets under the direct pay portion of the statute since applicable entities may not be familiar with such concepts.

Historically, the IRS has considered the following for determining placed in service for electric power generation facilities: (1) approval of required licenses and permits; (2) passage of control of the facility to taxpayer; (3) completion of critical tests; (4) commencement of daily or regular operations; and (5) synchronization into a power grid for generating electricity to produce income. While these are helpful, we believe that clarity is needed regarding placed in service for renewables which may operate intermittently and, particularly, for energy storage facilities.

Eligible property for the ITC should be defined broadly. For example, we believe that microturbines and waste energy and recovery property should be considered eligible property.

For purposes of both the PTC and ITC, what does "begin or commence construction" mean? Applicable entities may not be familiar with the history and evolution of this concept in the tax law over the years.

The IRS should clarify that a renewable generating unit claiming the PTC could also have a storage unit co-located at the same site which would qualify for the ITC.

The IRS should issue guidance regarding the repowering of shuttered or mothballed qualified facilities for purposes of direct pay tax credits. If Treasury and the IRS intend to continue with the 80/20 rule, it should be expanded to all qualified property under the statute and explained comprehensively since applicable entities would have no prior history of using such a rule when deciding on repowering.

The IRS should clarify that capacity additions occurring after 1/1/23 to an existing facility are eligible for the ITC if the property qualifies for the Energy Investment Credit under the IRA.

(2) Additional Issues Regarding the Energy Investment Credit (§ 48)

(a) Is guidance needed to determine whether an investment credit facility that elects to claim the § 48 investment tax credit in lieu of the § 45 production tax credit is subject to all of the requirements of § 45, including the requirement that electricity generated by the investment credit facility be sold to an unrelated person? If so, what factors should the Treasury Department and the IRS consider regarding such guidance?

We don't believe such a restriction is required by the statute. However, if the decision is made to place this additional requirement on the ITC for energy property, the IRS should clarify that the term "unrelated person" is a person or entity not described in the definition of "related person" contained in Section 45(e)(4).

(b) Is clarification needed on the applicability of the 80/20 rule used to determine whether retrofitted or repowered projects may qualify as new energy property? If so, how should this be clarified?

We believe the 80/20 rule should be expanded to include all qualified property under the statute. The rule should be explained in detail, if necessary, for each type of asset to which the rule may apply since many applicable entities will not have any familiarity with this concept.

(c) Section 48(a)(3)(A)(i) provides that energy property includes "equipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure." Is guidance needed to clarify the meaning of the term "structure"?

If so, how should this term be clarified?

(d) Please provide comments on any other topics relating to the § 48 credit that may require guidance.

We believe the term "original use" in the definition of "Energy Property" in Section 48, (B)(ii), should include a solar project placed in service by the applicable entity.

.03 IRA Addition of the Zero-Emission Nuclear Power Production Credit (§ 45U)

(1) Section 45U(a)(2) reduces the amount of the § 45U credit by a "reduction amount" that is calculated, in part, based on the gross receipts from any electricity produced by the facility. Section 45U(b)(2)(B) provides that gross receipts generally include any amount received by a qualified facility that are from a zero-emission credit program unless an exclusion applies. Is guidance needed to clarify the meaning of the term "gross receipts," especially as it applies to taxpayers receiving revenue through cost-of-service regulation or regulated contracts and who do not sell electricity in a manner attributable to individual nuclear reactors such as through sales into organized electricity markets or via power purchase agreements to third parties? If so, how should "gross receipts" be clarified? Should it be defined by cross reference to § 448(c) of the Code?

Electric cooperatives are minority owners of nuclear facilities for which an election out of Subchapter K is typically made by the owners. As a result, an electric cooperative is treated as the co-owner of an undivided interest in the facility. The majority owner bills the minority owners for the costs of production in addition to other costs in accordance with their joint ownership agreement.

With respect to gross receipts, the statutory language in the IRA provides that:

> ***"…the gross receipts from any electricity produced by such facility (including any electricity services or products provided in conjunction with the electricity produced by such facility) and sold to an unrelated person during such taxable year"***

Electric cooperative gross receipts from the sale of electricity are determined by our costs. With regard to gross receipts of electricity produced by a nuclear facility, NRECA believes that such gross receipts should be restricted to costs of the facility itself, or in the case of multiple facilities sited together, the cost of each single facility and any joint cost shared between the facilities. Such costs would not include allocable overhead corporate costs from either the majority or minority owner not specifically attributable to the production and sale of electricity from the facility or any other indirect costs not considered an integral part of the cost of production of electricity.

For electric cooperatives (both taxable and tax-exempt), gross receipts should be narrowly defined as costs directly associated with generating electricity at the particular "facility." Note that there can be multiple facilities on a plant site. The costs should be based on the accounting treatment (i.e., regulatory accounting treatment).

Gross receipts should not include indirect costs such as allocated corporate expenses from either the majority or minority owner that would be incurred even if the particular facility was no longer producing energy. Gross receipts would include directly attributable costs such as depreciation or interest expense.

NRECA recognizes that there are different considerations for Investor-Owned Utilities. Therefore, we think Treasury could provide multiple options for the definition of gross receipts. The above is the narrow definition that we believe is best for electric cooperatives.

(2) Section 45U(b)(2)(B)(ii) defines the term "zero-emission credit program."

What should the Treasury Department and the IRS consider in determining whether a payment is as a result of a government program for the zero-emission, zero-carbon, or air quality attributes of any portion of the electricity produced by the facility?

NRECA understands "zero-emissions credit programs" to be a reference to Zero Emissions Credit ("ZEC") programs (in some ways mirroring Renewable Energy Credit programs) that many States have adopted. NRECA believes that

it may be worthwhile to clarify that other state-administered programs are not misconstrued as a "zero emissions credit program." For instance, several states participate in the Regional Greenhouse Gas Initiative ("RGGI"), a multi-state attempt to create a cap-and-trade program intended to reduce carbon dioxide emissions. We do not believe that programs like RGGI should be considered to be the equivalent of state administered ZEC programs.

As discussed above, electric cooperatives are minority owners of nuclear facilities. Generally, under contractual arrangements between the electric cooperative and the majority owner of the facility, the majority owner is responsible for the day-to-day operation of the facility and billing costs to the minority owner. Under many of these contractual arrangements, the electric cooperative is afforded the right of scrutiny and audit of these costs. Importantly, however, unlike documentation related to the sale of the power, documentation related to the costs of operation may not necessarily be in the primary possession of the minority owner. To the extent that the IRS crafts guidance or regulations imposing record-keeping or record-maintenance obligations—whether in connection with defining "gross receipts" and the costs of the facility or in another context—the IRS should accommodate the position of minority owners of nuclear facilities and their more limited access to documentation. NRECA urges the IRS to adopt regulations that would impose the minimal documentation necessary for applicants to qualify for the credit under section 45(U) and for the IRS to comply with its obligations to ensure that the applicant has qualified for and correctly calculated the credit. Further, any timelines for the production of documents should accommodate the position of minority owners in accessing the documentation. The IRS should be sensitive to the fact that minority owners will not necessarily have instant or ready access to all of the information that IRS may require.

(3) Section 45U(b)(2)(B)(iii) excludes from gross receipts, for purposes of the reduction amount calculation, any amount received by the taxpayer from a zero-emission credit program if the full amount of the § 45U credit (determined without regard to § 45U(b)(2)(B)) is used to reduce payments from such zero-emission credit program.

What should the Treasury Department and the IRS consider when determining whether the full amount of the § 45U credit (calculated pursuant to § 45U(a)) is used to reduce payments from a zero-emission credit program?

(4) Please provide comments on any other topics relating to the § 45U credit that may require guidance.

We believe the IRS should define what constitutes a "facility" as each individual unit rather than as a general plant location. For example, a plant location may have 4 individual units. Each individual unit should be considered a "facility" whereby 1, 2, 3 or all 4 units could be eligible for the PTC. This mirrors how Treasury has treated other tax credits.

.04 IRA Addition of the Clean Electricity Production Credit (§ 45Y)

(1) What existing industry standards, if any, should the Treasury Department and the IRS consider in determining a taxpayer's eligibility for the § 45Y credit?

(2) Section 45Y(b)(2)(C)(i) requires the Secretary to annually publish a table that sets forth the greenhouse gas emissions rates for types or categories of facilities. What should the Treasury Department and IRS consider in publishing this table, including considerations around scope and the factors?

(3) Section 45Y(a)(1) generally provides a credit for electricity produced by the taxpayer at a qualified facility and either (1) sold by the taxpayer to an unrelated person during the taxable year, or (2) in the case of a qualified facility which is "equipped with a metering device which is owned and operated by an unrelated person, sold, consumed, or stored by the taxpayer during the taxable year." Is guidance needed to clarify when a facility is "equipped with a metering device which is owned and operated by an unrelated person" or when electricity produced at such a facility is "sold, consumed, or stored by the taxpayer during the taxable year"?

(4) Section 45Y(b)(2)(C)(ii) provides that, in the case of any facility for which an emissions rate has not been established by the Secretary, a taxpayer that owns such facility may file a petition with the Secretary for a determination of the emissions rate with respect to such facility. What procedures should be provided by the Treasury Department and the IRS for taxpayers to file such a petition? What should the Secretary consider when making such determinations?

(5) Please provide comments on any other topics relating to the § 45Y credit that may require guidance.

The IRS should clarify that if an applicable entity places in service a "new unit" or an addition to capacity to an existing facility after 2024, the new unit or addition would qualify for a new 10-year Clean Electricity PTC period to the extent of the increased amount of electricity produced.

The Treasury Secretary will annually publish a table that sets forth the greenhouse gas emissions rates for types or categories of facilities. This should be done promptly.

In the case of any facility for which an emissions rate has not been established, an applicable entity may file a petition with the Treasury Secretary for determination of the emissions rate with respect to the facility. Such requests should be expedited.

For purposes of the determination of the emissions rate, the IRS should clarify that any greenhouse gases emitted into the atmosphere by a facility does not include qualified carbon dioxide that is captured by the applicable entity and sequestered.

If the Treasury Secretary determines that the actual greenhouse gas emissions rate for a qualified facility was greater than 10 grams of CO2 equivalent per kilowatt after the placed in-service date, any property for which a section 48E ITC was allowed could be subject to ITC recapture if the determination occurs in the first 60 months after the facility is originally placed in service. Such determinations should be based on actual data, not theoretical data.

.05 IRA Addition of the Clean Electricity Investment Credit (§ 48E)

(1) What industry mechanisms currently exist for a taxpayer to demonstrate eligibility for the credit?

(2) Please provide comments on any other topics relating to the § 45E credit that may require guidance.

With respect to greenhouse gases, please see our comments above.

.06 IRA Addition of Special Programs for Certain Facilities Placed in Service in Connection with Low-income Communities (§§ 48(e) and 48E(h))

(1) Sections 48(e)(4)(A) and 48E(h)(4)(A) require the Secretary to establish a program to allocate amounts of environmental justice capacity limitation to applicable facilities. In establishing such program, the Secretary must provide procedures to allow for an efficient allocation process.

(a) What should the Treasury Department and the IRS consider in providing guidance regarding the application process for taxpayers seeking an allocation of the environmental justice capacity limitation?

We believe that guidance with respect to the application process should be clear and easy to understand and implement. The application process must be efficient. Applications should be processed in an expedited manner since the sooner an applicable entity receives the capacity limitation, the sooner the benefits of lower cost facilities may flow to low-income communities.

(b) How can the application procedures and application process be made accessible to taxpayers?

The IRS should consider a dedicated website for the application process which explains the procedures and announces the allocation of the environmental justice capacity limitation to each applicable entity.

(c) How can the process incorporate community input, engagement, and benefit for projects seeking an allocation of the environmental justice capacity limitation?

In the case of an electric cooperative because the cooperative is owned by those they serve and the democratically elected boards would have directors from districts representing each low-income community, the IRS should consider using a dedicated website, as mentioned above, which could be used by the electric cooperative or its membership to inquire about and comment on the environmental justice capacity allocation.

(2) What stage of completion, if any, should be required of the taxpayer at the time of application for or allocation of amounts of environmental justice capacity limitation (since the taxpayer will have four years to place the facility in service)?

We believe that an applicable entity should be allowed to make an application as soon as construction commences and that, as a result of ongoing supply chain issues in the electric utility industry, the IRS should not be unduly restrictive as to the timing of completion of a project beyond that which is otherwise required by the statute.

(3) What methods currently exist or need to be designed for a taxpayer to certify that a project is being built in a low-income community, on Indian land, or as part of a low-income residential building project or a qualified low-income economic benefit project?

We think that showing that a project is being built in a persistent poverty county should be sufficient to qualify that project to be certified as being constructed in a low-income community. Because electric cooperatives serve 92% of all persistent poverty counties in the United States, the allocation of environmental justice limitations are very important for the benefit of those electric cooperative members residing in persistent poverty counties.

(4) What mechanisms exist for a taxpayer to demonstrate that the financial benefits of the electricity produced by an applicable facility are allocated equitably among the occupants of a low-income residential building project and do not impact the occupants' eligibility for their housing? Similarly, what mechanisms exist for a taxpayer to demonstrate that at least 50 percent of the financial benefits of electricity produced by an applicable facility which is part of a low-income economic benefit project are provided to households within certain income thresholds?

(5) Is guidance needed to clarify the meaning of the term "financial benefit"?

We think that the term "financial benefit" should be construed broadly to include benefits other than those purely monetary in nature. For example, increasing the reliability and resiliency of electric service in low-income communities undoubtedly could lead to a financial benefit in the future, but such concepts may be hard to quantify initially. Also, financial benefit should be broad enough to incorporate the concept that the cost of electricity increased at a rate slower than would have otherwise been the case even though costs may have gone up in the aggregate.

(6) What is a financial benefit of the electricity produced by an applicable facility other than electricity acquired at a below-market rate for occupants of low-income residential building projects and low-income economic benefit projects?

As we noted earlier, unless a low-income community is located in a state that has adopted retail choice, the concept of below-market electric rates has no meaning. There are currently 26 states that offer retail energy choice. Consequently, using a concept of market rates would be useless in the other 24 states. Even in states that allow retail choice, some applicable entities may be excluded from such laws. For these reasons, we believe that the IRS should find another threshold other than below-market rates. An alternative option could be electricity

cost of an applicable facility that was some specified percentage below the average for the state in question. We think this would be preferential to using a market-based rate concept.

(7) What should the Treasury Department and the IRS consider in providing guidance regarding the recapture of the benefits of the credit increase allowed under §§ 48(e) and 48E(h) when property ceases to be property eligible for such credit increase? How should the one-time restoration of eligibility be documented before recapture?

(8) Please provide comments on any other topics relating to the environmental justice capacity limitation under §§ 48(e) and 48E(h) that may require guidance.

The IRS should consider guidance on what constitutes a "project" for purposes of the 5 MW limitation on interconnection costs. The concept of what constitutes a project should be defined expansively to include multiple individual projects of less than 5 MW each – not in the aggregate - which may be located in or near energy or low-income communities.

The IRS should avoid requiring that a project located in a low-income community also has to exclusively serve that community. As a practical matter, this may be impossible if the project is connected to the grid.

The award certification process for qualified investments in energy communities should be clear, concise, and as expeditious as possible in order to keep cost as low as practicable.

The environmental justice and capacity limitation for purposes of the low-income communities should be done as quickly as possible to capture efficiencies and economies in 2023 and 2024. Waiting until January 1, 2025, as permitted under the statute, would disadvantage low-income communities.

The IRS should define "low-income communities" in such a way that it would include entire persistent poverty counties. The IRS should not rely only on the New Markets Tax Credit program for guidance. All persistent poverty counties should be considered low-income communities. Many applicable entities are not familiar with the New Markets Tax Credit program.

Under the New Markets Tax Credits Program, the term "tract" should be defined in to include entire persistent poverty counties.

Census tracts with populations less than 2,000 should not be required to be empowerment zones under section 1391 if low-income thresholds are otherwise met.

Under the New Market Tax Credits program, a facility is part of a "low-income benefit project" if at least 50 percent of the financial benefits of the electricity produced are provided to households with incomes of less than 200 percent of the federal poverty line or less than 80 percent of the area median gross income. Energy acquired at below-market rates is considered a financial benefit. The 200 percent threshold should be reduced to the federal poverty line. Energy acquired at below-market rates requirement should be eliminated as there may not be electric markets in these areas and the IRS should be encouraging, not penalizing the use of the lowest possible cost of reliable electric service in areas where no electric markets exist.

All persistent poverty counties should be considered low-income communities in their entirety. Our current analysis relies on the CDFI Fund list from Treasury:

https://www.cdfifund.gov/sites/cdfi/files/2022-02/12._Persistent_Poverty_Counties_%28PPCs%29_%282011-2015_ACS_and_Island_Areas_Decennial_Census%29.xlsx).

For energy communities, the concept of "brownfield site" should be defined such that a portion of a site could be used for a project as opposed having to use the entire site.

For the definition of an energy community, the IRS should define areas which have or had a certain amount of employment or tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas and has an above-average unemployment rate broadly. An above average employment rate should pertain to a national or state average, not a local average which may be difficult to quantify or measure.

With respect to energy community, the IRS should define a census tract or adjacent area very expansively. Those census tracts or areas in which a coal mine has closed after 1999 or a coal-fired electric generating unit has been retired after 2009 should include partial use of such places.

The IRS will have to issue guidance on what constitutes a "project" for purposes of the 5 MW limitation on interconnection costs. The concept of what constitutes a project should be defined expansively to include multiple individual projects of less than 5 MW each – not in the aggregate - which may be located in or near energy or low-income communities.

There are no restrictions in the statute which would prevent an electric cooperative from receiving direct pay tax credits in full and also applying for and receiving grants and/or loans under the USDA Electric Cooperative Assistance Program. We urge the IRS not to place restrictions on electric cooperatives which are not in the statute.

The IRS should define what constitutes a "project" for purposes of the credit for carbon capture and sequestration.

Thank you for your consideration of our comments. If you have any questions, please don't hesitate to contact us.

Sincerely,

Russell D. Wasson
Senior Director of Regulatory Affairs
The National Rural Electric Cooperative Association