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Submitted Electronically and by Email

Internal Revenue Service
CC:PA:LPD:PR (REG-107423-23)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

RE: Request to Speak & Outline (REG-117631-23)

Dear IRS Representative:

This letter is submitted in response to the notice of proposed rulemaking and notice of public hearing for the "Section 45V Credit for Production of Clean Hydrogen; Section 48(a)(15) Election To Treat Clean Hydrogen Production Facilities as Energy Property," 88 Fed. Reg. 89220 (December 26, 2023). I would be pleased to have the opportunity and request to speak at the public hearing on the proposed rulemaking scheduled for March 25, 2024. The topics on which I would like to be recognized to speak are set forth in the attached outline – as directed by the notice. I will be speaking on my own behalf as an experienced attorney who practices in the area of renewable energy tax credits. I will be speaking in person at the public hearing.

Best Regards,

Timothy L. Jacobs

OUTLINE OF TOPICS

Summary: Regulations should clarify the incrementality requirement for the use of electricity from grid-connected renewable and other zero emission electric generating facilities such as wind and nuclear. Specifically, the final regulations should clarify that a clean hydrogen production facility may use qualifying energy attribute certificates with respect to repowered wind energy facilities that satisfy the 80/20 Rule and are treated as a new facility with a new original placed-in-service date for U.S. federal income tax purposes. Regulations also should clarify that uprates or upgrades with respect to zero emission electric generating facilities, such as a nuclear energy facility, satisfy the incrementality requirement, provided that the uprate results in an incremental increase in the electricity output based on the actual productive capability of the facility, after considering degradation and other limitations on its original nameplate, licensed, or rated capacity.

Topic 1: Guidance should clarify that a clean hydrogen production facility may use EACs with respect to repowered wind energy facilities that satisfy the 80/20 Rule and have a new original placed-in-service date for tax purposes. For purposes of the incrementality requirement, such repowered wind facilities should be treated as a new facility with a new COD.

- Renewable energy facilities (in particular, wind turbines) are commonly repowered.

- The repowering results in what the tax law recognizes as a new facility with a new original placed-in-service date. The "placed-in-service" date of a zero emission or low carbon electric generating facility, such as a wind facility, solar facility, geothermal facility, or nuclear facility has a well-established meaning under the tax law.

- Rather than using the placed-in-service date for the electric generating facility supplying a hydrogen production facility, the Proposed Regulations introduce the concept of a "commercial operations date," or "COD," as the basis for determining whether existing electricity generation facilities satisfy the incrementality requirement.

- The use of inconsistent terms, "COD" and "placed in service," in Prop. Reg. § 1.45V-4(d)(3)(i)(A), together with the absence of any mention of repowered facilities, creates great uncertainty as to Treasury and the IRS's intentions with respect to repowered facilities.

- It is imperative that Treasury and the IRS provide additional clarification regarding the application of the incrementality requirement with respect to repowered energy facilities.

- Final regulations should confirm that repowered facilities – i.e., those renewable energy facilities that have a new original placed-in-service date under the 80/20 Rule – will be treated as newly-built renewable electricity facilities.

    - The tax law has long recognized that repowered facilities should be treated the same as "new" facilities for tax law purposes because they have a similar useful life as a newly-built facility, as well as a similar capacity and production profile to match the state of current technology, but they also achieve efficiencies by re-utilizing and not wasting certain property and equipment from the "old" facility.

    - The qualification of a hydrogen facility for the § 45V credit should be made without regard to whether the renewable electricity comes from a wholly new or repowered facility.

    - Final regulations should therefore confirm the established tax law treatment of repowered facilities in the context of the § 45V credit by using the consistent term, placed in service, with respect to the incrementality requirement or by clearly stating that a repowered facility that obtains a new original placed-in-service date also is treated as having a new COD.

Topic 2: Guidance should clarify that uprates or upgrades with respect to a nuclear facility or other zero emission generating facility, such as hydropower, satisfy the incrementality requirement provided that the uprate or upgrade results in an incremental increase in the electricity generation output based on the actual productive capability of such facility, after considering degradation and other limitations on its original nameplate, licensed, or rated capacity.

- In the case of an addition of capacity or modification of an existing electricity generation facility that results in any incremental generation of electricity, Treasury and the IRS should confirm that such incremental electricity will satisfy the incrementality requirement.

- It is important that Treasury and the IRS confirm that any "additions of capacity" which are placed in service after December 31, 2024 and qualify for tax credits under § 45Y(b)(1)(C) or § 48E(b)(3)(B) will constitute incremental generation that satisfies the incrementality requirement for purposes of § 45V.

- Treasury and the IRS also should confirm that qualifying additions of capacity or modifications resulting in incremental production include "uprates" and "upgrades" to a generating facility.

- The Proposed Regulations recognize the critical importance of uprates and, as explained below, allow increased generation from uprated facilities to qualify under the incrementality requirement. However, certain clarifications are required with respect to the defined terms used to determine the "incremental generation capacity" which is used to calculate the "uprated production rate" and "uprated production" of an addition of capacity or modification to an existing facility. That is, it is important to define the term "nameplate capacity" consistently and in a manner that takes into account uprate changes that improve the incremental generational output of the facility.

    - For this purpose, the "nameplate capacity" of the facility should be determined in a manner similar to the determination of nameplate capacity under the recently-released § 48 proposed regulations and the definition of nameplate capacity provided in 40 CFR 96.202.

    - This definition of nameplate capacity recognizes generational changes to existing nuclear facilities relative to the original nameplate, licensed, or rated capacity of those facilities.

    - Importantly, final regulations should determine pre-uprate capacity by taking into account degradation and similar factors that reduce the actual, current productive capability or capacity of the facility and should determine post-uprate capacity (and, therefore, incremental generation capacity) by taking into account uprate changes that improve the incremental generational output of the facility.

    - In the case of nuclear power, it is particularly important that

historical measurements based on nameplate capacity be avoided. Rather, final regulations should determine pre-uprate capacity after considering outages, idling, and degradation to the recent years' capability of nuclear facilities in order to provide effective use of EACs from this important generation source.

- Final regulations should provide flexibility and alternative approaches to establishing pre-uprate and post-uprate capacity, including the preferences noted in Prop. Reg. § 1.48-14(g)(3)(ii) and through approval of an amended or modified operating license or similar approval by a governmental or quasi-governmental agency, such as the Nuclear Energy Regulatory Commission, Federal Energy Regulatory Commission, or a regional grid operator.