

November 4, 2022

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

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

Re: Notice 2022-50

Request for Comments on Elective Payment of Applicable Credits and Transfer of
Certain Credits

The National Rural Electric Cooperative Association (“NRECA”) respectfully submits the following comments in response to Notice 2022-50, the “Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits”. 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 Elective Payment of Applicable Credits (§ 6417)

(1) What, if any, guidance is needed to clarify the meaning of certain terms in § 6417, such as applicable credit and excessive payment? Is there any term not defined in § 6417 that should be defined in future guidance? If so, what is the term and how should it be defined?

(2) With respect to the Secretary's discretion to determine the time and manner for making an election under § 6417(a):

(a) What, if any, issues could arise when an applicable entity described in § 6417(d)(1)(A) makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues?

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

We think, due to the capital-intensive nature of investments which applicable entities will make an election under Section 6417, Treasury and the IRS should consider some form of rapid election resolution. For example, an applicable entity may place an asset in service in January 2023. It may be a burden to wait until the due date for a 2023 tax return which could be a year and several months later before realization of the direct payment of a credit related to the applicable asset. As a result, we would respectfully request that Treasury and the IRS consider a rapid election payment process such that an applicable entity would not have to wait until the due date for filing a tax return to request direct payment of an applicable credit. In order for this to be accomplished, Treasury and the IRS would have to also establish an efficient and rapid processing of elections under Section 6417.

(3) In determining the amount treated as making a payment against tax under § 6417(a), is guidance needed to clarify the application of any other Code provision? If so, what is the Code provision and what clarification is needed?

We request that, since the direct payment tax credit results from a deemed payment of tax under the statute, the Treasury and IRS rule that any payment as a result of an election under Section 6417 is not income to the applicable entity. Additionally, we request that Treasury and the IRS rule that a direct payment tax credit is not income for purposes of the 85-15 test of a tax-exempt electric cooperative.

(4) With respect to an election under § 6417(a) made by a partnership or S corporation pursuant to § 6417(c)(1) for any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation:

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues?

(b) Is guidance needed to clarify the treatment of a payment made pursuant to § 6417(c)(1)(A) to the electing partnership or S corporation? If so, what clarification is needed?

(5) With respect to the definition of the term “applicable entity” in § 6417(d)(1):

(a) What, if any, guidance is needed to clarify which entities are applicable entities for purposes of § 6417(d)(1)(A), and which taxpayers may elect to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D) for purposes of § 6417?

(b) What types of structures are anticipated to be used by applicable entities, and taxpayers who have elected to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D), when seeking to apply § 6417(a)?

A partnership or S corporation may include partners/shareholders that are applicable entities under §6417(d)(1)(a) and those that are not applicable entities. The statutory language in §6417(a) makes it clear that an applicable entity can make an election for the amount of the applicable credit that is determined with respect to that taxpayer. The guidance should make it clear that the partnership or S corporation is making the §6417 election on behalf of the partners/shareholders for the amount of applicable credits that are determined with respect to the partners/shareholders that are applicable entities. This treatment would allow applicable entities to receive the benefits of the applicable credits through a partnership or S corporation in the same manner they would have received those credits if they owned the investment directly. In addition, this should not prevent the partnership from making the §6418 election on behalf of its partners/shareholders that are eligible taxpayers under that section.

We anticipate that most electric cooperatives will decide to own projects for which an election is made under Section 6417. However, it is possible that some electric cooperatives will choose to participate in or form partnerships for the purpose of gaining economies of scale, particularly as it may relate to renewable assets. In our industry, it is not uncommon to elect out of Subchapter K when in partnership with entities other than electric cooperatives. It may be helpful to provide guidance that an election out of Subchapter K would result in each partner having an undivided ownership interest in the assets of the partnership and would be subject to the tax law as it would apply to an electric cooperative on a stand- alone basis. This may be necessary since applicable entities may not be familiar with Subchapter K and the election out of Subchapter K status.

(c) Is guidance needed to clarify the application of any Code provision other than § 6417 to an applicable entity, or a taxpayer electing to be treated as an applicable entity, that makes an election under § 6417(a)? If so, what is the Code provision and what clarification is needed?

Please see our response to question (b) above.

(d) Are there specific issues that the Treasury Department and the IRS should address for applicable entities that are subject to non-tax legal requirements or other rules that may affect such entities' ability to make an election under § 6417(a)?

(6) With respect to the elections under § 6417(d)(1)(B), (C), or (D):

(a) What, if any, issues could arise when an entity makes an election under § 6417(d)(1)(B), (C), or (D) and what, if any, guidance is needed with respect to such issues?

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

We believe that an election should be available immediately after a qualifying asset is placed in service. Since electric cooperatives are likely to use debt to finance such assets, and since we operate on a not-for-profit basis and typically serve economically distressed areas, we need to keep our costs as low as possible. It would be ideal if we could make an election as soon as an asset is placed in service. It would be most helpful if the IRS could expedite such elections. This would minimize our costs to our members.

(c) What, if any, issues could arise when an entity revokes an election made under § 6417(d)(1)(B), (C), or (D) and what, if any, guidance is needed with respect to such issues?

(d) Is guidance needed to clarify the prohibition of a transfer described in § 6418(a) by a taxpayer who has made an election under § 6417(d)(1)(B), (C), or (D)? If so, what clarification is needed?

(7) Section 6417(d)(3)(A)(i)(I) provides that, in the case of any government, or political subdivision, described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), any election made by these applicable entities under § 6417(a) must be made no later than such date as is determined appropriate by the Secretary. What factors should the Treasury Department and the IRS consider when providing guidance on the due date of the election for these applicable entities?

(8) Section 6417(d)(4)(A) provides that, in the case of any government, or political subdivision described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), the payment described in § 6417(a) is treated as made on the later of the date that a return would be due under § 6033(a) if such government or subdivision were described in § 6033 or the date on which such government or subdivision submits a claim for credit or refund at such time and in such manner as the Secretary provides. What factors should the Treasury Department and the IRS consider when providing guidance to clarify the timing and manner of a payment made by these governments or political subdivisions?

(9) For purposes of preventing duplication, fraud, improper payments, or excessive payments under § 6417, what information, including any documentation created in or out of the ordinary course of business, or registration, should the IRS require as a condition of, and prior to, any amount being treated as a payment made by an applicable entity under § 6417(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required?

All of NRECA's members that participate in nuclear units do so as minority owners. We think the IRS should be aware of the fact that minority owners will not necessarily have instant or ready access to all of the information that the IRS may require since this information would be controlled by the majority owner investor-owned utility.

As indicated above, NRECA's members are minority owners in nuclear facilities. The majority owner and operator may not believe its units are eligible for the benefits under the 45U Existing Nuclear PTC. The IRS should be aware that the majority owner and operator are the primary entity responsible for recordkeeping at all nuclear facilities in which electric cooperatives own an undivided ownership interest. While electric cooperatives intend to work

closely with their co- owner, the documentation to ensure the facility qualifies for the 45U Existing Nuclear PTC may be cumbersome to obtain.

Should the IRS require the same documentation or registration as a condition of, and prior to, any amount being treated as a payment made by both an applicable entity as well as a taxpayer who is treated as an applicable entity after making an election under § 6417(d)(1)(B), (C), or (D)? Should the IRS require the same documentation or registration for all applicable credits? If not, how should the information or registration differ between applicable credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive payments under § 6417?

(10) What, if any, guidance is needed to clarify the application of the excessive payment provisions of § 6417? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6417(d)(6)(B)? What, if any, guidance is needed to calculate the excessive payment amount under § 6417(d)(6)(C)?

(11) For purposes of § 6417(g), what, if any, guidance is needed to clarify the application of § 50 for credit recapture and basis adjustments to investment credit property?

(12) The advanced manufacturing investment credit under § 48D also contains an elective payment provision under § 48D(d). The Treasury Department and the IRS seek comments on whether the elective payment provisions of § 6417 should operate similarly or differently than the elective payment provision under § 48D.

(13) Please provide comments on any other topics that may require guidance.

.02 Transfer of Certain Credits (§ 6418)

(1) What, if any, guidance is needed to clarify the meaning of certain terms in § 6418, such as eligible credit, eligible taxpayer, and excessive credit transfer? Is there any term not defined in § 6418 that should be defined in guidance? If so, what is the term and how should it be defined?

(2) Section 6418(c)(1) provides that, in the case of any eligible credit determined with respect to any facility or property held directly by a partnership or S corporation, the Secretary determines the manner in which such partnership or S corporation makes an election under § 6418(a) with respect to such credit.

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6418(a) and what, if any, guidance is needed with respect to such issues?

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

(3) Section 6418(c)(2) provides that, in the case of any facility or property held directly by a partnership or S corporation, no election by any partner or shareholder is allowed under § 6418(a) with respect to any eligible credit determined with respect to such facility or property. If the election is made, what issues should be considered regarding the transfer of any portion of an eligible credit and what, if any, guidance is needed with respect to such issues? Further, what, if any, guidance is needed on allocating any amount received as consideration for transferring any portion of an eligible credit?

(4) What, if any, guidance is needed with respect to parameters or limitations on a transferee taxpayer's eligibility to claim the credit?

(5) For purposes of § 6418(d), what, if any, guidance is required to determine the proper taxable year in which to claim any credit that was transferred pursuant to an election made under § 6418(a)?

- (6) In determining the amount of eligible credit transferred under § 6418(a), is guidance needed to clarify the application of any other Code provision? If so, what is the Code provision and what clarification is needed?
- (7) Is guidance needed to clarify how any other Code provision applies to an eligible taxpayer or a transferee taxpayer when an election is made under § 6418? If so, what is the Code provision and what clarification is needed?
- (8) For purposes of preventing duplication, fraud, improper payments, or excessive credit transfers under § 6418, what information, including any documentation created in or out of the ordinary course of business, or registration, should be required by the IRS as a condition of, prior to, or after any transfer of any portion of an eligible credit pursuant to § 6418(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required? Should the IRS require the same documentation or registration for all eligible credits? If not, how should the information or registration differ between eligible credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive credit transfers under § 6418?
- (9) What, if any, guidance is needed to clarify the application of the excessive credit transfer provisions of § 6418? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6418(g)(2)(B)? What guidance is needed to calculate the excessive credit transfer amount?
- (10) For purposes of § 6418(g)(3), what, if any, guidance is needed to clarify the application of § 50 for purposes of credit recapture, basis adjustments, and eligibility related to § 50(b)(3)? Pursuant to § 6418(g)(3)(B)(i), an eligible taxpayer must notify the transferee taxpayer if, during any taxable year, the applicable investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period. What factors should be considered in determining the form and manner of this notice? Likewise, pursuant to § 6418(g)(3)(B)(ii), the transferee taxpayer must notify the eligible taxpayer of the recapture amount. What factors should be considered in determining the form and manner of this notice?
- (11) Is guidance needed to clarify the application of § 6418(g)(4) regarding progress expenditures? If so, what clarification is needed?
- (12) Please provide comments on any other topics that may require guidance.

The following is a draft tax form we shared with Treasury and the IRS which would enable applicable entities to request the electric payment under section 6417 of the Code.

Direct Pay Tax Credit Election Under Section 6417 of the Internal Revenue Code

Type of Entity:

Tax Exempt

State or Political Subdivision

Tennessee Valley Authority

Indian tribal government (as defined in section 30D(g)(9))

Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C.

20 1602(m))

A corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas (taxable electric cooperative described in section 1381(a)(2)(C)).

Tax exempt entities filing Form 990 will claim the direct pay tax credit on Form 990-T Part III line 6g Other.

Taxable electric cooperatives will claim the direct pay tax credit on Form 1120 Schedule J Part III line 20d.

Taxable corporations will claim the direct pay tax credit on Form 1120 Schedule J Part III line 20d.

Partnerships will claim the direct pay tax credit on Schedule K line 15f.

Subchapter S corporations will claim the direct pay tax credit on Schedule K line 13g.

All other entities shall claim the section 6417 credit on this form. The filing deadline and extensions for this form shall be the same as those for Form 990.

Affirmation:

The filing organization has met the requirements for additional bonus credits arising from:

Prevailing Wages

Apprenticeships

Domestic Content

Energy Community

Project Commenced Construction Prior to 60 Days After IRS Guidance on Prevailing Wage and Apprenticeship (Bonus Credit Without Meeting Prevailing Wage or Apprenticeship)

Correction and penalty related to failure to pay prevailing wages in accordance with section 45(b)(7) or section 48(a)(10).

Low Income Community Tax Credit Allocation from the Secretary of the Treasury.

Direct Pay Tax Credit

Electricity production credit determined under section 45(a) attributable to qualified facilities which are originally placed in service after December 31, 2022.

Energy credit determined under section 48

Clean electricity production credit determined under section 45Y(a)

Clean electricity investment credit determined under section 48E

Alternative fuel vehicle refueling property allowed under section 30C

Credit for carbon oxide sequestration determined under section 45Q(a) attributable to carbon capture equipment which is originally placed in service after December 31, 2022.

The zero-emission nuclear power production credit determined under section 45U(a).

Credit for production of clean hydrogen determined under section 45V(a) attributable to qualified clean hydrogen production facilities which are originally placed in service after December 31, 2012.

In the case of a tax-exempt entity described in clause (i), (ii), or (iv) of section 168(h)(2)(A), the credit for qualified commercial vehicles determined under section 45W by reason of subsection (d)(3) thereof.

Credit for advanced manufacturing production under section 45X(a).

Clean fuel production credit determined under section 45Z(a).

Qualifying advanced energy project credit determined under section 48C.

Credits for Each Facility and Annual Elections Required

In the case of the credits below, an election shall be made by the taxpayer for each facility and for each taxable year during the 10-year period beginning on the date such facility was originally placed in service (or, in the case of the credit described in clause 13 (iii), for each year during the 12-year period beginning on the date the carbon capture equipment was originally placed in service at such facility).

Electricity production credit determined under section 45(a) attributable to qualified facilities which are originally placed in service after December 31, 2022.

Credit for carbon oxide sequestration determined under section 45Q(a) attributable to carbon capture equipment which is originally placed in service after December 31, 2022.

Credit for production of clean hydrogen determined under section 45V(a) attributable to qualified clean hydrogen production facilities which are originally placed in service after December 31, 2012.

Clean electricity production credit determined under section 45Y(a).

Direct Pay Tax Credit Calculation

Base Tax Credit

Bonus Credit

Bonus Credit Without Meeting Prevailing Wage or Apprenticeship Requirements

Prevailing Wages

Apprenticeships

Domestic Content

Energy Community

Low Income Community

Reduction in the direct pay Production Tax Credit under section 45(a) for tax exempt bonds

Reduction in the direct pay Investment Tax Credit under section 48 for tax-exempt bonds

Total Direct Pay Tax Credit

Under penalties of perjury, I declare that I have examined this form and to the best of my knowledge and belief, it is true, correct, and complete.

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