

Part III - Administrative, Procedural, and Miscellaneous

Credit for Production from Advanced Nuclear Facilities

Notice 2006-40

SECTION 1. PURPOSE This notice sets forth interim guidance, pending the issuance of regulations, relating to the credit under § 45J of the Internal Revenue Code for production of electricity at advanced nuclear power facilities. Specifically, this notice specifies the method that will be used to allocate the national megawatt capacity limitation that limits the allowable credit and prescribes the application process by which taxpayers may request an allocation of the national megawatt capacity limitation. This notice also provides guidance on the requirement that the electricity be sold to an unrelated person and on the effect of grants, tax-exempt bonds, subsidized energy financing, and other credits. The Internal Revenue Service and the Treasury Department expect that the regulations will incorporate the rules set forth in this notice.

SECTION 2. BACKGROUND

.01 Section 45J was enacted by section 1306 of the Energy Policy Act of 2005,

Public Law 109-58 (199 Stat. 594). Section 45J permits a taxpayer to claim a credit for electricity that the taxpayer (1) produces at an advanced nuclear power facility during the eight-year period beginning when the facility is placed in service and (2) sells to an unrelated person (qualifying electricity).

.02 Under § 45J(d), an advanced nuclear power facility is a nuclear facility that meets all of the following requirements:

(1) The facility consists of a nuclear power reactor that uses nuclear energy to produce electricity. For purposes of this notice, each nuclear power reactor located on a multi-reactor site is a separate facility.

(2) The facility is owned by the taxpayer.

(3) The reactor design for the facility is approved by the Nuclear Regulatory Commission after December 31, 1993 (and such design or a substantially similar design of comparable capacity was not approved on or before that date).

(4) The facility is placed in service before January 1, 2021.

.03 Under § 45J(b)(1), a taxpayer may claim a credit for qualifying electricity produced at an advanced nuclear power facility only if part of the national megawatt capacity limitation has been allocated to the facility.

.04 Under § 45J(b)(1) and (c), the credit allowed for a taxable year with respect to the qualified electricity produced at an advanced nuclear power facility is computed under the following rules:

(1) A tentative credit for the taxable year is computed for the facility. The facility's tentative credit for the taxable year is equal to 1.8 cents multiplied by the kilowatt hours of qualified electricity produced at the facility and sold during the taxable year to an

unrelated person.

(2) The credit percentage is computed for the facility. If the nameplate capacity of the facility exceeds the national megawatt capacity limitation allocated to the facility, the credit percentage for the facility is determined by dividing the national capacity limitation allocated to the facility by its nameplate capacity. If the nameplate capacity of the facility does not exceed the national megawatt capacity limitation allocated to the facility, the credit percentage for the facility is 100 percent.

(3) The credit allowed is the lesser of (a) the tentative credit for the facility multiplied by the credit percentage for the facility, or (b) \$125,000,000 per 1000 megawatts of national megawatt capacity limitation allocated to the facility.

.05 Section 45J(b)(2) provides that the national megawatt capacity limitation is 6,000 megawatts. Section 45J(b)(3) requires the Secretary to allocate this national megawatt capacity limitation. Section 45J(b)(4) requires the Secretary to provide a certification process under which the Secretary, after consultation with the Secretary of Energy, shall approve and allocate the national megawatt capacity limitation.

SECTION 3. ALLOCATION OF NATIONAL MEGAWATT CAPACITY LIMITATION

.01 Allocation Limited to Qualifying Facilities. The Service will allocate the national megawatt capacity limitation only to advanced nuclear facilities (within the meaning of § 45J(d)(2)) that satisfy the requirements of this section 3.01 (qualifying facilities). An advanced nuclear facility is a qualifying facility only if each of the following requirements is satisfied:

(1) An application for a construction/operating license for the facility is filed with the Nuclear Regulatory Commission on or before the later of (i) December 31, 2007, or

(ii) the date on which the aggregate nameplate capacity of advanced nuclear facilities for which applications for a construction/operating license have been filed with the Nuclear Regulatory Commission first equals or exceeds 6,000 megawatts.

(2) Construction on the facility begins before January 1, 2014. For this purpose, construction begins when a person who has applied for or been granted a combined license for an advanced nuclear facility initiates the pouring of safety-related concrete for the reactor building.

(3) The U.S. Department of Energy (DOE) provides a certification that the facility qualifies as an advanced nuclear facility, that the requirements of section 3.01(1) and (2) are satisfied, and that it is feasible for the facility to be placed in service prior to January 1, 2021 (“DOE certification”).

.02 Application Required.

The Service will allocate the national megawatt capacity limitation only to qualifying facilities for which the applications are submitted in accordance with section 4 of this notice.

.03 Allocation Method.

The national megawatt capacity limitation will be allocated as follows:

(1) If the total nameplate capacity of all qualifying facilities for which applications are submitted does not exceed the national megawatt capacity limitation, each of those facilities will be allocated an amount of national megawatt capacity limitation equal to its nameplate capacity.

(2) If the total nameplate capacity of all qualifying facilities for which applications are submitted exceeds the national megawatt capacity limitation, the national megawatt

capacity limitation will be allocated among the facilities in proportion to their nameplate capacities.

.04 Service Action.

On or before December 31, 2014, the Service will accept or reject the taxpayer's application and will notify the taxpayer, by letter, of its decision. If the taxpayer's application is accepted, the acceptance letter will state the amount of the national megawatt capacity limitation allocated to the facility.

SECTION 4. APPLICATIONS FOR ALLOCATION OF NATIONAL MEGAWATT CAPACITY LIMITATION

.01 A taxpayer must submit, for each facility for which an allocation of the national megawatt capacity limitation is requested (1) an application to the Service for an allocation under § 45J(b) ("application for § 45J allocation") and (2) an application to DOE for a DOE certification ("application for DOE certification").

.02 Applications for § 45J allocation and applications for DOE certification must be submitted before January 31, 2014. For purposes of this notice, an application that is submitted by U.S. mail will be treated as received by the Service on the date of the postmark and an application submitted by a private delivery service will be treated as received by the Service on the date recorded or the date marked in accordance with § 7502(f)(2)(C).

.03 The application for § 45J allocation must include all of the following:

- (1) The name and taxpayer identification number of the taxpayer who will place the facility in service;
- (2) The name and location of the facility;

- (3) The nameplate capacity of the facility;
- (4) The date on which the application for a construction/operating license for the facility was filed with the Nuclear Regulatory Commission;
- (5) The date on which construction on the facility began;
- (6) Documentation establishing that the facility is expected to be placed in service prior to January 1, 2021; and
- (7) A copy of the application for DOE certification for the facility.

.04 Applications for § 45J allocation should be marked: SECTION 45J APPLICATION FOR ALLOCATION. There is not any user fee for these applications.

- (1) These applications should be sent to the following address:

Internal Revenue Service
Attn: CC:PSI:6, Room 5114
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

If a private delivery service is used, the address is:

Internal Revenue Service
Attn: CC:PSI:6, Room 5114
1111 Constitution Ave., N.W.
Washington, DC 20224

- (2) Applications for certification may also be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PSI:6, Room 5114
1111 Constitution Avenue N.W.
Washington, DC 20224

.03 The application for DOE certification must be submitted to DOE in such

manner and contain such information as DOE may require. If DOE determines that the conditions for certification are satisfied (see section 3.01 of this notice), it will provide the DOE certification to the Service. The DOE certification will be subject to such requirements and conditions as the Secretary of Energy may prescribe.

SECTION 5. REALLOCATION OF NATIONAL MEGAWATT CAPACITY LIMITATION IN CERTAIN CASES

If an amount of national megawatt capacity limitation is allocated to a facility and the facility is not placed in service before January 1, 2021, or the DOE informs the Service that the DOE certification for the facility has been withdrawn, the amount of the national megawatt capacity limitation allocated to that facility will be withdrawn and the national megawatt capacity limitation will be reallocated under the rules of section 3.03 of this notice among the remaining qualifying facilities.

SECTION 6. ADDITIONAL ISSUES

.01 Sale to Unrelated Person. The credit under § 45J is allowed only for electricity that the taxpayer produces and sells to an unrelated person. 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. For rules for determining whether a person is related to the producer of the electricity, see § 45(e)(4).

.02 Effect of Grants, Tax-Exempt Bonds, Subsidized Energy Financing, and Other Credits. The amount of the credit under § 45J is not reduced on account of any

grants, tax-exempt bonds, subsidized energy financing, or other credits described in § 45(b)(3).

SECTION 7. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-2000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this notice are in section 3. This information is required to be collected and retained in order for taxpayers to claim the new credit for the production of electricity from advanced nuclear power facilities under § 45J. The information will be used to determine the portion of the national megawatt capacity limitation to which a taxpayer's facility is entitled. The collection of information is required to obtain a benefit. The likely respondents are corporations and partnerships.

The estimated total annual reporting burden is 600 hours.

The estimated annual burden per respondent varies from 10 to 60 hours, depending on individual circumstances, with an estimated average of 40 hours. The estimated number of respondents is 15.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by

26 U.S.C. 6103.

SECTION 8. DRAFTING INFORMATION

The principal author of this notice is Patrick S. Kirwan of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Mr. Kirwan at (202) 622-3110 (not a toll-free call).