U.S. Department of Energy
Proposed Guidance Amendment for the Civil Nuclear Credit Program

June 17, 2022

Summary: The U.S. Department of Energy (DOE or the Department) invites public comment on this proposed amendment (Guidance Amendment) to the Guidance for the Civil Nuclear Credit Program dated April 19, 2022 (Guidance).[1] Specifically, in this Guidance Amendment, DOE seeks public comment on whether the eligibility criteria should be revised to eliminate the requirement that an applicant (Applicant) for credits (Credits) under the Civil Nuclear Credit (CNC) Program not recover more than 50 percent of a Nuclear Reactor's cost from cost-of-service regulation or regulated contracts.

Instructions for Comment Submission: Written comments on the proposed Guidance Amendment are requested on or before June 27, 2022. Written comments should be submitted via the following email address: *rfi-cnc@nuclear.energy.gov* Submit electronic comments in Microsoft Word or PDF file format and avoid the use of special characters or any form of encryption. Please include "Response to Proposed Guidance Amendment" in the subject line. Comments will be made publicly available on the CNC Program website.

For Further Information Contact: Requests for additional information may be sent to: *rfi-cnc@nuclear.energy.gov*.

Background:

(a) IIJA. The Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58, codified at 42 U.S.C. § 18753, also known as the Bipartisan Infrastructure Law, directs the Department to establish the CNC Program to prevent premature closures of Nuclear Reactors by providing financial support for existing Nuclear Reactors projected to cease operations due to economic factors. Among other criteria, Section 40323(a)(1)(A) states that in order to be certified, a Nuclear Reactor must "compete[] in a competitive electricity market."

(b) RFI. On February 15, 2022, the Department published a *Notice of Intent and Request for Information Regarding Establishment of a Civil Nuclear Credit Program* (RFI).[2] The RFI explained DOE's proposed structure of the CNC Program and included proposed descriptions of the requirements for owners or operators of Nuclear Reactors that are projected to cease operations due to economic factors to submit certification applications to become certified Nuclear Reactors and the issues relevant to the recapture requirement. Among other topics, the Department requested comment on the criteria that may be applied to determine whether a Nuclear Reactor competes in a competitive electricity market.

[1] *Notice of Availability of Guidance for the First Award Period of the Civil Nuclear Credit Program*, 87 Fed. Reg. 24,291 (Apr. 25, 2022). The Guidance is posted at https://www.energy.gov/ne/civil-nuclear-credit-program (hereinafter "Guidance").
[2] 87 Fed. Reg. 8570 (Feb. 15, 2022).

(c) Guidance. The Guidance for the first award cycle specifies that a Nuclear Reactor may demonstrate that it competes in a competitive electricity market during the 4-year period for which Credits are awarded (the Award Period) by showing that it "will receive 50 percent or more of total revenue from sources that are exposed to electricity market competition."[3] The Guidance states that those sources of revenue include:

"a. Sales of energy, capacity and/or ancillary services into organized wholesale markets;

"b. bilateral agreements with non-affiliated purchasers on competitively negotiated terms."[4]

The Guidance provides further that an Applicant for Credits that "recovers more than 50 percent of the Nuclear Reactor's costs from cost-of-service regulation or regulated contracts will not be deemed to compete in a competitive electricity market."

(d) Request for Clarification. By letter dated May 23, 2022, the Office of the Governor of California (the Governor) requested that DOE revise the Guidance in three respects. First, the Governor asks that the Department remove the limitation that a Nuclear Reactor will not be eligible for Credits if it recovers more than 50 percent of its cost from cost-of-service regulation or regulated contracts. Second, the Governor suggests that the Guidance could be clarified to specify that "operating losses include 'costs not recovered through cost-of-service-ratemaking.'" Third, the Governor asks that the Guidance "[e]xplicitly include grid reliability and support for state clean energy goals, as well as emissions reductions, as a rationale for extending operations."

The Governor explains the request to change the eligibility requirements related to cost-of-service regulation. The letter states that the 50 percent regulated rate recovery exclusion "is overly broad, especially where cost-of-service does not cover the costs for which funding is being sought." The Governor's letter explains that in the case of Diablo Canyon Power Plant (DCPP), in order to extend operations beyond the current license expirations, the owner "would incur significant transition costs over the next four years to perform necessary studies, invest in plant enhancements, and obtain licenses and permits." According to the Governor, because there is no existing cost recovery mechanism for those transition costs, they would constitute operating losses and are the kind of adverse economic factors threatening the continued operation of Nuclear Reactors that the CNC Program is intended to address.

Proposed Guidance Amendment:

DOE proposes for comment whether the Guidance at page 11 be revised as set forth below [italics indicate additions to the existing text of the Guidance; strikethroughs indicate deletions from the existing text of the Guidance].

2. The Applicant must demonstrate that the Nuclear Reactor competes in a competitive electricity market during the Award Period. An Applicant can do so by

[3] Guidance at 11.

[4] Guidance at 11.

showing that the Nuclear Reactor will receive *a material amount of its total revenue* ~~50 percent or more of total revenue~~ from sources that are exposed to electricity market competition. These sources include but are not limited to:

> **a. Sales of energy, capacity and/or ancillary services into organized wholesale markets;**
>
> **b. bilateral agreements with non-affiliated purchasers on competitive negotiated terms.**

~~Notwithstanding the amount of revenue a Nuclear Reactor receives as a result of clearing in energy, capacity or ancillary services markets, or through bilateral agreements, a Nuclear Reactor for which an Applicant recovers more than 50 percent of the Nuclear Reactor's cost from cost-of-service regulation or regulated contracts will not be deemed to compete in a competitive electricity market.~~

DOE declines to propose changes to the Guidance with respect to the other two requested clarifications contained in the Governor's letter. With respect to the definition of operating costs, the costs that the Governor refers to as "transition costs" are already included in costs as set forth in IIJA section 40323(c)(1)(A)(i) and as described in the "Economic Factor Guidance" beginning at page 14 of the Guidance. With respect to the request to include additional certification criteria, DOE recognizes the important role that nuclear power plants can play in maintaining grid reliability and helping states achieve clean energy goals. However, unlike the certification requirement that a Nuclear Reactor demonstrate avoidance of incremental air pollutants, the IIJA does not explicitly contemplate including grid reliability and support for state clean energy goals as a requirement for extending operations for purposes of the CNC Program.

Discussion:

The IIJA does not define "competes in a competitive electricity market." DOE in the Guidance for the first award cycle sought to identify the circumstances where a Nuclear Reactor bears market risk for recovery of costs that if not recovered could otherwise place the Nuclear Reactor at risk to cease operations due to economic factors. However, as explained in the Governor's letter, there are circumstances that were not contemplated in the Guidance where a Nuclear Reactor both receives cost-of-service rate recovery and also sells into an organized wholesale market, but nevertheless could still incur operating losses that threaten the ability of the Nuclear Reactor to continue operations. To address this scenario, the Guidance Amendment would provide a Nuclear Reactor with the opportunity to demonstrate that it has operating losses notwithstanding the percentage of cost-of-service revenues and market revenues.

The proposed Guidance Amendment would eliminate the exclusion from eligibility for an Applicant that recovers more than 50 percent of the Nuclear Reactor's cost from cost-of-service regulation or regulated contracts. This requirement was not included in the IIJA and DOE requests feedback as to whether the proposed Guidance Amendment better effectuates congressional intent of preserving economically distressed nuclear reactors while protecting taxpayer dollars. The proposed Guidance Amendment retains the provision that "compet[ing] in a competitive electricity market" includes making sales of energy, capacity, and/or ancillary services into an organized wholesale market and sales from bilateral agreements with non-affiliated purchasers on competitively negotiated terms, but requires those sales constitute a "material" amount of total revenues rather than a bright line "50 percent or more" of total revenues. DOE anticipates that materiality would mean that the revenues earned in the market and exposed to market risk are sizable enough to influence the economics and retirement decision. The Guidance already requires that an Applicant disclose all revenue sources, including revenue from "[r]etail rates or amounts collected through cost-of-service rate recovery,"[5] thus avoiding the possibility of over recovery.

DOE proposes that the conditions underpinning the determination whether a Nuclear Reactor "competes in a competitive electricity market" under the Guidance as revised would be consistent with the IIJA requirements that a Nuclear Reactor must "compete in a competitive electricity market" and must demonstrate it is projected to cease operations due to economic factors. If the Guidance is amended as proposed, a Nuclear Reactor must still demonstrate that it competes in a competitive market, including by showing that, the revenues earned by a Nuclear Reactor that are exposed to market risk are sizable enough to influence the Nuclear Reactor's economics and retirement decision. In addition, the Nuclear Reactor would be eligible for the award of Credits only with respect to operating costs that are not recovered from either cost-of-service rates or market revenues (i.e., the Nuclear Reactor's bid for Credits may not exceed its projected operating losses, which would exclude those costs recovered through cost-of-service rates). Moreover, the Guidance retains the requirement that the Nuclear Reactor affirmatively demonstrate that it is projected to cease operations due to economic factors.

Consistent with the purpose of the CNC as enacted by the IIJA, the revisions proposed in this Guidance Amendment would preserve the opportunity of a Nuclear Reactor that would otherwise close due to economic factors to demonstrate its eligibility for Credits, thereby allowing it to continue to operate and provide the energy, environmental, and economic benefits as contemplated by the IIJA, notwithstanding that it receives some portion (potentially a majority) of its revenues through cost-of-service regulation. The proposed Guidance Amendment is consistent with Congress's intent to provide taxpayer dollars only for amounts needed to keep Nuclear Reactors operational because Credits would be awarded for costs that are incurred for the continued operation of the Nuclear Reactor and that are not recovered in the Nuclear Reactor's cost-of-service rates or in the wholesale market. Taxpayers would be further protected because redemption of Credits will be subject to audit and annual adjustment to prevent over recovery in accordance with the Guidance and the Credit Redemption Agreement to be executed by successful Applicants. For example, if either (i) actual revenues of the Nuclear Reactor exceed the projected revenues on which the award of Credits was based or (ii) actual capital costs in the categories of Enhancement or Sustaining Capital Costs are lower than the amounts on which the award of Credits was based, the Credits available for redemption would be reduced to reflect the lower level of actual losses.[6] In addition, the Guidance retains the requirement that the Applicant must identify and quantify the Nuclear Reactor's operational and market risks that may affect future operating losses,[7] and DOE

[5] Guidance at 17.
[6] Guidance at 33.
[7] Guidance at 16.

would expect that an Applicant would not include in its operating costs for purposes of the CNC Program operational and market risks related to revenues it recovers through cost-of-service regulation or regulated contracts. The Guidance Amendment also retains the option that an Applicant may identify any changes to its existing commercial arrangements affecting the sources of revenues during the Award Period.[8]

The Guidance as revised by the Guidance Amendment is drafted to be generic, that is to treat all potentially eligible Nuclear Reactors fairly and on equal terms. The Guidance, if modified by the proposed Guidance Amendment, would not constitute a finding that DCPP is likely to be certified nor awarded Credits.

Request for Comments:

DOE seeks comments on all elements of this proposed Guidance Amendment. In addition, DOE seeks comment on the following specific questions:

1. If DOE revises the Guidance with respect to the criteria to determine whether a Nuclear Reactor competes in a competitive electricity market, should DOE revise the Guidance for a future award cycle, or amend the Guidance for the first award cycle?
2. If DOE amends the Guidance with respect to the criteria to determine whether a Nuclear Reactor competes in a competitive electricity market for the first award cycle, should DOE extend the deadline for submission of certification applications and sealed bids, currently July 5, 2022?

[8] Guidance at 11.