ACORE
AMERICAN COUNCIL ON RENEWABLE ENERGY

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Via Electronic Submission

Office of Associate Chief Counsel
(Passthroughs and Special Industries)
Internal Revenue Service
1111 Constitution Ave NW
Washington, DC 20224

ACORE Comments in Response to REG-119283-23: Notice of Proposed Rulemaking on the Section 45Y Clean Electricity Production Credit and Section 48E Clean Electricity Investment Credit

Dear Office of Associate Chief Counsel,

The American Council on Renewable Energy ("ACORE") is pleased to submit these comments in response to REG-119283-23, containing a Notice of Proposed Rulemaking ("Notice"), published by the U.S. Department of the Treasury ("Treasury" or "Department") and Internal Revenue Service ("IRS"), on the Section 45Y Production Tax Credit ("PTC") and Section 48E Investment Tax Credit ("ITC"), also referred to as the "technology-neutral credits".

ACORE is a 501(c)(3) national nonprofit organization that promotes affordable, reliable, and clean energy for all Americans. ACORE's membership spans the entire energy value chain including clean energy developers, institutional investors, corporate buyers of clean energy and environmental attributes associated therewithin, manufacturers, electric power generators, retail energy providers, and other stakeholders. ACORE member companies collectively hold $24.7 trillion in assets. In 2023, roughly 85 percent of the booming utility-scale U.S. renewable growth was financed, developed, owned, or contracted for by ACORE members.

ACORE is strongly supportive of the transition from the existing tax credit regime to the Sections 45Y and 48E technology-neutral credits for their ability to simplify the tax code and expand the universe of clean energy technologies eligible for these important incentives. ACORE commends Treasury and the IRS for reflecting earlier feedback from the clean energy sector in this Notice, applying straight continuity from the original PTC and ITC for non-combustion technologies; providing clarity for storage projects to qualify under Section 48E; clarifying that projects that start construction in 2024 (or prior) but are placed into service in 2025 may choose from either the technology-neutral or legacy ITC and PTC regimes; and requesting

further public comments and perform analyses for how clean combustion and gasification and pre-commercial technologies can qualify for the credits.

Our comments below offer recommendations to address other areas of improvement for these tax credits. We recommend modifications that would limit the applicability of problematic provisions under the Section 48 ITC proposed regulations for Section 48E, concerning the rules addressing the separate ownership of energy property, the aggregation of multiple properties, and application of the "80/20 Rule". We also recommend alternatives to the nameplate capacity threshold requirement for energy storage technologies ("EST"), suggest improvements to address the treatment of reimbursements for certain interconnection-related costs, and request further clarity on other less detailed areas of the Notice.

- **Applicability of Cross-Cutting Principles Under the Section 48 ITC Proposed Regulations to Section 48E**

Definition of "Integral Part" and Rules Concerning the Separate Ownership of Energy Property

ACORE appreciates that Treasury and the IRS are considering stakeholder comments on provisions of the Section 48 ITC proposed regulations that would limit the ability of third-parties, i.e., non-generation owners, to claim credits. It is critical that the regulations for Section 48E also address these limitations.

In the Notice's definition of "integral part,"[1] ACORE requests Treasury and the IRS to provide that components that are treated as integral to an "energy property" or "qualified investment facility" are eligible to be claimed by the taxpayer, regardless of whether the taxpayer also owns an interest in the energy property. Property is either integral to energy property or it is not, and the question of which company owns equipment is not relevant to the definition of integral property. The Notice's definition of integral property contradicts past precedent (e.g., IRS PLR 8341057, which found that co-owner tenants in common may elect separate methods of depreciation for their respective ownership share); the underlying statute, which specified no such restrictions; and certain elements contained within the Notice

[1] The Notice currently defines Integral Part as: "(3) *Integral part* — (i) *In general.* For purposes of the section 48E credit, a component of property owned by a taxpayer is an integral part of a qualified facility if it is used directly in the intended function of the qualified facility and is essential to the completeness of such function. Property that is an integral part of a qualified facility is part of the qualified facility. A taxpayer may not claim the section 48E credit for any property that is an integral part of the taxpayer's qualified facility that is not owned by the taxpayer."

itself, such as the allowance for multiple taxpayers to claim the Section 48E credit for shared power conditioning and transfer equipment proportionate to their ownership share.[2]

It is unclear why Treasury and the IRS would allow for separate ownership in certain contexts, such as for co-located property, but not for others. This limitation puts pressure on the distinction between the treatment of energy components that are functionally interdependent, to which the ownership rule does not apply, and those that are integral to energy property, to which the ownership rule does apply – creating confusion for taxpayers. It would also erroneously suggest that the sharing or separate ownership of integral property would not preclude access to the Section 48E credit for taxpayers that own a unit of energy property (such as in the case of a battery storage project co-located with a solar project), and could prohibit access to credits in situations where multiple taxpayers own different components that comprise an entire unit of energy property (such as offshore wind turbines and the requisite substation equipment).

Under a technology-neutral regime, Treasury and the IRS risk inadvertently disqualifying traditional business structures that companies use for scaling a wide universe of zero-carbon technologies. ACORE respectfully asks Treasury and the IRS to clarify that an integral part of energy property is ITC-eligible, regardless of whether the taxpayer also owns any interest in the functionally interdependent property.

Applicability of the Definition of "Energy Project" and Aggregation of Multiple Properties

The proposed regulations for Section 48E do not refer to the definition of "energy project" used to determine the basis of the legacy Section 48 ITC. Under the Section 48 "energy project" definition, multiple energy properties would be treated as one energy project if, at any point during their construction, they are owned by a

[2] See: "(D) Example 4. Co-located qualified facility and Energy Storage Technology owned by different taxpayers. X constructs a solar farm that is a qualified facility (as defined in § 1.48E-2(a)) (Solar Qualified Facility) and is co-located with an EST (as defined in § 1.48E-2(g)) (Energy Storage) owned by Y. The Solar Qualified Facility and Energy Storage share transfer equipment that is integral to both. X and Y each incur 50% of the cost of the transfer equipment. The fact that the Solar Qualified Facility and Energy Storage share property that is integral to both does not impact the ability of X to claim a section 48E credit for the Solar Qualified Facility or Y to claim a section 48E credit for the Energy Storage. When X and Y place in service the Solar Qualified Facility and Energy Storage, for purposes of computing the section 48E credit, 50% of the cost of the transfer equipment is included in X's basis in the Solar Qualified Facility and 50% of the cost is included in Y's basis in the Energy Storage."

single taxpayer and meet two or more of seven factors. By contrast, Section 48E appears to test each "qualified facility" and "energy storage technology" separately.[3] ACORE strongly supports this facility-by-facility approach, but we seek clarification from Treasury and the IRS that their intention is to allow taxpayers to determine Section 48E credits on this basis. Failure to provide this assurance could repeat the issues commenters have raised for Section 48 ITC guidance, as discussed below.

The aggregation of multiple energy properties via the term "energy project" is prudent in limited situations but should not be used to group together energy properties in disparate technology classes due to their co-location and ownership by the same taxpayer.

ACORE members have shared examples of clean energy projects that have been adversely affected by the aggregation principles and the seven-factor test outlined in the Section 48 ITC proposed regulations, expressing concern that the application of this sweeping interpretation to Section 48E could further disrupt investments by restricting traditional structures. In one instance, a company's large-scale, multi-phase solar and battery energy storage system ("BESS") projects, currently under development, would be treated as a single project despite separate interconnection requests, engineering, procurement, and construction ("EPC") contracts, offtake contracts, and project Limited Liability Companies ("LLCs"). This treatment would make it far more complicated to secure financing because of the multi-year construction period associated with assets of such size and benefits derived from the flexibility to move labor and equipment across construction phases as needed.

ACORE members have also described the heightened uncertainty with respect to the one-megawatt ("MW") threshold for compliance with prevailing wage and apprenticeship ("PWA") requirements and the 80 percent credit shortfall that could result if taxpayers wrongly interpret the seven-factor test. In another instance described by an ACORE member, a closely situated portfolio of small-scale clean energy assets is likely to be treated as a single project under this definition, which may result in six- or seven-figure labor compliance costs that would account for a major portion or exceed the total value of the assets themselves. This treatment would also nullify the 1-MW bright line that Congress put in place for low-output facilities.

Again, ACORE appreciates that Treasury and the IRS are still considering, and urges they swiftly adopt, a more practicable definition of "energy project" in the context

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[3] Such aggregation principles have historically not been applied in a PTC context.

of the Section 48 ITC. However, the relevance of this issue to the Notice on 48E is unclear, in the absence of confirmation that no such definition applies. The fate of projects, like those referenced above, depends heavily on affording taxpayers the flexibility to decide how or whether to aggregate multiple facilities, particularly those in disparate technology classes that enjoy distinct statutory eligibility, and should be determined accordingly.

- **Alternatives to the Nameplate Capacity Threshold for Augmentation of Qualifying EST and Reversal of the Proposed Application of the "80/20 Rule"**

ACORE commends Treasury and the IRS for outlining a clear pathway for energy storage technologies, including both hydrogen and thermal storage, to qualify under Section 48E. The Notice's definition of EST appears to be based exclusively on nameplate capacity, which is set at or above 5 kilowatt-hours ("kWh"). However, taxpayers often replace storage equipment, such as new battery modules, inverters, and enclosures, to manage the natural degradation of storage assets over time, prolonging the useful life of these projects, even if such improvements do not meet a 5-kWh threshold. Moreover, nameplate capacity of EST is typically defined when initial interconnection is approved, meaning that taxpayers who wish to claim the estimated expenditures of storage augmentation under Section 48E will need to modify the original interconnection agreement or oversize their assets before placing them into service. Both options present risk and additional costs. ACORE therefore requests that the Section 48E rules recognize the eligibility of storage augmentation beyond nameplate capacity and urges Treasury and the IRS to clarify that the estimated expenditures associated with augmentation of qualifying EST are fully eligible.

As this discussion is relevant in the context of existing assets, new components and capital improvements added to existing property, storage or otherwise, should not be subject to the "80/20 Rule," such as in the case of using new equipment to augment existing EST described above. Unlike in cases of retrofitted or refurbished property, wherein we agree that the application of the 80/20 Rule is appropriate to establish a new original placed-in-service date, we do not agree that the 80/20 Rule should apply to additions or modifications to energy property that are otherwise ITC eligible. ACORE requests that the longstanding precedent of authorizing capital additions or modifications to ITC-eligible property be upheld under Section 48E.

- **Treatment of Reimbursements for Certain Interconnection-Related Costs**

The Notice reflects statutory amendments, affirmed under the Section 48 ITC proposed regulations, that authorize taxpayers to claim amounts paid or incurred for certain qualified interconnection property, in connection with the installation of energy property that has a maximum net output of not greater than 5 MW. This includes an allowance to aggregate multiple facilities, so long as they are each individually below that threshold.

For those cases where the taxpayer funds the network upgrades and is then later reimbursed by the Transmission Owner, we urge Treasury and the IRS to avoid accounting for any reimbursements of interconnection-related expenses paid in later years to the taxpayer. If necessary, Treasury and the IRS could incorporate a recapture mechanism in cases where taxpayers receive a greater amount in reimbursements than was paid for the interconnection costs net of the credit.

ACORE also requests confirmation from Treasury and the IRS that taxpayers are authorized to claim qualifying interconnection costs recovered through Transmission-Owner Initial Funding ("TO funding"). In certain regional markets, the Transmission Owner funds the costs of interconnection upgrades for which a taxpayer is responsible, and the taxpayer then reimburses the Transmission Owner over a certain period, typically 20 years. Under such a TO funding agreement, the taxpayer typically must provide security in an amount equal to the full cost of interconnection costs and is typically responsible for all payments for the full term, regardless of whether the associated facility is placed into service or if the taxpayer defaults under the agreement.

ACORE requests confirmation that taxpayers with TO-funded arrangements may include the full amount of interconnection costs that a taxpayer's facility is responsible for as qualified interconnection costs that are eligible to be included in the basis of associated energy property, as of the date the energy property is placed in service, subject to meeting the other requirements for such inclusion.

- **Other Issues**

In addition to the substantive changes above, ACORE would appreciate further clarity in future guidance on other, less detailed elements of this Notice:

- Clarify the process for obtaining provisional emissions rates (PER), in particular the timing by which taxpayers can expect to receive an official

assessment via the National Laboratories and other involved experts. We respectfully urge Treasury and the IRS to prioritize certainty and expediency in this process. As appropriate, ACORE also encourages Treasury and the IRS, in partnership with the Department of Energy ("DOE"), to consider authorizing joint evaluations of similar PER requests, as well as leveraging information submitted under prior evaluations, to promote a more streamlined process.

- Clarify the process to establish emissions rates for future and emerging technologies. To avoid an overreliance on the PER process, we respectfully ask Treasury and the IRS, in partnership with DOE, to collaborate with industry stakeholders via roundtable discussions, individual meetings, and other regular forms of public-private engagement to examine the addition of future and emerging technologies to the annually published table (Annual Table) that sets forth the GHG emissions rates for types or categories of facilities. We also respectfully ask Treasury and the IRS to establish a safe harbor for taxpayers with ongoing transactions in the event of any changes to categories of facilities and corresponding GHG emissions rates listed on the Annual Table, with a clearly advertised cutoff date for the applicability of the prior iteration.

- Clarify the applicability of the "dual use" and "incremental cost" concepts to Sections 45Y and 48E. With respect to "dual use" equipment, clarify that the "75 percent cliff" for energy property with integrated storage does not apply.

Thank you for your consideration of these comments. ACORE strongly appreciates the partnership of Treasury and the IRS and their public service in setting forth expedient and workable tax regulations that set the stage for America's clean energy economy.

Please do not hesitate to contact me at hunter@acore.org with any additional questions you may have.

Sincerely,
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