UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY

Comments of the Electric Power Supply Association on Proposed Guidance Amendment for the Civil Nuclear Credit Program

Reference Number: DOE-HQ-2022-0006

June 27, 2022

I. INTRODUCTION

The Electric Power Supply Association ("EPSA")[1] respectfully submits these comments in response to the Proposed Guidance Amendment for the Civil Nuclear Credit Program ("Guidance Amendment" or "Amendment")[2] distributed as an invitation for public comment via email on June 20, 2022, by the United States Department of Energy ("Department" or "DOE").[3] The invitation requests feedback on whether the Department should revise the eligibility criteria set out in the April 2022 Guidance[4] for the Civil Nuclear Credit ("CNC") program. EPSA's comments are intended to aid the Department in the development of a transparent, objective, and fair certification process which is consistent with the intent of Congress. EPSA opposes the Guidance Amendment as proposed, for either the first or any future award cycles, and thus also opposes extension of the deadline for submission of certification submissions and sealed bids, currently due July 5, 2022.

The proposed amendment addresses one issue – whether the eligibility criteria set out in the Guidance for the CNC Program should be revised to eliminate the requirement that an applicant not recover more than 50 percent of its cost from cost-of-service regulation or regulated contracts. This

1 EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

2 U.S. Department of Energy Proposed Guidance Amendment for the Civil Nuclear Credit Program, (Issue date June 17, 2022).

3 Invitation for Public Comment: Civil Nuclear Credit Program ("Invitation"), distributed via email from NECommunications@nuclear.energy.gov on June 20, 2022.

4 U.S. Department of Energy Guidance for the Civil Nuclear Energy Credit Program ("Guidance"), (Issue date April 19, 2022).

proposed change responds to a letter from the Office of the Governor of California[5] requesting that DOE revise the program guidance in three ways[6] in order to address "the unique circumstances of [Diablo Canyon Power Plant]" which the letter describes as "slated for closure *in part* based on economic circumstances."[7] In the proposed Guidance Amendment, DOE explains that it declines to consider proposed changes with respect to two of the three requested revisions outlined in the Governor's letter. The amendment does propose to revise the eligibility criteria language which defines that a nuclear reactor participates in a competitive electricity market. The revised language strikes the reference to the recovery of at least 50% of total revenue from sources exposed to electricity market competition. Rather, the amended guidance would require a reactor to show that it "will receive a material amount of its total revenue from sources that are exposed to electricity market competition."[8]

EPSA submits the comments herein to oppose the change for eligibility in the First Award Cycle or any subsequent Award Cycles. Rather than effectuate Congress's intent in the Bipartisan Infrastructure Law,[9] this request, coming from one state to address the unique circumstances of one Nuclear Reactor in its jurisdiction, would contort a multi-billion-dollar federal program in order to ensure financial support for one Nuclear Reactor in the program's First Award cycle which is scheduled to close for applications in eight days.

II. BACKGROUND

EPSA is a fuel- and technology-neutral organization committed to preserving and promoting well-functioning competitive wholesale electricity markets. Our members own and operate all types

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5 Letter to DOE Secretary Jennifer Granholm Requesting Clarification to the Guidance issued by DOE for the First Round of the Civil Nuclear Credit Program Application, From the Office of the Governor, State of California, signed by Ana Motasantos, Cabinet Secretary ("CA Letter"), (dated May 23, 2022).

6 Guidance, p. 2, section (d).

7 CA letter, p. 2, emphasis added.

8 Amendment, p. 3.

9 The Infrastructure Investment and Jobs Act ("IIJA," or "Bipartisan Infrastructure Law"), Public Law 117-58, (November 15, 2021), Section 40323.

of electric generation resources, including two nuclear power plants in the competitive Texas electricity market. Furthermore, EPSA supports efforts to combat climate change through transparent, open, and nondiscriminatory competitive markets[10] in an affordable and reliable manner, such as an economy-wide price on carbon or a well-designed clean energy standard. These tools recognize the environmental benefits that all non-emitting generators, including nuclear, provide, and create revenue opportunities for those resources, thereby reducing the risk of closure of existing carbon-free resources.

In the absence of a national, market-based policy to address carbon emissions in the near-term, EPSA remains committed to competitive electricity markets which utilize fuel- and technology-neutral market mechanisms to procure and deliver energy, capacity, and ancillary services. While the CNC Program represents an out-of-market payment structure, EPSA acknowledges the intent of the program – as directed in the IIJA – is to provide federal credits to nuclear power plants located in competitive electricity markets that can show that they will cease operation due to economic factors. This focus strikes a balance between providing limited financial support to nuclear reactors that are truly at risk of closure and the preservation of vibrant competitive wholesale electricity markets that can, if designed properly, provide incentives to deploy the extensive resources necessary to meet the Administration's clean energy and decarbonization goals.

III. COMMENTS

In the furtherance of the decarbonization goals of the U.S. Congress and the Administration, the IIJA established the CNC Program based on the threshold requirement that a Certified Nuclear Reactor must "compete in a competitive electricity market."[11] However, the legislation did not

[10] https://epsa.org/about-epsa/our-principles/
[11] IIJA, sec. 40323 (a)(1)(a).

specify the eligibility requirements to determine that a nuclear reactor may be deemed to compete in a competitive electricity market. The Department collected extensive comment from industry and stakeholders on this issue in response to a Notice of Intent and Request for Information.[12] Pursuant to that substantial input, the CNCP Guidance established certification requirements as indicated in the IIJA to establish that an applicant will compete in a competitive electricity market during the Award Period. The Guidance set up two distinct requirements: (1) that a reactor receive 50% or more of total revenue from sources exposed to electricity market competition and, (2) the disqualification of any reactor that recovers more than 50% of its costs through regulated cost-of-service rates or regulated contracts. Neither standard should be adjusted. The first regarding competition is already a low threshold to deem a resource "competitive," but it is clear and quantifiable – to change it to a "material" finding creates a subjective standard that will inject uncertainty into the program. The second eligibility specification setting a cost-of-service threshold, while arguably overly high, ensures that eligible reactors are compared on similar grounds. Without this limitation, a mere "material" competitiveness finding could allow for certification of reactors that recover a significant portion of its costs from captive ratepayers, which is not the intention of the Program.

The existing criteria establishes an objective measurement for an applicant to demonstrate it faces economic pressure that may lead to its closure due to exposure to market risk and ensures a level playing field among applicants who rely on competitive markets for cost and revenue recovery. Nuclear reactors that are compensated through regulated cost-of-service rates or contracts face vastly lower levels of market risk and therefore should not be eligible to become a Certified Nuclear Reactor. To allow otherwise is inconsistent with the spirit of the Program, harms other

[12] Notice of Intent and Request for Information Regarding Establishment of a Civil Nuclear Credit Program, FedReg 87 FR 8570, (Published February 15, 2022).

applicants who seek program certification and available credits in either the same Award Cycle or those which come later, and inappropriately directs federal funds to correct the impacts of a poorly functioning centralized market and state policies.

Hence, the attempt to reform this extensive, multi-billion-dollar program to accommodate one particular Nuclear Reactor – Diablo Canyon Power Plant ("DCPP") – is both adverse to the intent and foundation of the program and would create a lasting distortion impacting most, if not all, other potential applicants. Notably, as acknowledged by the California Governor's office, DCPP could be eligible for the First Award Cycle which considers only those reactors that have already publicly announced their intention to cease operations permanently on or before September 30, 2026. As explained in the Guidance, limiting eligibility in the First Award Cycle directs credits to units most at risk of closure in the near term "while retaining Credits for future award cycles to assist as many additional Nuclear Reactors as possible that are projected to cease operation due to economic factors in a future period."[13] Thus, the level of awards granted in the first cycle will impact the amount and availability of awards for future cycles.

To contort the program to guarantee certification of a reactor that cannot pass what is in fact a minimal test for competitive status – a 50% threshold of revenue recovery – inappropriately and improperly tips the scales and harms all other applicants. In the DOE NOI-RFI seeking comments, the Department and many commenters acknowledge that economic factors may differ for existing nuclear reactors. Thus, the Guidance establishes a transparent and quantifiable test to support the finding that an applicant competes in a competitive market and thus faces certain verifiable market and economic risks. The California governor's request that the Department address the recovery of particular sets of costs focuses on an inappropriate and irrelevant metric – the CNC program is to assess the overall economic status of a competitive market reactor. The program will not and should

[13] Guidance, p. 10.

not focus on what individual costs are recoverable and which are not as it assesses the status of each applicant.

The proposed amendment not only loosens what is already a low-level threshold for this determination, but also establishes criteria which is overly subjective and open to interpretation. EPSA has grave concerns regarding the proposed language that an applicant show it receives "a material amount of its total revenue" from competitive sources to establish the Congressional direction that it competes in a competitive electricity market. While the 50% threshold established in the Guidance is not a strong "competitiveness indicator" in EPSA's view, there is merit in the clarity and objectivity of the requirement. The proposed change creates a subjective demonstration which injects uncertainty and potentially unfairness into the program writ large. For instance, it is foreseeable that what is considered "material" could change from year to year as the applicant pool changes, creating an obfuscated and moving threshold for applicants in future award cycles – arguably Congress initiated this program to insert *additional* certainty into the market where resources are under economic distress in the market. The Department should not relax this requirement as requested by the California Governor's office or as proposed in the amendment.

While a Certified Nuclear Reactor may receive some portion of its revenues through cost-of-service regulation, the congressional requirement that it competes in competitive electricity markets not only establishes a level of fairness regarding market and economic risk, but also protects federal taxpayers from subsidizing facilities which are already supported – or could be supported – by direct customers pursuant to regulated cost-of-service rates or contracts. Additionally, federal taxpayer protections should also apply to substituting federal funds for a poorly functioning centralized market or correcting the impacts of state policy choices that endanger the economic health of resources that provide reliability to the system and establish preferences that dictate winners and losers among state resources.

The "competitiveness test" included in the legislation and DOE's Guidance establishes a threshold standard for federal economic support – which protects against the substitution of federal taxpayer funds for ratepayer obligations just because the money is available. The circumstances of DCPP indicate that this could be a motivational factor in the Governor's request, as DCPP's owner and operator has not indicated an inclination to pursue the federal credits in order to keep the plant open beyond the expiration of its Nuclear Regulatory Commission operating licenses which expire on November 2, 2024 (Unit 1) and August 26, 2025 (Unit 2). DCPP's owner, Pacific Gas & Electric Company ("PG&E"), has ceased all efforts to renew DCPP's operating licenses, citing California state policy preferences and legislation as the reason to retire these facilities – not any dire economic factor or stress.[14] As indicated by numerous formal filings and correspondence, PG&E began the process of retirement several years ago. It is unclear whether the necessary efforts, processes, certifications, and licensing could be restarted at this point, or whether fuel or other operational assets could be procured on a timely basis.

To fundamentally alter the eligibility of the CNC Program at the behest of one state to support continued operation of one nuclear reactor that may not even seek certification for any available funding is a disservice to all concurrent or future applicants, and the taxpayers who are footing the bills. Further, the indication that the Department is willing to modify the eligibility

[14] PG&E Letter DCL-16-066 to the U.S. Nuclear Regulatory Commission, Dockets 50-275, OL-PR-80; 50-323, OL-DPR-82, (June 21, 2016), "Based on discussions with various stakeholders involved in these state approval processes, PG&E has reached an agreement in principle not to proceed with license renewal for DCPP. In support of the state's policy preference to meet California's future electricity needs with renewable generation resources, energy efficiency, or storage, PG&E will continue to operate DCPP until expiration of the current operating licenses in 2024 and 2025, for Units 1 and 2 respectively…. PG&E therefore requests that the NRC suspend activity on the DCPP license renewal application."

Joint Proposal of Pacific Gas and Electric Company, Friends of the Earth, Natural Resources Defense Council, Environment California, International Brotherhood of Electrical Workers Local 1245, Coalition of California Utility Employees and Alliance for Nuclear Responsibility to Retire Diablo Canyon Nuclear Power Plant at Expiration of the Current Operating Licenses and Replace it with a Portfolio of GHG Free Resources, (June 20, 2016). See p. 2, Para C: "After considering [many] factors…PG&E in consultation with the Parties has concluded that the most effective and efficient path forward for achieving California's SB 350 [legislative] policy goal for deep reduction of GHG emissions is to retire Diablo Canyon at the close of its current operating license period and replace it with a portfolio of GHG free resources."

requirements for the program to accommodate one unique circumstance – in the words of the California governor[15] – will inject uncertainty regarding the program looking forward to future Award Cycles. The proposed amendment also thwarts the establishing principle of the program – to support nuclear reactors at risk of closure due to economic stress and duress, which is not the case in this circumstance based on all available information.

IV. CONCLUSION

We appreciate the opportunity to provide our input on the Proposed Guidance Amendment. For the reasons cited above, EPSA opposes the amended language for the CNCP Guidance, and thus also opposes the extension of the deadline for submission of certification applications and sealed bids for the First Award Cycle, which is currently July 5, 2022.

Respectfully submitted,

/s/ *N.E. Bagot*

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15 CA Letter, p. 2, "I am writing to highlight some *circumstances that may be unique to DCPP* and to suggest a few minor adjustments to the April 2022 Guidance issued by DOE for this program to effectuate Congress's intent and the Department's objectives *while addressing the unique circumstances of DCPP*." (Emphasis added.)