



Tax Department

Duke Energy
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Internal Revenue Service
CC:PA:LPD:PR (Notice 2018-28)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Submitted electronically to: Notice.Comments@irs.counsel.treas.gov

Re: Comments in Response to Notice 2018-28, Initial Guidance Under Section 163(j) as Applicable to Taxable Years Beginning After December 31, 2017

Dear Sir or Madam:

Duke Energy Corporation (“Duke Energy”) is responding to the request for comments in Notice 2018-28, Initial Guidance Under Section 163(j) as Applicable to Taxable Years Beginning After December 31, 2017.

Duke Energy is an energy holding company headquartered in Charlotte, N.C. that is the parent company of an affiliated group of corporations that file a consolidated federal income tax return and operate in the United States. Its Electric Utilities and Infrastructure business unit serves approximately 7.5 million retail electric customers in six states in the Southeast and Midwest, representing a population of approximately 24 million people. The company’s Gas Utilities and Infrastructure business unit distributes natural gas to approximately 1.6 million customers in the Carolinas, Ohio, Kentucky and Tennessee. Its Commercial Renewables business unit operates a growing renewable energy portfolio across the United States. Duke Energy is a Fortune 125 company traded on the New York Stock Exchange under the symbol DUK.

We are pleased to have the opportunity to provide comments on issues we feel should be addressed in the forthcoming regulations under Section 163(j) of the Internal Revenue Code (the “Code”), as recently amended by P.L. 115-97, and we thank the Department of the Treasury (“Treasury”) and the Internal Revenue Service (the “IRS”) for considering our recommendations.

Our comments, which primarily consists of recommendations for addressing issues relevant to taxpayers¹ that conduct both a trade or business described in Section 163(j)(7)(A)(iv) (a “Regulated Utility Business”) and a trade or business that is not described in Section 163(j)(7)(A) (a “Non-Exempt Business”), are as follows:

¹ In the case of an affiliated group of corporations that file a consolidated tax return, the term “taxpayer,” as used in this letter, refers to the consolidated group (*i.e.*, treating all members of the group as a single taxpayer).



- **Properly Allocable Income and Expense** - With the exception of interest paid or incurred and interest includible in gross income, allow a taxpayer to identify its items of income, gain, deduction, and loss which are properly allocable to a Regulated Utility Business by reference to amounts reflected in its regulated books of account used for ratemaking purposes in determining amounts excluded from adjusted taxable income under Section 163(j)(8)(A)(i).
- **Asset-Based Approach to Interest Allocation** - Require a taxpayer, under the basic principles of Section 864(e) of the Code and the Treasury Regulations promulgated under Section 861 of the Code, to determine the portion of its interest paid or incurred on indebtedness properly allocable to a Regulated Utility Business (as well as the amount of interest includible in its gross income which is properly allocable to a Regulated Utility Business) on the basis of the amount of assets used in the taxpayer's Regulated Utility Business(es) ("Regulated Utility Assets") relative to its total assets.²

We believe this approach, based on the principle that money is fungible, and debt supports all the activities and property of a taxpayer, is appropriate for the most capital-intensive industry, the electric utility industry, which invests more than \$100 billion annually to build energy infrastructure.

In addition, we recommend that Treasury and the IRS adopt the following special rules for purposes of this allocation:

- Require the allocation to be made without regard to construction work-in-progress or any trusts established to fund specific liabilities (such as pension trusts and plant decommissioning trusts).
- Define "Regulated Utility Assets" to include the portion of a taxpayer's basis in a partnership interest (excluding debt) attributable to such partnership's Regulated Utility Business(es) (based on the partnership's Regulated Utility Assets relative to its total assets).
- Define "Regulated Utility Assets" to also include the excess of the price paid to acquire the stock of a corporation that conducts a Regulated Utility Business over the tax book value of the target corporation's total assets (reducing such excess ratably over a 15-year period beginning with the month of the acquisition).
- Require taxpayers to measure assets used in the allocation as if the taxpayer never claimed any special depreciation allowance under Section 168(k).

² We do not believe that a regulator's decision to impose or approve a debt to equity ratio on the capital structure of a Regulated Utility Business would provide a reasonable basis to make this determination, as was suggested by the comments provided by the New York State Bar Association to Treasury and the IRS on March 28, 2018.



- **Elective Treatment for De Minimis Non-Regulated Utility Assets** - For purposes of administrative ease on taxpayers and the IRS, provide an election that allows a taxpayer with Regulated Utility Assets that make up 80 percent or more of its total assets (as determined under the methodology described above) to treat all of its trades or businesses as a single Regulated Utility Business for purposes of Section 163(j). As an eligibility requirement, Treasury and the IRS should consider limiting the availability of this election to taxpayers that also make an election under Section 168(k)(7) with respect to all classes of property for any taxable year in which all of the taxpayer's trades or businesses are treated as a single Regulated Utility Business. We also suggest that Treasury and the IRS consider allowing this election to be made on a member-by-member basis in case of a consolidated group with Regulated Utility Assets that make up less than 80 percent of its total assets.
- **Regulated Utility Business Qualification** - Adopt rules similar to those that have been used to define public utility property under Section 168(i)(10) to answer the question whether a regulator has sufficient authority over a trade or business to qualify that trade or business as a Regulated Utility Business, and to distinguish between a Regulated Utility Business and a Non-Exempt Business that involves the furnishing or sale of electric energy.
- **Prospective Effective Date** - Provide an effective date that ensures the any future guidance is first effective for taxable years ending no sooner than 90 days after being issued, and allow taxpayers to use any reasonable methodology consistently applied to properly allocate interest before such effective date.

Thank you for considering our comments. If you have any questions or would like to discuss these comments further, please do not hesitate to contact Stephen De May at (704) 382-2620 or Stephen.DeMay@duke-energy.com.

Respectfully submitted,

A handwritten signature in black ink that reads "Steven K. Young".

Steven K. Young
Executive Vice President and Chief Financial Officer

A handwritten signature in blue ink that reads "Stephen G. De May".

Stephen G. De May
Senior Vice President, Tax and Treasurer

cc: Thomas West, Tax Legislative Counsel, Department of the Treasury
Brett York, Attorney-Advisor, Department of the Treasury