December 23, 2022

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2022-50)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2022-50: Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits; Notice 2022-51: Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements

Dear Sir/Madam:

On November 4, 2022, the Large Public Power Council ("LPPC") submitted comments in response to the two Notices (the "Notices") referred to above. We are submitting this follow-up letter to bring greater focus to two specific issues that are of significant and immediate concern to LPPC and its members: First, the treatment under the provisions of the IRA of the type of joint ownership structure used for many decades as a method for two or more entities to co-own electric generation projects. Second, we wanted to propose a specific approach related to an issue that we emphasized in our prior submissions regarding the application of the domestic content rules that would provide public power with certainty in planning and moving forward with projects. With respect to each of these issues, we believe that prompt guidance is needed in order for public power to move forward with energy projects that are eligible for direct payment tax credits under the IRA.

As a reminder, LPPC is a national organization comprising 27 of the nation's largest public power systems. LPPC's members are locally owned and controlled not-for-profit electric utilities committed to the people and communities we serve. LPPC advocates for policies that allow public power systems to build infrastructure, invest in communities and provide reliable service at affordable rates. From New York to California and Washington State to Florida, LPPC members provide reliable, low-cost electric service to over 30 million people. Our member utilities represent a cross section of the nation's utility industry, and own and operate 30,000 circuit miles of high

voltage transmission lines and over 71,000 MW of generation with a significant amount of renewables, fossil, hydro, efficiency and demand side management.

As we previously stated, public power has embraced the clean energy transition, with many LPPC members offering some of the cleanest energy generation portfolios in the country. Our members have invested heavily in new and innovative low-carbon technologies and plan to increase and accelerate those investments in the coming decade. LPPC members are setting nation-leading goals to decarbonize their generation portfolios, with several committing to be carbon-free by 2030 and 2035. It is expected that well over half of the generation resources of LPPC's members will be carbon-free by 2030.

LPPC's members are political subdivisions or tax-exempt organizations. As you know, under section 6417 of the Inflation Reduction Act (the "Act"), these types of entities are referred to as "applicable entities" and are eligible to elect to receive direct payments of many of the tax credits related to facilities that produce electric energy. For LPPC's members and other public power systems, this ability to directly obtain the federal tax subsidies for green energy facilities is an enormously significant change in the law that has been long sought by LPPC and will dramatically increase ownership of green energy generation by LPPC's members. Prior to the Act, because LPPC's members were unable to receive the available energy tax credits, nearly all of the green energy facilities that they acquired were privately owned through complex tax partnerships with the electricity sold to LPPC's members through power purchase agreements ("PPAs"). The ability under the Act to directly obtain the value of the energy tax credits is expected to enable LPPC's members to own their own facilities without having to forgo any of the benefits of the tax credits.

Executive summary. As set forth in detail below, we are requesting prompt guidance on the following:

- Clarification that co-ownership structures in which two or more entities each own a specified share of a single project are not treated as partnerships for IRA purposes if the co-owners elect under section 761 to not to be treated as partnerships. Consistent with long-standing tax guidance and decades of industry practice, this would enable each co-owner to determine its eligibility for direct pay credits under section 6417 and "regular" tax credits without impacting the other co-owners. The lack of clarification of this issue is already impacting projects involving applicable entities and the taxable entities and tax equity investors who will participate in these projects.

- Adoption of a safe harbor that would enable eligible entities to determine on the date that the contract with a third party to acquire or construct a project whether the project will satisfy the domestic content rules, without the risk of losing all or part of the tax credits due to events that subsequently occur. This type of safe harbor

> would enable LPPC's members and other entities to move forward with plans to own their electric resources without the risk that the tax credits could be lost due to the unavailability of project components domestically. The planning of large projects will be underway years before the commencement of construction of those projects and the risk that tax credits will not be available for projects that commence construction after 2025 is already of concern.

Detailed comments.

Domestic content. In our prior submission related to the domestic content rules, we focused on the rule under which, for projects of applicable entities that begin construction after 2025, the inability to comply with the domestic content rules will result in loss of the entire tax credit and related adverse economic affects. While this result is mandated by the Act, the implementation of the domestic content rules, including the timing of their application and the availability of the exceptions to the requirement, are critical to public power being able to plan for and take advantage of the tax credit provisions of the Act. Stated simply, unless there is clarifying guidance, from the time an applicable entity signs an engineering, procurement, and construction ("EPC") contract or orders substantial components of a project (such as solar panels) it will bear the risk of satisfaction of the domestic content rules and the potential loss of the tax credits representing of 40-50% of the project cost.

While we recognize that there are exceptions to the applicability of the domestic content rules including a waiver process, the lack of certainty as to whether these exceptions will apply (and the time it can take to complete the waiver process) will put LPPC's members and other applicable entities at such a significant risk that they may have to forgo ownership of eligible projects despite the clear goals of the Inflation Reduction Act. Although 2026 seems like a long way off, given the process that many large projects go through—planning, internal approval, the procurement process, etc.—there is not, in fact, all that much time to provide guidance on this issue.

We propose the adoption of a safe harbor that would enable an applicable entity to obtain certainty regarding the domestic content rule at the time that it enters into a contract. For example, if an EPC contract is executed for an entire project, compliance with the domestic content rule for the entire project could be determined at that time. If a contract only relates to a specific component of a project, such as steel, satisfaction of the domestic content rule for that component would be determined at the time that contract is entered into. More specifically we suggest the following safe harbor:

> At the time that an applicable entity enters into a binding contract, compliance with the domestic content rule may be determined for the project (or the components of the project that are the subject of the contract) if the following requirements are met:

(1) the applicable entity has obtained from an independent source (including the applicable contractor) information supporting the conclusion that the applicable entity will be able to obtain the components provided for under the contract that are necessary to satisfy the domestic content requirement on a timely basis and at a cost that is consistent with the provisions of the domestic content rule;
(2) the applicable entity and third parties engaged to provide the related components make commercially reasonable efforts to obtain those components in a manner that satisfies the domestic content rule; and
(3) any failure to satisfy the domestic content rule is the result of the unavailability of the related product, including availability but only at a time that would prevent project completion consistent with the terms of the bind contract to provide the related project.

We believe that this approach would facilitate the ownership of green energy facilities by LPPC's members and other applicable entities without adversely affecting the domestic content goals that are incorporated in the Inflation Reduction Act.

Co-ownership of projects. For many decades, the method under which the ownership of large electric generation projects with multiple owners has been structured is with the project participants owning the project as tenants in common, with each participant having the right to and taking its share of the power generated, and each participant, through its own system, separately selling and distributing this power to its own customers. The participants have no intent to form a joint venture, partnership, or association taxable as a corporation. Each participant contributes its share of fixed costs and variable generating costs. The fixed costs are determined by the co-tenancy agreement and do not vary for each participant, no matter how much power it transmits to its customers. The variable generating costs are based upon the amount of power a participant orders from the venture. Each participant provides for transmission of its share of power, which it then retransmits to its own customers. The participants elect, under section 761 (a) to have it excluded from the application of subchapter K, chapter 1, of the Code.

The IRS has issued guidance over many years that essentially treats each participant's undivided interest in a project structured in this manner is a separate interest. The IRS has stated that a particular undivided interest can be leased, or qualify for investment tax credits, or be financed with tax-exempt bonds, without regard to the status or use of the other co-owners. See Rev. Rul. 68-344, 1968-1 C.B. 569, Rev. Rul. 72-268, 1978-2 C.B. 10, Rev. Rul. 82-61, 1982-1 C.B. 13, and Treasury Regulation section 1.141-7(i) Example (1) (collectively, the "Existing Guidance"). Ownership of a substantial number of electric generating facilities has been structured in this manner, with co-owners including political subdivisions, electric cooperatives, and taxable corporations such as investor-owned utilities.

We believe that the law is clear that the tenancy in common/undivided interest structure described above would apply in the context of facilities owned by multiple participants each of which is eligible for tax credits, including direct pay credits under section 6417. Thus, for example, if one of the co-owners of a project that is eligible for PTCs or ITCs is a political subdivision that finances its share of a project with tax-exempt bonds, it would be eligible for direct pay tax credits (subject to a 15% reduction in the tax credits) and a co-owner that is not an applicable entity would be eligible for the tax credits based on its share of the project and without being impacted by the tax-exempt bonds that the political subdivision used to finance its share of the project. Although we believe that these are the results under existing law, public power systems have experienced some push-back on these conclusions from other industry participants who, as a result, are potentially unwilling to structure project ownership in this manner. They have expressed concern that the owners would be treated as a partnership in a transaction involving section 6417 and that the use of tax-exempt bonds by the political subdivision would result in a tax credit haircut for the other co-owners. These concerns are being expressed in transactions currently being planned in a manner that is affecting the structuring of those transactions and, for that reason, we request that clarifying guidance be issued on an expedited basis.

We appreciate your consideration of our suggestions. The LPPC would be happy to meet with you or your staff to discuss these issues in detail.

Sincerely,