ADVANCED ENERGY ECONOMY
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Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-51), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

November 4, 2022

Re: Notice 2022-51 (Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022)

To Whom It May Concern:

Advanced Energy Economy ("AEE") respectfully submits the comments herein in response to Notice 2022-51[1], *Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022* (the "Notice"). We appreciate the work of the staff at the Internal Revenue Service ("IRS") to issue the Notice and prioritize guidance that will facilitate broad use of the clean energy tax credits authorized, modified, and extended in the Inflation Reduction Act of 2022 (the "IRA"). We further appreciate the work of the staff of other federal agencies and administration officials specialized in clean energy finance and development to support the IRS's vital IRA implementation work.

AEE is a national association of businesses committed to making the energy we use secure, clean, and affordable. AEE is the only industry association in the United States that represents the full range of advanced energy technologies and services, both grid-scale and distributed. As we define it, advanced energy includes energy efficiency, demand response, energy storage, wind, solar, hydroelectric, nuclear, electric vehicles, and more. AEE represents more than 100 companies in the $240 billion U.S. advanced energy industry, which employs 3.2 million U.S. workers. Our member companies run the gamut of sizes, stages of development, business models, and technologies. They and others in the industry are and will continue to be at the forefront of the clean energy transition: developing projects, commercializing new technologies, and building the manufacturing facilities that will onshore more of our clean energy supply chain within our borders. As such, they and we have a vested interest in seeing clear and timely IRA guidance that will enable them to make the investments that the IRA is designed to incentivize.

[1] 2022-43 I.R.B. 331 (October 5, 2022).

In these comments, we request guidance and make recommendations on specific matters and questions contained in the Notice, as well as other items that are within the regulatory purview of the Department of the Treasury ("Treasury", "the Department") and the IRS. In preparation for submitting these comments, we worked with our member companies to learn what are the most critical questions and needs with respect to the below matters. The views and requests for clarification expressed below are representative of our membership as a whole but should not be interpreted as the view of any individual member company.

While we have endeavored to address the questions posed by Treasury and the IRS below with specificity and granularity where appropriate, there are several overarching themes that thread throughout our comments, and, at the outset, are worth highlighting as the Department deliberates upon implementation of the IRA.

First and foremost, AEE and its member companies appreciate the swift yet deliberate process upon which Treasury has embarked to inform guidance around the provisions covered by these notices. It is our hope that this process will produce clear, consistent, and stable guidance, by which we mean the guidance can be easily interpreted and applied ("clarity"), wherever possible it is consistent across project and technology types, and it is stable over time. Such clarity, consistency, and stability will maximize business investment, project deployment and, ultimately, the decarbonization of our electric grid, transportation system, and built environment—as is one of the express intents of the law. In the same vein, such clarity, consistency, and stability will serve to minimize risk and market uncertainty.

Uncertainty about whether projects or technologies are eligible for these incentives, or whether a project or technology will receive a credit one year only to see that revoked or clawed back subsequently, can have a chilling effect upon investment. Minimizing this "chilling effect" should be a significant priority for the Department. To that end, we would recommend that, in the process of issuing guidance, Treasury be explicit about whether such guidance is legally binding or not. We can envision a scenario wherein the Department issues guidance, upon which companies and investors act, only to revise that subsequently, and expose such parties to legal and financial risk. Although market actors will always bear some degree of risk, minimizing that with clarity, consistency, and stability in the *process* of developing and issuing guidance would be greatly appreciated. This is not intended to discourage the Department from issuing draft guidance—indeed, in a number of instances, such as guidance around apprentice and prevailing wage provisions, we would strongly encourage the Department to issue drafts for comment—but rather to encourage clarity in communications about the process being utilized and where the Department is in that process.

Second, AEE would encourage Treasury and the IRS to be flexible and inclusive in its interpretation of the law wherever possible. This overarching recommendation stems from AEE's fundamental outlook with respect to the development of a clean economy. We believe that the development of an American advanced energy economy and industry will require the involvement of a host of (often complimentary, even interconnected) technologies—there is no one "silver bullet" that will clean the grid, electrify

transportation, and decarbonize buildings. Moreover, some of the technologies that will be integral to achieving that future are still evolving or simply have yet to be invented. As such, we take a technology agnostic approach to the development of advanced energy markets and policies. It is our view this agnosticism is reflected in the policies Congress enacted in the IRA (particularly the technology neutral investment and production tax credits). In practice such flexibility and inclusivity would entail broadly interpreting system costs to include necessary upgrades and repairs for the installation of a distributed generation system or broadly constructing what constitutes a component or subcomponent of a given system, to cite just a few examples.

Third, and finally, AEE strongly supports the intent of the IRA to develop a robust domestic advanced energy supply chain in the United States. The development and expansion of domestic production of clean energy technologies, advanced grid components, electric vehicles, critical minerals, transportation electrification infrastructure, and energy efficient appliances and systems will produce a host of benefits for the country, including the revitalization of American manufacturing, sustained economic growth, and increased energy independence. This transition to domestic content will not happen overnight, however. To ensure it occurs consistently and effectively we would recommend that Treasury and the IRS provide reasonable flexibility around issues of domestic content. We believe such flexibility will ultimately result in greater demand-side utilization of these incentives, growing a stable market for domestic producers, while also ensuring our transition to a clean economy continues swiftly.

We appreciate your consideration of the recommendations and requests for clarifications discussed below and look forward to the issuance of proposed regulations and other guidance that will facilitate much-needed investment in facilities and property to reduce greenhouse gas emissions and overall advance the IRA's objectives of promoting high-paying domestic clean energy jobs and energy security. If you have any questions, please do not hesitate to contact us at hgodfrey@aee.net.

Sincerely,

Nat Kreamer
Chief Executive Officer
Advanced Energy Economy

Responses to Specific Questions in the Notice

.02 Apprenticeship Requirement

(4) Please provide comments on any other topics relating to the apprenticeship requirements in § 45(b)(8)(B) that may require guidance.

AEE appreciates the opportunity to provide feedback upon this topic, and we would echo the questions that a number of our member companies have raised. A range of the facilities, such as solar arrays, energy storage installations, and electric vehicle chargers, that must adhere the prevailing wage and apprenticeship requirements in order to be eligible for this credit enhancement would utilize credits (e.g. 45, 45Y, 48C, and 30C) that are applied one-time during the full lifecycle of that facility—i.e. the tax year when it is installed and made operational.

In these circumstances, we request clarification of whether the prevailing wage and apprenticeship standards are applicable only to the construction of these facilities, or do they likewise cover subsequent alteration and repair. To the extent that Treasury intends to include alternation and repair, we would respectfully request additional, detailed guidance on the process to capture this in the mechanics of a "one-time" credit.

.03 Domestic Content Requirement

(2) Sections 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) provide that manufactured products that are components of a qualified facility upon completion of construction will be deemed to have been produced in the United States if not less than the adjusted percentage of the total costs of all of such manufactured products of such facility are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States.

(a) Does the term "component of a qualified facility" need further clarification? If so, what should be clarified and is any clarification needed for specific types of property, such as qualified interconnection property?

The advanced energy industry is comprised of a diversity of technologies and generation resources. This poses a challenge to establishing single definition for "component of a qualified facility" that can be universally applicable. Consequently, AEE would simply advise the Department, as they consider such standards, to define this term broadly so that it captures ALL components involved in a given technology.

From our viewpoint, there is greater risk in defining the term too narrowly, and thus only considering a subset of components of a given technology—skewing this calculation and potential excluding otherwise eligible projects and technologies—than defining it too broadly. Moreover, a broad definition that is inclusive of a wider set of components should serve to encourage more domestic manufacturing on the whole by incentivizing the participation of a greater range of domestic manufacturers. At the same time,

such a broad definition will provide the industry with greater compliance flexibility as we work to develop more robust domestic supply chains over the course of this decade.

(b) Does the determination of "total costs" with regard to all manufactured products of a qualified facility that are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States need further clarification? If so, what should be clarified? Is guidance needed to clarify the term "mined, produced, or manufactured"?

AEE appreciates and supports the intent of policymakers to reduce our reliance on geostrategic competitors for these resources. As recent industry announcements demonstrate, we are working diligently to develop supply chains focused in the U.S. and among our trading partners. That said, the process of pivoting such supply chains will take years to accomplish. Thus, we would encourage Treasury to issue guidance that allows for reasonable flexibility in these requirements within the scope of the law. As such the phrase "mined, produced or manufacturers" should be interpreted to mean that, in the calculation of total cost, a component or resourced would qualify towards the domestic content percentage if it is either mined, produced or manufactured in the United States.

(c) Does the term "manufactured product" with regard to the various technologies eligible for the domestic content bonus credit need further clarification? If so, what should be clarified? Is guidance needed to clarify what constitutes an "end product" (as defined in 49 C.F.R. 661.3) for purposes of satisfying the domestic content requirements?

As noted in response to a prior question, the advanced energy industry is comprised of a diversity of technologies and generation resources. Thus, crafting a single definition of a "manufacturing product" that's universally applicable across technology types would prove difficult. That said, AEE would urge Treasury to be conservative in this definition—by which we mean, when in doubt, a product should be considered a component of a facility, rather than an "end product". This reduces the risk of imposing the total cost calculation upon an individual component or narrow set of subcomponents. As noted above, this more inclusive definition should serve to encourage more domestic manufacturing on the whole by incentivizing the participation of a greater range of domestic manufacturers. At the same time, such a broad definition will provide the industry with greater compliance flexibility as we work to develop more robust domestic supply chains over the course of this decade.

(4) Sections 48 and 48E have domestic content bonus amount rules similar to other provisions of the Code. Section 48(a)(12) has domestic content requirement rules similar to § 45(b)(9)(B) and § 48E(a)(3)(B) has domestic content rules similar to the rules of § 48(a)(12). What should the Treasury Department and the IRS consider in providing guidance regarding the similar domestic content requirements under § 48(a)(12) and § 48E(a)(3)(B)?

We would refer Treasury officials to our above comments in regard to domestic content considerations and flexibility. From a procedural standpoint, we would encourage Treasury to set consistent standards around domestic content across all relevant tax provisions. Given the ability of a number of technologies to utilize either the PTC or ITC, unequal treatment of domestic content between the two adds to complexity and may result in regulatory arbitrage.

(5) Please provide comments on any other topics relating to the domestic content requirements that may require guidance.

In addition to the guidance provided above, we would encourage Treasury to utilize 49 C.F.R. § 661 and related Federal Transit Administration ("FTA") Guidance letters, as well as other interpretations of these regulations, to guide in the implementation of domestic content provisions. Specifically, we would urge the Department to utilize the three-tiered process—domestic content is determined by first identifying the: (i) end product; (iii) components, and (iii) subcomponents—laid out therein. Under this process, components of an end product include those articles delivered and fully integrated into the qualifying facility. The whole is, in turn, considered as the manufactured product. This treatment of integrated systems is particularly important for clean energy generation paired with storage. In such circumstances, we would recommend, in line with the FTA guidance, that such integrated projects are considered a single qualifying facility for the purposes of determining domestic content

We would likewise encourage Treasury to clarify that a 'component of a qualified facility' is the same as the definition of "component' in 49 C.F.R. 661.3 and that a representation from the manufacturer certifying domestic content manufacturing is sufficient evidence for eligibility. In our opinion, the established processes detailed in this guidance are in keeping with the intent of the law and familiar to market participants, facilitating implementation. Moreover, given that this section is referenced in the law itself, Treasury would be on firm legal ground to utilize it in crafting related guidance.

.04 Energy Community Requirement

(7) Please provide comments on any other topics relating to the energy community requirement that may require guidance.

AEE welcomes and strongly supports the inclusion of project and manufacturing incentives tied to energy communities as part of the IRA. Encouraging advanced energy development in communities that have felt the most significant impact of the energy transition, as well as those that have been slow to recover from the COVID-induced downturn and Great Recession, should serve both to bolster our industry and the nation as a whole.

Although some of the criteria that are used to determine what constitutes an "energy community" are relatively well defined in code, others are not. Moreover, given that certain metrics used to determine such communities may vary year by year, it is possible that a community may be considered an "energy community" in one year, only to be disqualified the next. In order to ensure such variation does not

discourage investment, it is essential that Treasury clearly identify a fixed point in time, consistent across project development processes, wherein an investor or project developer may determine if a project is located in an "energy community". We recommend this be at the time of contract execution date. After that determination is made, and provided such a project is completed in placed in service within a reasonable period after that determination, it shall be eligible for the associated incentive henceforward. Moreover, should metrics vary such that the community ceases to be considered an "energy community" thereafter, this process should ensure that such a project is not subject to claw-back. For any type of energy community that is based on a type of facility closure (e.g., a retired coal plant), Treasury should establish a reasonable boundary distance around that facility (e.g., two miles) to ensure the facility and anything related to that facility (roads, outbuildings, etc.) are captured, as opposed to a singular latitude longitude dot on a map.

.05 Increased Credit Amount for Qualified Facility With Maximum Net Output of Less than 1 Megawatt

Section 45(b)(6)(A) provides for an increased credit amount in the case of any qualified facility that satisfies the requirements of § 45(b)(6)(B). One way that a qualified facility can satisfy the requirements of § 45(b)(6)(B) is if it is a facility with a maximum net output of less than 1 megawatt (as measured in alternating current). Similarly, § 48(a)(9)(A) provides for an increased credit amount in the case of any energy project that satisfies the requirements of § 48(a)(9)(B), and one way that an energy project can satisfy the requirements of § 48(a)(9)(B) is if it is a project with a maximum net output of less than 1 megawatt of electrical (as measured in alternating current) or thermal energy. Sections 45Y(a)(2)(B) and 48E(a)(2)(A) also provide similar rules. Does the determination of when a facility or project will be considered to have a maximum net output of less than 1 megawatt need further clarification? If so, what should be clarified?

AEE also welcomes additional clarification regarding when a facility or project is considered to have a maximum net output of less than 1 megawatt. For ease of administration, we would recommend that the size of the system as stated on the interconnection agreement be used to determine eligibility. In order to receive an increased credit amount, qualified facilities should be determined based on the maximum amount AC that they can send out to the grid (i.e., post-inverter for inverter-based resources). Facilities that include, for example, generation and storage assets that exceed 1 megawatt AC ("MWAC") could still qualify provided that their inverter(s) are not capable of sending out 1 MWAC or more. This can be an inverter configuration or can be a commercial limit based on an interconnection agreement with the interconnecting utility.