

Comment from American Public Power Association

Please find the attached comments from the American Public Power Association in response to 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.



November 4, 2022
Submitted electronically to www.regulations.gov

The Honorable Lilly Batchelder
Assistant Secretary
Department of Treasury
Washington, DC 20220

The Honorable Charles Rettig
Commissioner
Internal Revenue Service
Washington, DC 20224

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

Dear Assistant Secretary Batchelder and Commissioner Rettig:

The American Public Power Association (APPA) appreciates this opportunity to provide feedback in response to the Department of Treasury (Treasury) and Internal Revenue Service (IRS) Notice 2022-49 Request for Comments on Certain Energy Generation Incentives (Notice).

APPA is the national trade organization representing the interests of the nation's 2,000 not-for-profit, community-owned electric utilities. A public power utility is a "state utility" as defined under the Federal Power Act (16 USC 824q(a)(4)) and includes utilities owned or authorized by a state, utilities owned by a political subdivision of a state, such as a municipality or utility district, and joint action agencies formed to serve, collectively, other public power utilities.

Public power utilities are load-serving entities, with the primary goal of providing the communities they serve with safe, reliable electric service at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of the utilities with the long-term interests of the residents and businesses in their communities.

Public power utilities are in every state except Hawaii; collectively they serve more than 49 million people and 2.6 million businesses; and account for 15 percent of all sales of electric energy (kilowatt-hours) to end-use customers. Public power utilities serve some of the nation's largest cities, including Los Angeles, Jacksonville, Austin, and San Antonio. They also serve some of the smallest counties, towns, and villages. In fact, most public power utilities serve small communities. All but 160 of the nation's

2,000 public power utilities are considered “small entities” as defined under the Regulatory Flexibility Act, and roughly 1,300 have 10 or fewer employees.

APPA and its members worked for years with other stakeholders to make federal energy investment incentives available to all market participants, and strongly supported the direct pay tax credit provisions in the Inflation Reduction Act (IRA). Now, we look forward to working with the Administration and Congress to ensure that the IRA reaches its full potential in implementation. While there are myriad suggestions that could help guide this task, APPA’s comments today focus on issues that can be addressed through guidance, are important and time sensitive, and are uniquely important to public power utilities, or likely to be made only by public power.

For clarity, APPA’s comments repeat the specific questions to which they are responding, and the order follows the organization of the Notice.

.03 Domestic Content Requirement

(3) Solely for purposes of determining whether a reduction in an elective payment amount is required under § 6417, §§ 45(b)(10)(D) and 45Y(g)(12)(D) provide an exception for the requirements contained in §§ 45(b)(9)(B) and 45Y(g)(10)(B) (respectively) if the inclusion of steel, iron, or manufactured productions that are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent or relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

(a) Does the determination of “overall costs” and increases in the overall costs with regard to construction of a qualified facility need further clarification? If so, what should be clarified?

(b) What factors should the Secretary include in guidance to clarify when an exception to the requirements under section §§ 45(b)(10)(D) and 45Y(g)(12)(D) applies? What existing regulatory or guidance frameworks, such as the Federal Acquisition Regulation (FAR) and Build America Buy America (BABA) guidance, may be useful for developing guidance to grant exceptions under §§ 45(b)(10)(D) and 45Y(g)(12)(D)?

(c) Do the “sufficient and reasonably available quantities” and “satisfactory quality” standards need further clarification? If so, what should be clarified?

Treasury and the Internal Revenue Service will likely be inundated with myriad suggestions for guidance on the domestic content requirements. APPA would align itself with the suggestions made by the National Rural Electric Cooperative Association on this issue. However, our comments focus more broadly on two important and time sensitive goals: simplicity and certainty.

To qualify for direct payment, a qualifying facility owned by a public power utility must:

- Prove that the facility meets the domestic content requirement;
- Prove that inclusion of the domestic-content requirements would increase overall cost of construction of the qualifying facility by more than 25 percent; or
- Prove that relevant steel, iron, or manufactured products are not produced in U.S. in “sufficient and reasonably available quantities or of a satisfactory quality”; or

- Be a facility that has a maximum output of less than 1 megawatt (MW);

The 25 percent test may be too high of a bar to be of use in certain circumstances. Take, for example, a project qualifying for the base credit of 6 percent. If it meets the direct pay requirements, then it is eligible for a 2-percentage point increase to the base credit – to 8 percent – and is eligible for direct payment. However, it is possible that the cost of meeting the domestic content requirements will exceed 8 percent, but still not be high enough to exceed the 25 percent cost threshold. In such a situation, it would likely make more sense to contract with a third party that would not be required to meet domestic content requirements to qualify for a base credit. This is a perverse effect of the law: on the one hand, encouraging privatization where the cost of meeting domestic content requirements is more than 8 percent, but less than 25 percent; but on the other hand, encouraging direct ownership when it is too expensive (i.e., a cost increase of more than 25 percent) to build using domestic content. APPA would strongly encourage Treasury to consider options that would address the economic realities while still being consistent with congressional intent to encourage domestic-production and purchases. In any case, it is essential that guidance make these calculations as simple and clear to determine as possible.

Likewise, the 1 MW floor means that all but the smallest projects will be subject to the domestic content requirements. For example, a 1 MW facility operating at the national average 24 percent capacity factor would generate roughly 2.2 gigawatt-hours (GWh): enough power to provide a smaller (74,000 square foot) hospital, but nowhere near the 6 GWh needed to serve the average sized (200,000 square foot) large hospital. This cannot be helped in guidance, but shows that most new generation intended to be incentivized by these new provisions will be subject to the domestic content requirements if owned by a public power utility.

As a result, simplicity is critical in ensuring that transactions are not so beleaguered with paperwork and the need for bespoke legal guidance as to become uneconomic. Energy tax policy and municipal finance tax laws are complicated in their own right. The IRA adds to that complexity with the new domestic content, labor, and apprenticeship requirements, and then compounds that further with a new direct payment regime if a public power utility want to access these new incentives and help achieve Congress' objective of increasing clean power production and fewer harmful emissions in the environment.

In the face of this daunting prospect, public power utilities are still excited about the opportunity that the IRA provides to finally allow them to own and operate their own qualifying facilities. However, APPA asks Treasury and IRS to keep in mind simplicity and clarity at every step.

For example, one of our members that serves roughly 10,000 homes and businesses found that there was no law office in its entire state with the appropriate combination of expertise willing to begin to advise it on a transaction. As a result, the utility has had to hire an out-of-state firm at a quoted rate of \$1,300 per hour.

In addition, more than two-thirds of public power utilities have been in operation since World War II and more than half have been in operation for a century or longer. It is in public power's genetics to provide reliable and affordable power to its customers. They do not serve the community; they are the community. As a result, our members will not undertake these transactions without certainty that the economic objectives of the project are achievable.

APPA understands that Congress had specific policy goals in mind when it drafted each of these provisions. However, no goals will be met if a project never gets off the ground. Again, this is particularly important in the context of domestic content rules: meeting these requirements provides a 10 percent bonus for others; but, for public power utilities, rural electric cooperatives, and other tax-exempt entities, it is an existential test of whether they qualify for direct payment.

Thank you in advance for your consideration of these comments. If you have any questions, please feel free to contact me at jgodfrey@publicpower.org or via phone at (202) 467-2929. Additionally, APPA would be happy to meet with you or your staff to discuss these issues in detail.

Sincerely,

John Godfrey
Senior Government Relations Director