November 4, 2022

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2022-51)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

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 Sir/Madam:

In response to Notice 2022-51 (the "Notice"), the Large Public Power Council ("LPPC") is writing to respond to certain of the questions contained in the Notice.

Founded in 1987, 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.

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. These provisions of the Act 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 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"). Through the pricing of the electricity under these PPAs, LPPC's members obtained a portion of the tax subsidies but a significant portion of the value of the subsidies went to tax credit investors. These structures included other inefficiencies including that the public power system typically only had a fair market value option to purchase the related facilities at specified times under the PPA. The ability under the Act to directly obtain the value of the energy tax credits is expected to change all of this, with LPPC's members able to own their own facilities without having to forgo any of the benefits of the tax credits.

The LPPC is appreciative of Treasury and the IRS requesting input from the public on the issues arising under the Act and we recognize the enormous amount of work that is required to implement the energy tax provisions of the Act and the time-sensitive nature of the need for guidance. As with others, LPPC's members continue their review and analysis of these provisions of the Act and the impact on their energy resource plans. We are providing these comments in accordance with the November 4th deadline but note that further questions and suggestions may arise as our review continues and we hope to be able to provide further input to the Treasury and IRS.

Executive summary. As set forth in detail below, the most significant issues for LPPC under the Notice are as follows:

- Domestic content. There is no more significant issue for LPPC than the application of the rules related to the domestic content requirement. For LPPC the domestic content rules could ultimately mean the frustration of the goal of permitting tax-exempt entities to own renewable energy projects and receive direct payments of the tax credits as the inability to comply with the domestic content rules will result in loss of the entire tax credit for a project 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 in Treasury's hands and those issues are critical to public power being able to plan for and take advantage of the tax credit provisions of the Act.

- Documentation and substantiation of compliance. LPPC's members will, for the most part, construct and acquire their energy projects by contracting with a third party under an engineering, procurement, and construction contract ("EPC") or a similar arrangement. As a result, it will be the contractor under the EPC and its subcontractors, not the owner of the project, that will hire the bulk of the employees and acquire the iron, steel, and other project components. For this reason, it is critical that compliance with the prevailing wage, apprenticeship, and domestic content rules permit the project owner to rely on certifications and documentation provided by the contractor and its subcontractor and that it is those parties that bear the economic consequences when they agree to comply with these rules but fail to do so. This is consistent with the manner in which the application of the Buy America Act and other grant and loan programs operated by the federal government.

Detailed comments. Set forth below are the questions from the Notice that raise issues of concern to LPPC and LPPC's responses to those questions.[1]

.01. Prevailing Wage Requirement

(2) Section 45(b)(7)(B)(i) generally provides a correction and penalty mechanism for failure to satisfy prevailing wage requirements. What should the Treasury Department and the IRS consider in developing rules for taxpayers to correct a deficiency for failure to satisfy prevailing wage requirements?

As with the application of the other provisions of the Act that impact eligibility for receipt of tax credits, we believe that safe harbors should be provided that set forth a procedure under which the project owner would not be subject to penalties or loss of tax credits due to noncompliance, particularly where it is a third party contractor who is responsible for the noncompliance. Under the prevailing wage rules, correction of noncompliance requires that the shortfall to the worker be remedied plus interest plus a $5,000 penalty for each undercompensated worker. The safe harbor should enable the project owner to avoid the penalty portion if the related party has satisfied a reasonable specified procedure under which it had made a good faith effort to comply with the prevailing wage rules.

(3) What documentation or substantiation should be required to show compliance with the prevailing wage requirements?

Prevailing wage requirements apply under other Federal (and State) programs. For example, LPPC members that have received funding from FEMA have to comply with prevailing wage requirements and FEMA's rules set forth their requirements related to documentation and substantiation. The application of the Buy America Act is described in

[1] We have retained the numbering of the questions from the Notice.

the domestic content section below. These programs permit the reliance on certification and documentation provided by contractors and subcontractors that are built into the contracts. Similarly, some LPPC members enter into contracts where the contractor enters into a project labor agreement with the labor union that sets forth the applicable requirements. LPPC believes that in the context of the Act's tax credits, Treasury and the IRS should use existing Federal prevailing wage requirements related to documentation and substantiation, particularly those that energy industry participants are familiar with. As stated above, in applying any documentation or substantiation requirements, the rules should take into account that LPPC's members and other applicable entities will largely be relying on their contractors and subcontractors to comply with the requirements and provide necessary documentation to the applicable entity and the applicable entity will have to rely on that information in submitting claims for the tax credit. While it is reasonable to require the applicable entity to perform some review of the information provided, these entities cannot be expected to perform audits of that information or ferret out every misstatement.

.02. Apprenticeship Requirement

(2) Section 45(b)(8)(D)(ii) provides for a good faith effort exception to the apprenticeship requirement.

(a) What, if any, clarification is needed regarding the good faith effort exception?

We strongly support the inclusion of safe harbors under which the good faith effort exception would be satisfied rather than rules that rely solely on factors that support a showing of good faith. As with the prevailing wage and domestic content rules, public power will need to rely on certifications and information provided by their contractors in determining compliance with the apprenticeship requirement.

(b) What factors should be considered in administering and promoting compliance with this good faith effort exception?

As indicated above, we believe that safe harbors should be provided to enable applicable entities to satisfy the good faith exception to failures to meet the apprenticeship requirement. While factors that support satisfaction of the good faith exception are helpful, we are concerned that "factors" leave too much room for differing opinions between taxpayers and IRS agents. In particular, to the best of our knowledge, IRS agents are not experienced with enforcing laws related to apprenticeship and this could lead to audits of these rules imposing significant costs on public power systems and other applicable entities. In particular, we are concerned with IRS agents enforcing apprenticeship rules beyond computing whether the required number of hours of apprentice labor has occurred.

(3) What documentation or substantiation do taxpayers maintain or could they create to demonstrate compliance with the apprenticeship requirements in § 45(b)(8)(A), (B), and (C), or the good faith effort exception?

As stated above, we expect that LPPC's members will largely rely on contractors and subcontractors for the construction or acquisition of facilities that qualify for the applicable credits. As a result, it will be these third parties that will employ the apprentices needed to satisfy the requirements of section 45(b)(8)(A), (B), and (C). In these situations, applicable entities should be permitted to rely on documentation and representations provided by their contractors and subcontractors for purposes of satisfaction of the apprenticeship requirements and to demonstrate qualification for the good faith exception if the requirements have not been satisfied. We suggest the application of procedures similar to those that apply to the Buy America Act as described below. With respect to employees of an LPPC member that are involved in the procurement of a project that qualifies for applicable credits, the LPPC member would have to develop and retain its own records.

.03 Domestic Content Requirement

As described in detail later in this section, the application of the domestic content provisions to public power and other applicable entities is a critical issue. While taxable entities may lose out on the 10 percent bonus if the domestic content rules are not met, their risk is substantially less than that of tax-exempt entities. It is public power and other applicable entities that could face the loss of the entire tax credit on projects that they own and that, therefore, are most dependent on the rules for domestic content and waivers of the requirements. Such rules need to be clear, flexible, and reflective of the real world need to be able to engage in the planning, contracting, and acquisition of projects subject to these rules with the greatest degree of certainty that their projects will qualify for the tax credits.

As an example, assume that one of LPPC's members determines to move forward with a solar or wind project that it will own. After entering into a contract with a third party to build the project (under which the domestic content rules would be satisfied) with the LPPC member intending to obtain direct payment of investment tax credits, the LPPC member may issue long-term debt to finance the portion of the project's cost that wouldn't be covered by the ITC. Under the current application of the Buy America Act, the application for a waiver would typically be submitted during the process of sourcing materials and components for the project (not at the outset). Under this process, prior to the date on which the project is placed in service, it could become clear that the public power system will not be able to meet the domestic content rules, and as the owner it will face the loss of all of the ITC. To avoid that result, the owner will have to scramble to find a party to whom it can sell the project and then enter into a PPA with. That transaction could very well result in a significant cost to the public power system given changes in project costs and the fact that the buyers have the public power system somewhat over the barrel. Moreover, the public power system will have issued long-term debt for a significant portion of the cost of the project and will not likely be able to retire that debt (unless it had incurred higher interest costs by including an extraordinary redemption right to apply if the project was sold). If it is unable to sell the project, the public power owner will face an increased cost from having to pay for 100 percent of the project instead of 60 or 70 percent of the cost. The fact is that 2026 will be upon us sooner than we think and planning for projects that commence in 2026 even sooner than that. These potential outcomes create significant risk for public power. Given the length of the planning process for major renewable projects, LPPC's members need workable rules soon or endure major uncertainty as to whether they will ever see benefits of the Act.

(1) Sections 45(b)(9)(B) and 45Y(g)(11)(B) provide that a taxpayer must certify that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was produced in the United States (as determined under 49 C.F.R. 661).

(a) What regulations, if any, under 49 C.F.R. 661 (such as 49 C.F.R. 661.5 or 661.6) should apply in determining whether the requirements of section §§ 45(b)(9)(B) and 45Y(g)(11)(B) are satisfied? Why?

We believe that the IRS and Treasury should provide that rules under 49 C.F.R.661 related to determinations of compliance, such as 661.6, should be used in applying the domestic content rules applicable to the energy tax credits. These rules are known to contractors and subcontractors and effectively place the responsibility for compliance on the "right" party. Our understanding is that, generally, the prime contractor affirms that it is compliant with the Buy America Act ("BAA"). In order to do so, it generally asks in its subcontracts that its suppliers provide it with truthful origin information. If the component is one that is being used to comprise the domestic material on which the prime contractor's certification is based, the prime contractor could ask for both origin certification of BAA compliance. If there is a violation, there would be an investigation of where the violation occurred along the chain of origin. There can be indemnification provisions in those subcontract agreements that allows the prime contractor to rely on the subcontractor's representation, and if there is a misrepresentation by the subcontractor, that subcontractor can be independently be held liable for a false claim act or false statement violation stemming from a statutory violation if they had knowledge that the representation was false. These procedures seem designed to achieve the same results as the Act's domestic content provisions in a practical and reasonable mann

(b) What should the Treasury Department *and the IRS consider when determining "completion of construction" for purposes of the domestic content requirement? Should the "completion of construction date" be the same as the placed in service date? If not, why?*

Although we recognize that "placed in service" is used for a variety of purposes under the Internal Revenue Code, it is not a concept that has relevance to public power and many other applicable entities. For this reason, we suggest that applicable entities be permitted to elect to use either the placed in service date or another commonly accepted term (for example, the commercial operations date).

(d) What records or documentation do taxpayers maintain or could they create to substantiate a taxpayer's certification that they have satisfied the domestic content requirements?

We suggest that in drafting the guidance on the domestic contact rules that Treasury and the IRS look to and apply rules under existing laws that applicable entities and other taxpayers are familiar with. As stated, we understand that the BAA generally works on a self-certification system, where the relevant party must certify (under penalty) that it meets the requirements of the applicable regulations. The contracting officer in the related federal agency has the right to ask for more information. We understand that if additional information is sought, the agency will generally seek the contracts that demonstrate the origins of components and any certificate of origins received from the component's provider, as well as raw good invoices evidencing the origins of the components that were used in the production/manufacturing of that particular product. We believe that the same type of procedures as described above (along with customary record retention rules) should apply to the domestic content provisions applicable to energy tax credits.

Since LPPC's members will, for the most part, enter into contracts with third parties for the construction and acquisition of their projects, LPPC's members need to be able to rely on those contractors (and, to the extent required) their subcontractors to determine compliance with the domestic content rules (as will be the case with the apprenticeship and prevailing wage rules).

(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) (for failure to satisfy the domestic content rules) provide an exception for the various domestic content requirements for the tax credits 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?

The Act creates a new concept of "energy project" that applies to the domestic content requirement, including determining overall costs. It appears to be an open question regarding the application of the domestic content requirements: are they applied on an energy project basis (with a definition to be provided), or on a property-by-property (or facility-by-facility basis for the production tax credit). We are aware of a definition of "project" that is used for purposes of section 141(b)(4), related to application of the private activity bond test for so-called "output" facilities (including electric facilities), with regulations that define "project" contained in section 1.141-8(b). The difference in how broadly energy project is defined will affect the domestic content computations of the project and the portions thereof. Given the other complexities with regard to domestic content, we suggest providing taxpayers and applicable entities with flexibility in applying these rules. For example, it may make sense for a project owner to define the project by reference to what is included in the EPC contract.

The last issue is how to perform the domestic content calculations when an exemption for manufactured products is provided in the calculation. We suggest that the exempted product be excluded from the numerator and denominator.

(b) *What factors should the Secretary include in guidance to clarify when an exception to the domestic content 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)?*

As stated above, the domestic content rules are critical for public power being able to take advantage of the tax credits now available to applicable entities. The most significant aspect of these rules is for public entities to plan and implement the acquisition of projects with the assurance that they will not lose the credits for failure to meet the domestic content rules and the lack of applicable exceptions. In virtually every project that is eligible for energy tax credits, public power will have the option of owning the project and obtaining tax credits, an option that never existed before the Act, or having the project privately owned with the electricity sold to the public power system under a PPA. However, if public power entities cannot be assured that they will meet the domestic content rules or that an exception applies, it will be difficult and risky for those entities to plan to own their own resources.

As an example, assume that one of LPPC's members determines to move forward with a solar or wind project that it will own. After entering into a contract with a third party to build the project (and to satisfy the domestic content rules) and obtain investment tax credits, the LPPC member may issue long-term debt to finance the 60 percent of the project's cost that won't be covered by the ITC. If, prior to the date on which the project is placed in service, it becomes clear that the public power system will not be able to meet the domestic content rules, it will have to scramble to find a party to whom it can sell the project and then enter into a PPA with. That transaction could very well result in a significant cost to the public power system given changes in project costs and the fact that the buyers have pricing leverage over the public power system given the circumstances. Moreover, the public power system will have issued long-term debt for as much as 60 percent of the cost of the project and will not likely be able to retire that debt (or it would have had to incur higher interest costs by including an extraordinary redemption right to apply if the project was sold).

As described below, public power and other applicable entities need to know early in the process of planning a project whether the domestic content rules will apply. This concern extends to the applications of the exceptions to the domestic content rules. Based on current supply chain and other issues, we believe that it would be appropriate for Treasury to issue a blanket waiver of the rules until further notice. Even though the rules will only apply to projects that begin construction in 2024 and thereafter, the planning, contracting, and financing of those projects will start much sooner than 2024 and may have already begun and certainty is required.

As stated above, in terms of the more technical aspects of compliance with the domestic content rules, we suggest that Treasury apply the rules under the BAA.

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

We request clarification of these standards. For example, "reasonably available quantities" must take into account the timing aspect of availability. Steel that can be procured if sufficient quantities are available in 2028 for a project that needs to be completed in 2026 is not reasonably available. LPPC's members plan the acquisition of electric resources to meet the needs of their customers and a facility available in 2028 because that's when the required content is available domestically, is not an acceptable result, when the electricity is needed starting in 2026 .

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

As indicated above, the domestic content provisions are of the greatest importance to LPPC and other applicable entities. Importantly, the ability to satisfy the domestic content rules will largely depend on matters outside of the control of applicable entities since they will generally be relying on contractors and subcontractors to be able to satisfy the domestic content rules (including being able to procure domestic materials at a reasonable price).

We expect that the availability of domestic content at reasonable prices will vary over time, particularly if supply chain issues continue. For public power and other applicable entities it will be critical to be able to plan their projects with the ability to determine in advance whether they can satisfy the domestic content rules, the ability for the waiver process to work in a manner such that changes in pricing or availability do not result in a project not qualifying for applicable credits, and the ability for applicable entities to change their structures (for example, from governmentally owned to privately owned) until the date on which the project is placed in service.

The determination of whether an exception applies to the domestic content rules should be made at the time that the contract to construct or acquire a project is executed and throughout the period until the project is completed. Compliance with the domestic content rules could be impacted throughout that period if a portion of the iron, steel, or components becomes unavailable or increase in cost in a manner that causes the cost of the project to increase by more than 25 percent.

In applying the exceptions to the domestic content rules, Treasury should create a procedure under which published guidance is issued on an expedited timely basis so that the public is aware of the exceptions as quickly as possible. There should also be an expedited process for individual taxable entities and applicable entities can obtain transaction specific waivers.

We also request clarification of the application of the domestic content rule once a project has been placed in service.

.04 Energy Community Requirement

(1) Section 45(b)(11)(A) provides an increased credit amount for a qualified facility located in an energy community. What further clarifications are needed regarding the term "located in" for this purpose, including any relevant timing considerations for determining whether a qualified facility is located in an energy community? Should a rule similar to the rule in § 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines), the rules in 26 C.F.R. §§ 1.1400Z2(d)-1 and 1.1400Z2(d)-2, or other frameworks apply in making this determination?

Similar to the timing and planning issues that arise in connection with the domestic content rules, timing issues regarding the status of an area as an energy community require guidance. We recommend Treasury clarify that a project qualifies for the energy community bonus if the project is located in an area that satisfies the requirements in

45(b)(11)(B) at the commencement of construction. This will ensure that project developers that seek to invest in energy communities are not penalized when construction timelines are extended or delayed (for example, an area has dramatic increase in employment levels or the national unemployment rate rises at a rate faster than a specific area). Given that projects can take several years to construct, there is concern that changing employment rates will impact project feasibility. Similar issues could arise in the case of changes to census tracts.

We also suggest that Treasury put in place a procedure to permit areas outside the specific definition of energy community to qualify as such, perhaps through a private letter ruling process. For example, an area impacted by the closing of a coal mine or plant might not be the specific census tract covered by the energy community definition but might in fact be the nearby area most adversely affected by such closures.

(3) Which source or sources of information should the Treasury Department and the IRS consider in determining a "metropolitan statistical area" (MSA) and "nonmetropolitan statistical area" (non-MSA) under § 45(b)(11)(B)(ii)? Which source or sources of information should be used in determining whether an MSA or non-MSA meets the threshold of 0.17 percent or greater direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas, and an unemployment rate at or above the national average unemployment rate for the previous year? What industries or occupations should be considered under the definition of "direct employment" for purposes of this section?

Some industries and occupations that LPPC would like to see included as "direct employment" are:

- Gas distribution utilities
- Employees at pipeline companies and natural gas power stations and the contractors that serve them
- Oilfield services companies, including legal and professional services
- Segments of academic institutions focusing on fossil fuel extraction

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

We request that Treasury clarify that the 10 percent energy community bonus is additive so as to increase the available credits, as adjusted by other bonuses, by 10 percent.

Other Comments—Notice 2022-48
.02 Residential Clean Energy Credit (§ 25D):

(2) Section 25D(b)(2) provides that no credit is allowed under § 25D for an item of property described in § 25D(d)(1) unless such property is certified for performance by the non-profit Solar Rating Certification Corporation, or a comparable entity endorsed by the government of the State in which such property is installed. What information should the Treasury Department and the IRS consider in determining what constitutes a "comparable entity"

The comparable entity must be a certifier and standards developer for solar heating & cooling products whose ratings are used by the state or local government entities. Example in some cases may be IAPMO.

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,