November 4, 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

Dear Sir/Madam:

In response to Notice 2022-50 (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:

- For the reasons described below and in our submission on Notice 2022-51, eligible entities need to be permitted to elect to receive direct payments no earlier than the date on which a project is placed in service.

- Guidance is requested that "political subdivision" be defined similarly to the definition for tax-exempt bond purposes and to confirm the long-standing treatment of joint action agencies and co-ownership arrangements.

- Governmental entities should be permitted to receive direct payments on an expedited basis, including immediately after a project is placed in service for investment tax credits.

- The regulations should not impose special rules on eligible entities to protect against fraud and excessive payments that are not applicable to taxable entities.

- A safe harbor should be provided to enable eligible entities to avoid the imposition of the 20 percent penalty for excessive payments.

Detailed comments. Set forth below are the questions from the Notice (in italics) that raise issues of concern to LPPC and our responses.[1]

.01. Elective Payment of Applicable Credits (Section 6417)

(2) With respect to the Secretary's discretion to determine the time and manner for making an election under § 6417(a):

(a) What, if any, issues could arise when an applicable entity described in §6417(d)(1)(A) makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues?

We suggest that in the case of a governmental entity the required election should be made by the entity and retained on its books and records and then submitted with its claim for payment of the tax credit for the reasons described below. The rules should provide that the election need not be made until after the related project is placed in service. Other applicable entities are not required to make the election until such time as the tax return for the related year is due and governmental entities should not be required to make the election any earlier than other applicable entities.[2]

The second issue with respect to the making of such an election is who the appropriate person is to make the election for an applicable entity. In the tax-exempt bond area, which contains rules designed for and familiar to political subdivisions and many other applicable entities, section 1.150-2 contains rules related to an entity's intent to issue tax-exempt bonds for a project. Those rules provide for the adoption of a "declaration of intent" that can be made in any reasonable form, including issuer resolution, action by an appropriate representative of the issuer (e.g., a person authorized or designated to declare official intent on behalf of the issuer), or specific legislative authorization for the issuance of obligations. Another example can be found in section 1.149(e)-1, related to the information return on IRS Form 8038-G that issuers of tax-exempt bonds are required to file. Under those regulations, an authorized representative of the issuer must

[1] We have retained the numbering of the questions from the Notice.
[2] If it would be helpful for compliance purposes, we would be open to discussing a process under which an eligible entity notifies the IRS at an earlier time of a project that may elect direct payments under section 6417.

sign the form and must have the authority to consent to the disclosure of the issuer's return information, as necessary to process this return, to the person(s) that have been designated in Form 8038-G. We suggest that the IRS and Treasury take the approach used in either section 1.149(e)-1 or section 1.150-2 described above.

(5) With respect to the definition of the term "applicable entity" in § 6417(d)(1):

(a) What, if any, guidance is needed to clarify which entities are applicable entities for purposes of § 6417(d)(1)(A), and which taxpayers may elect to be 17 treated as applicable entities under § 6417(d)(1)(B), (C), or (D) for purposes of § 6417?

Political subdivisions. Section 6417 provides that applicable entities include political subdivisions and other tax exempt entities. Section 6417 seems intended to permit entities that do not pay tax to receive direct payments of tax credits and, in general, that entities that pay tax are ineligible for direct payments of tax credits. We believe that the guidance should follow this overriding policy. While all of LPPC's members themselves are either political subdivisions or entities that are exempt from tax, there will likely be areas of uncertainty. Although there is both caselaw and IRS published guidance on whether entities qualify as "political subdivisions," the law is not black and white and depends in part on whether an entity has sufficient sovereign powers (powers to tax, condemnation powers, and police powers). In addition, the tax law status of governmental entities is complex and somewhat confusing. Section 115 of the Code provides a tax exemption for income that accrues to a political subdivision, rather than a tax exemption for the entity as a whole. In other words, even an entity all of the income of which is tax exempt under section 115—which is normally the case--is not a "tax exempt entity". Existing tax law also provides that an entity that is an "integral part" of a political subdivision is tax exempt but the law on whether entities qualify as such is also somewhat uncertain. Finally, an entity can be classified as an "agency or instrumentality" of a political subdivision under the guidance in Rev. Rul. 57-128. Agencies and instrumentalities can be "integral parts" or can qualify under section 115. In contrast to other entities, political subdivisions are not eligible to create disregarded entities under the check the box regulations. These distinctions and uncertainties will cause concern particularly where, for example, political subdivisions form governmentally controlled affiliates (e.g., special purpose entities that are controlled by a political subdivision) to own particular projects.

We believe that Treasury has authority to issue regulations under which the various types of governmental entities described above are treated as applicable entities. Section 6417(h) provides authority for Treasury to issue regulations or other guidance "as may be necessary to carry out the purposes" of 6417. By analogy, section 103 provides that interest on obligations of a State or political subdivision thereof is exempt from tax. Section 1.103-1 expands this so that interest on obligations issued by or on behalf of any State or local governmental unit by constituted authorities empowered to issue such obligations are the obligations of such a unit is tax-exempt.

Based on our conversations with staff of the Senate Finance Committee who were involved in the drafting of section 6417, their intent was that this section was to be interpreted broadly with respect to the eligibility of governmental entities for direct payments and the provision was scored by the Joint Tax Committee on that basis. Based on all of this, the guidance under section 6417 should, like the guidance under section 103, be drafted to cover the various types of governmental entities that are described above as long as the entity (or the income related to the project for which the credit is claimed) is exempt from tax. We note that this type of guidance would provide significant assistance to other types of governmental entities beyond public power.

<u>Joint action agencies</u>. We also note that several of LPPC's members and other public power systems are formed as "joint action agencies." A joint action agency is a political subdivision formed to own projects for its multiple governmental members. For example, a joint action agency might be formed with 10 cities in a state as its members with the joint action agency acquiring a solar project and the 10 cities acquiring varying various interests in the projects, typically through power purchase agreements. Under the related person rules applicable to governmental entities under section 1.150-1, the members would not usually be treated as related to the joint action agency given that each member's interest in the agency is relatively small.

(b) What types of structures are anticipated to be used by applicable entities, and taxpayers who have elected to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D), when seeking to apply § 6417(a)?

LPPC's members are likely to own their qualifying projects using varying structures. First, a public power system may own all of a project directly or a through a special purpose entity (an "SPE") created solely to own that project. LPPC's members and other participants in the energy sector routinely own large projects through co-ownership structures under which each entity owns an undivided interest in the project (and each elects not to be treated as a partnership for tax purposes). Under this structure, each co-owner is treated as owning a separate portion of the project (for example, a 40% interest in the project and not a 40% interest in a partnership that owns the project).

Although it is rare for public power systems to enter into partnership arrangements with other entities, we request clarification that in the case of a partnership a partner that is an applicable entity should be permitted to receive its share of the credits as a direct payment under section 6417.

(7) Section 6417(d)(3)(A)(i)(I) provides that, in the case of any government, or political subdivision, described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), any election made by these applicable entities under § 6417(a) must be made no later than such date as is determined appropriate by the Secretary. What factors should the Treasury Department and the IRS consider when providing guidance on the due date of the election for these applicable entities

The issue that could arise for applicable entities making an election under section 6417(a) (the "Election") is the potential for a change in plans. For this reason it is critical that the rules permit the Election to be made as late in the process of building as project as possible, specifically, as late as the date on which the project is placed in service. There are a variety of situations that could arise in which an applicable entity plans on owning a project and making the election where during the course of building that project it becomes necessary for the project to be owned by a taxable entity that enters into a power purchase agreement with the applicable entity. In particular, as described in detail in our comments with respect to Notice 2022-51, the domestic content requirements could compel an applicable entity to change its plans in this manner. For projects that begin construction after 2025, applicable entities will face the possibility of receiving none of the tax credits if the domestic content rules are not satisfied. In comparison, the consequences to a taxable entity that does not satisfy these rules are relatively modest. With the long-lead time needed to structure and complete a project, it is not difficult to imagine issues with satisfaction of the domestic content rules arising during the development of a project. If an applicable entity has to choose the ownership structure before the project is at or near completion, it could make it difficult for those entities to make the Election because of concerns that the tax credits may not materialize due to domestic content rules or other issues.

In addition, we request clarification that a single election is all that is required in the case of production tax credits that would be paid over a number of years.

(8) Section 6417(d)(4)(A) provides that, in the case of any government, or political subdivision described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), the payment described in § 6417(a) is treated as made on the later of the date that a return would be due under § 6033(a) if such government or subdivision were described in § 6033 or the date on which such government or subdivision submits a claim for credit or refund at such time and in such manner as the Secretary provides. What factors should the Treasury Department and the IRS consider when providing guidance to clarify the timing and manner of a payment made by these governments or political subdivisions?

In contrast to taxable entities, tax years and tax return deadlines have no real relevance to political subdivisions. Political subdivisions should be eligible to direct payments of ITCs as soon as the project is placed in service. Obviously production tax credits for a year cannot be paid until after year end but once that occurs, political subdivisions should be eligible to receive the direct payments. In many cases the payments of ITCs will be used to retire interim borrowings and PTC payments used to pay ongoing debt service on borrowings for the related facilities. Any delay in receipt of the direct payments will have a direct cost to political subdivisions and other applicable entities. For these reasons, we urge the Treasury and IRS to provide applicable entities with an ability to obtain the direct payments as soon as they qualify for the related credits. If necessary, the rules could provide for a tax return that an applicable entity could, in filing the return, effectively elect an earlier due date than otherwise required.

Most of LPPC's members and many other political subdivisions and section 501(c)(3) organizations issued Build America Bonds ("BABs") in 2009 and 2010. Under the BABs program, taxable bonds were issued and issuers were entitled to receive direct payments from the IRS to subsidize the interest expense on the taxable bonds. While this was generally a good program, one recurring problem has been delays in the payments by the IRS to issuers of the BABs. These delays occurred both during the early months of the pandemic as well as at other times. At times these delays were significant and meant that issuers of BABs had to wait for months to receive the direct payments with no effective means of resolving the delays other than waiting. This experience makes it critical that the direct payment provisions of the Act be handled by the IRS through an effective and timely process and that applicable entities that do not receive timely payments have designated contacts at the IRS with the ability to quickly resolve the delays. Finally, as with BABs, the payments under section 6417 should not be made as "offsets" to other amounts owed by applicable entities.

(9) For purposes of preventing duplication, fraud, improper payments, or excessive payments under § 6417, what information, including any documentation created in or out of the ordinary course of business, or registration, should the IRS require as a condition of, and prior to, any amount being treated as a payment made by an applicable entity under § 6417(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required? Should the IRS require the same documentation or registration as a condition of, and prior to, any amount being treated as a payment made by both an applicable entity as well as a taxpayer who is treated as an applicable entity after making an election under § 6417(d)(1)(B), (C), or (D)? Should the IRS require the same documentation or registration for all applicable credits? If not, how should the information or registration differ between applicable credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive payments under § 6417?

LPPC believes that the same requirements related to documentation, registration, etc. that have long applied to the energy tax credits available to taxable entities should apply to applicable entities. Our understanding is that those entities claim the energy tax credits on prescribed IRS forms and that they are not required to submit any additional documentation or registration with the forms in order to claim the credits. Of course, like those taxpayers, applicable entities should be required to retain documentation that supports their eligibility for the credits but we believe that eligible entities, particularly governmental entities, are if anything less likely to engage in fraud or improperly claim credits than other taxpayers. As far as claims for excessive credits, the 20 percent penalty that can be imposed creates a significant incentive for eligible entities to be careful and conservative in claiming credits and we expect that most of these entities will obtain the advice of lawyers and/or accountants in connection with filing their claims. In short, we do not believe that eligible entities should have any greater compliance burden than entities that are not eligible entities and we are especially concerned with any requirements that would result in delays in the payments to be made pursuant to section 6417.

(10) What, if any, guidance is needed to clarify the application of the excessive payment provisions of § 6417? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6417(d)(6)(B)? What, if any, guidance is needed to calculate the excessive payment amount under § 6417(d)(6)(C)?

LPPC's members, like nearly every other governmental entity, have always been careful and conservative in complying with federal tax laws and are expected to follow the same approach with respect to direct payments of tax credits. In connection with direct payments of tax credits and the potential for excessive payments, it is also important to note that LPPC's members and other governmental entities have never been responsible for tax compliance related to tax credits as they have never been eligible for those credits. As a result, both the long-standing requirements (for example, determination of basis, when a project is placed in service, etc.) and the new ones are all new to governmental entities. It is therefore critical that the risk of a 20% penalty being imposed not be so great as to dissuade LPPC's members and other applicable entities from taking advantage of the direct payment tax credits.

For these reasons, we believe that it is very important that Treasury and the IRS not just identify factors to be taken into account for purposes of the waiver of the 20 percent penalty but that they provide safe harbors enabling applicable entities to follow procedures that will, absent unusual circumstances, protect them from imposition of the 20 percent penalty. Governmental entities do not employ experts in the federal tax law and, in the limited situations where federal tax issues arise, rely on almost entirely on tax lawyers and other consultants to assist them in complying with the related rules. As our comments to Notice 2022-51_indicates, with respect to the prevailing wage, apprenticeship, and domestic content rules, LPPC's members will have to rely on their contractors and subcontractors to provide them with the related records to establish compliance with those rules. Overall, an applicable entity that exercises good faith in its efforts to determine the amount of the direct payments should not be at risk of the 20 percent penalty being imposed. Further, if an excessive payment results from misstatements of contractors, subcontractors, or other third parties, the tax laws provide the IRS with the ability to penalize those parties rather than the applicable entity. Based on these factors we suggest that a safe harbor be established under which the 20 percent penalty will not be imposed if the following conditions are satisfied:

(1) With respect to the prevailing wage, apprenticeship, and domestic content rules, an applicable entity obtains records from its contractors and subcontractors that set forth compliance with those rules (and the applicable entity makes a good faith effort to comply with those rules with respect to its own employees and purchases);
(2) With respect to other matters affecting eligibility for, and the amount of, the direct payment tax credits, the applicable entity obtains and relies upon opinions of qualified attorneys or accountants; and

(3) The applicable entity performs reasonable diligence with respect to the above-described matters.

In the case of small projects, we suggest a simplified safe harbor process.

(11) For purposes of § 6417(g), what, if any, guidance is needed to clarify the application of § 50 for credit recapture and basis adjustments to investment credit property?

As LPPC's members and other governmental entities are not subject to income tax, no guidance is required related to basis adjustments for projects that receive energy tax credits. With respect to recapture, the rules should take into account that governmental entities do not file tax returns. If an event requiring recapture of credits occurs with respect to a governmental entity, the reporting and payment of the recapture amount should be consistent with the rules applicable to taxable entities (that is, no reporting or payment due until a tax return would be due for the related calendar year). We note that governmental entities are subject to somewhat analogous rules for tax-exempt bond purposes under section 1.141-12, under which noncompliance after a tax-exempt bond was issued can require that the bond issuer take action to preserve the tax status of the bonds and such action may require a payment or notice to the IRS.

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,