Comment from Power Company of Wyoming, LLC

The Power Company of Wyoming, LLC submits the attached comments 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).

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VIA EMAIL

November 9, 2022

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

Re: Notice 2022-51

To Whom It May Concern:

The Power Company of Wyoming, LLC ("PCW") is developing the Chokecherry and Sierra Madre Wind Energy Project (the "CCSM Project"), an over 3,000 MW capacity wind farm located south of Sinclair and Rawlins in Carbon County, Wyoming. The CCSM Project will ensure a reliable, competitively priced supply of renewable electricity that is unmatched in the West. This output will help America reduce greenhouse-gas emissions, diversify energy sources and meet growing demand for renewable energy. At the same time, the wind project will generate hundreds of good jobs, millions of dollars in tax revenue and other economic benefits. Work on the CCSM Project has been ongoing since 2016. The CCSM Project is expected to begin commercial operation after 2024. P.L. 117-169 (the "Inflation Reduction Act" or the "Act") created Sections 45Y and 48E of the Internal Revenue Code of 1986, as amended. In connection with the Project, a number of issues under these provisions arise that PCW believes should be addressed by the Internal Revenue Service (the "Service") and the U.S. Department of Treasury ("Treasury") in addition to those issues raised by the Service and Treasury in Notice 2022-51.

1. Beginning of Construction[1]

Section 45Y(a)(2)(B)(ii) provides that, if the construction of a qualified facility begins prior to the date that is 60 days after the Secretary publishes guidance with respect to the "prevailing wage" requirements of section 45Y(g)(9) and the "apprenticeship" requirements of section 45Y(g)(10), the applicable amount (before inflation adjustments) for claiming the clean electricity production credit will be 1.5 cents. A similar rule in section 48E(a)(2)(A)(ii)(II) sets the applicable percentage under section 48E to 30 percent. This is paralleled by rules in sections 45(b)(6)(B)(ii) and 48(a)(9)(B)(ii). We refer to all of these as the "60 Day Rule."

[1] PCW also submitted comments pursuant to Notice 2022-49 with respect to beginning of construction requirements as they relate to the credit phase-out provisions found in sections 45Y(d) and 48E(e).

The Service has specified how to determine the beginning of construction under section 45 and section 48, before their amendment by the Inflation Reduction Act, in Notice 2013-29 and the notices that clarify and/or modify that notice and in Notice 2018-59 and the notices that clarify and/or modify that notice. While not directly relevant, the Service also set out how to meet the beginning of construction requirement under section 45Q in Notice 2020-12, which follows the same basic approach as Notice 2013-29 (as clarified and modified) and Notice 2018-59 (as clarified and modified) (collectively, the "Begun Construction Notices").

The Service and Treasury should make clear that the same tests for determining whether construction has begun in those notices apply for purposes of the 60 Day Rule. Many taxpayers, including PCW, have expended significant sums and taken significant development risk in beginning the construction of projects, including the CCSM Project, to ensure that those projects qualified as having begun construction. If the Service and Treasury were to change the tests or requirements for beginning construction, it could mean that the projects that are in the midst of construction might no longer be considered to have begun construction. Further, the rationale for prior begun-construction tests and the 60 Day Rule are the same (i.e., to ensure that certain provisions of the Code apply to projects that are actually underway and not to all projects for all time).

While we urge the Service and Treasury to provide guidance that the 60 Day Rule uses the same begun-construction tests as under the Begun Construction Notices, we also urge the Service and Treasury to address gaps and ambiguities and issues in those tests.

One issue that should be resolved involves breaks in continuity. The Begun Construction Notices provide that, for construction to have begun, there must be continuous efforts or continuous construction (the "Continuity Test"). See Section 4 of Notice 2021-41. There is a "continuity safe harbor" to satisfy this test that applies for a certain number of years (depending on when the "physical work test" or "five percent safe harbor" was used, whether federal lands or offshore wind is involved and whether the Department of Defense is involved). However, outside that continuity safe harbor, the determination of the Continuity Test is a facts and circumstances test. There are excused disruptions in section 4.02 of Notice 2016-31 and section 6.03 of Notice 2018-59, but these do not make clear whether night-time is an excused disruption or whether weekends or State or Federal holidays (or the day after Thanksgiving) are excused disruptions. The Service and Treasury should make clear that "continuous" does not require work after "normal" business hours (i.e., a 40-hour work week)(though this should also not require work on the project every second during the 40-hour work week), on weekends, or on State or Federal holidays (or the day after Thanksgiving).

The Service and Treasury should also address what happens if a project has a disruption that may cause a failure of the Continuity Test. In such a circumstance, the work that was completed on the project may have been completed before the "prevailing wage" requirements and the "apprenticeship" requirements (the "PWA Requirements") were law and likely were completed on the presumption that the PWA Requirements do not apply to the project. As such, the Service and Treasury should state that, if a project otherwise would have begun construction prior to the date that is 60 days after the Secretary publishes guidance with respect to PWA Requirements but subsequently fails the Continuity Test, the PWA Requirements will not apply with respect to any construction work on the project prior to failing the Continuity Test but, if the PWA Requirements guidance has been published more than 60 days before work commences

again on the project, the PWA Requirements will only apply to the work on the project after work re-commences.

Notice 2021-5 provides that the continuity safe harbor for an "Offshore Project" or "Federal Land Project" will be satisfied if the taxpayer places the project into service within 10 calendar years of beginning construction. A "Federal Land Project" is defined in section 4.02 of that notice as one where more than 50 percent of the project will be placed in service on Federal Land, "as determined by relative value or relative area." As PCW and its counsel has previously discussed with the Service and Treasury, it is unclear how "value" and "area" are to be determined and the Service and Treasury should clarify these measurements.

The Service and Treasury have expanded the continuity safe harbor on multiple occasions due to macro-economic and social factors beyond the control of project developers, such as COVID-19, supply chain issues, Putin's war on Ukraine, etc. These factors continue to plague project developers and we urge you to again expand the continuity safe harbor due to these factors.

2. Subcontractors

The PWA Requirements are found in sections 45(b)(7) and (8) and section 48(a)(10). Those PWA Requirements are then incorporated by provisions that say that "[r]ules similar" to those provisions apply under sections 45Y and 48E. See Section 45Y(g)(9) and (10) and sections 48E(d)(3) and (4).

The "prevailing wage" requirements apply to laborers and mechanics employed by "the taxpayer or any contractor or subcontractor." Likewise, the "apprenticeship" requirement is, in part, measured by the total labor hours worked by the taxpayer and work performed by "any contractor or subcontractor." Another part of the "apprenticeship" requirement requires "Each taxpayer, contractor, or subcontractor who employs 4 or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility shall employ 1 or more qualified apprentices to perform such work." Further, a "qualified apprentice" is defined as an individual employed by the taxpayer or by any contractor or subcontract and is participating in a registered apprenticeship program.

The "prevailing wage" requirements make direct reference to the Davis-Bacon Act by its reference to subchapter IV of chapter 31 of title 40 of the United States Code. In the Department of Labor regulations under the Davis-Bacon Act (29 CFR Part 5, section 5.2), the "construction" of a building or work is defined to mean work done "at the site thereof" and defines the "site of the work" as the physical place where the building or work will remain and, if a site is established specifically for the performance of the contract or project, any other site where a significant portion of the building or work is constructed. Further, fabrication plants, batch plants, etc. of a commercial or material supplier which are established by the supplier before opening of bids and not on the site of the work are not part of the site of the work, even if operations for a period of time may be dedicated exclusively (or nearly so) to the performance of a contract.

The Service and Treasury should adopt a similar limitation on the PWA Requirements as that included in the Department of Labor regulations. While it may be that subcontractors of any tier are included in "subcontractor" for purposes of the PWA Requirements, taxpayers should be required to show compliance with the PWA Requirement (where applicable) only as to those engaged in construction, alternation or repair on or at the "site of the work." Thus, taxpayers should not be required to show compliance with the PWA Requirement at suppliers or vendors. For example, for a wind facility, if the PWA Requirements are applicable, the work at the site of the wind facility should be completed in compliance with the PWA Requirements, but the taxpayer should not be required to ensure compliance with the PWA Requirements by its supplier of wind turbines or other materials that are manufactured offsite.

3. Prevailing Wage and Benefits

Section 45(b)(7)(A) provides that a taxpayer satisfies the prevailing wage requirements to qualify for an increased credit amount if the taxpayer ensures that laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, in the construction of a qualified facility and, in some cases, the repair or alteration of such facility, are paid wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor in accordance with the Davis-Bacon Act (subchapter IV of chapter 31 of title 40 of the United States Code). Similar rules apply under Sections 48(a)(10), 45Y(g)(9), and 48E(d)(3).

The Davis-Bacon Act requires that certain federal construction contracts "shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics," and that minimum wages must be based on prevailing wages as determined by the Secretary of Labor. 40 USC § 3142. "Wages," "scale of wages," "wage rates," "minimum wages," and "prevailing wages" include, generally, (1) the basic hourly rate of pay and (2) the rate of contribution or costs paid by a contractor or subcontractor for benefits such as "medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the forgoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying the costs of apprenticeship or other similar programs, or for other bona fide fringe benefits…." 40 USC § 3142(2). Further requirements regarding contributions for benefits are found at 29 CFR §§ 5.25-5.29.

These prevailing wage provisions and others in the Davis-Bacon Act provide an adequate reference point in applying the prevailing wage requirements set forth in Sections 45(b)(7)(A), 45Y(g)(9), and 48E(d)(3). We suggest that the Service and Treasury adopt rules similar to those in the Davis-Bacon Act. The Service and Treasury should allow taxpayers to rely upon the "wage determinations" referenced under 29 CFR § 5.30, as displayed at www.sam.gov, to determine the prevailing wage and benefits rates in a specific county. The Service and Treasury should adopt a similar means of accounting for the benefits paid as to employees in determining prevailing rates for purposes of Sections 45(b)(7)(A), 45Y(g)(9), and 48E(d)(3). In short, the Service and Treasury should follow the procedures and definitions in the Davis-Bacon Act regarding prevailing wages and benefits.

4. Department of Labor Determinations

Section 45(b)(7)(A) references one or more determinations to be made by the Secretary of Labor with respect to the prevailing wage requirements, but it is unclear exactly which items are to be determined by the Secretary of Labor. Specifically, section 45(b)(7)(A) states that, generally, to meet prevailing wage requirements, laborers and mechanics "shall be paid wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located *as most recently determined by the Secretary of Labor*, in accordance with subchapter IV of chapter 31 of title 40, United States Code." (Emphasis added.) Section 45(b)(7)(A) could be read such that the Secretary of Labor's determinations apply only as to the prevailing rates, or only as to "the locality in which [the qualified] facility is located." It could also be read such that the Secretary of Labor's determinations apply as to whether the work performed is "of a similar character" as work for which the Secretary of Labor has established prevailing rates. The definitions of "construction," "alteration," "repair," "laborer" and/or "mechanic" might be determinations to be made by the Secretary of Labor. What wages are considered paid could also be a Secretary of Labor determination. Finally, section 45(b)(7)(A) could be read such that the Secretary of Labor's determinations apply as to all of the above.

Section 45(b)(7)(A) should be read such that the Secretary of Labor's *wage determinations* govern. These determinations list prevailing wage and benefit rates for each county in the United States by "construction type" (i.e., "heavy," "highway," or "residential"). The Service and Treasury should clarify the specific wage determinations, available at www.sam.gov, that will apply. This would mean that the locality of the facility (as determined by the taxpayer and the Service) should be matched up to the localities for the Secretary of Labor's wage determination and that those wage determinations should set the prevailing wage. However, the Service and Treasury should either clarify the specific categories of laborers and mechanics that apply to renewable energy construction, repair or alteration or should work with the Secretary of Labor to begin making clear wage determinations of which categories of laborers and mechanics apply in a renewable energy construction, repair or alteration, including clear delineation of what is a "laborer" and what is a "mechanic."

Determinations of the wages paid and what constitutes construction, repair or alteration should be made by the Service and Treasury. The former (determinations of the wages paid) should be determined, in the first instance by the taxpayer and, if necessary, on audit by the Service. The latter requires clear definitions from the Service and Treasury.

The Service and Treasury should also issue guidance permitting taxpayers to obtain facility-specific rulings from the Service on the PWA Requirements after the initial generalized guidance has been issued. The Service gains important insight into the issues that arise for taxpayers in applying the generalized guidance from taxpayer-specific rulings so that the Service and Treasury may address common issues. Taxpayer-specific rulings also allow taxpayers to obtain certainty. The Act specifying that certain determinations are to be made by the Secretary of Labor should not impact the Service being the agency tasked with making taxpayer-specific rulings (including as to prevailing wage determinations).

5. Prevailing Wage Correction and Penalty Mechanism

Section 45(b)(7)(B) provides a correction and penalty mechanism for taxpayers that claim increased credit amounts but fail to satisfy the prevailing wage requirement under Section 45(b)(7)(A). If, for example, a taxpayer pays laborers or mechanics less than prevailing wages for the construction of a qualified facility, it will be deemed to have paid prevailing wages if it subsequently pays those laborers or mechanics the difference between the amount paid and the amount required to be paid as prevailing wages, plus 6 percent interest, and pays a penalty to the IRS (which can be multiplied by ten in cases of intentional disregard). Section 45(b)(7)(B)(iv) states that, if the Service makes a final determination that a taxpayer failed to satisfy the requirements of Section 45(b)(7)(A), the ability to make corrective payments does not apply unless payments are made on or before the date which is 180 days after the date of the final determination. Similar rules apply under Sections 48(a)(10), 45Y(g)(9), and 48E(d)(3).

It is unclear when this correction and penalty mechanism may be used. The Service and Treasury should clarify that the corrective payments described in Section 45(b)(7)(B) can be made at any time before the date that is 180 days after the date of a final determination that the taxpayer failed to pay prevailing wages and specify that such payments may be made within that time period even after a Service-initiated audit has begun or the Service has proposed to deny tax credits claimed under Sections 45, 45Y, 48, or 48E.

6. Apprenticeship and Labor Hours

Section 45(b)(8)(A) provides that a taxpayer satisfies the apprenticeship requirements with respect to the construction of any qualified facility if the taxpayer ensures that not less than the applicable percentage of the total labor hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) with respect to such facility is, subject to applicable apprentice-to-journey worker ratios published by the Department of Labor, performed by qualified apprentices. The required applicable percentage of total labor hours depends on when construction begins for the qualified facility. See § 45(b)(8)(A)(ii).

It is not clear from the Act how to define "labor hours" worked by apprentices. For example, such term could be limited to hours apprentices spend on the job actively constructing the qualified facility, or it could include hours spent in safety training, off-site job training, and similar activities. Although the Department of Labor does not appear to have a rule directly on point, the regulations at 29 CFR Part 29 (i.e., implementing the National Apprenticeship Act) suggest that one way for an apprenticeship program to be eligible for approval by and registration with a registration agency is to require at least 2,000 hours of "on-the-job learning." See 29 CFR § 29.5(b)(2)(i). These regulations also define an "apprenticeable occupation" as one that "would require the completion of at least 2,000 hours of on-the-job learning to attain." 29 CFR § 29.4(c). "On-the-job learning" is not defined in the regulations, but the preamble indicates that apprenticeship programs are generally required to provide for "at least 2,000 hours of *actual* on-the-job learning…." 29 CFR Vol. 73, No. 210 at 64408 (emphasis added). While this suggests that the Department of Labor's "labor hours" should mean hours of actual, on-the-job work performed by apprentices, it does not address when "learning" occurs "on-the-job."

The prevailing wage requirements in the Act indicate that "labor hours" should mean hours of on-site work. As noted above, the "prevailing wage" requirements make direct reference to the Davis-Bacon Act, the regulations under which note that "construction" means work done on a particular building or "at the site thereof" and defines the "site of the work" as the physical place where the building or work will remain. 29 CFR § 5.2. So, for purposes of calculating the applicable percentage used to determine whether apprenticeship requirements are met, total labor hours should include only hours spent on "at the site" of the qualified facility.

Trainings at the site, including as to the nature of the facility, how to safely perform the work, how to accomplish the tasks needed, etc. are critical aspects of the construction, repair or alteration of the facility. The Service and Treasury should not specify what trainings do or do not count, as that would lead to the Service and Treasury guiding the trainings that occur. Rather, all trainings "at the site" (which, as in the Department of Labor rules, includes certain off-site occurrences) should be included in the hours worked by apprentices and others.

The concept of on-site construction hours should also be considered in defining the total labor hours worked by individuals "employed by the taxpayer or by any contractor or subcontractor." See § 45(b)(8)(E)(i). "Labor hours" is not limited to hours worked by employees of the taxpayer or a contractor or subcontractor *specifically on the qualified facility at issue*. It could be that a contractor works on many projects at one time and employs many workers across multiple potentially qualified facilities owned by different taxpayers. The definition of "labor hours" should be narrowed to include only those worked by employees of the taxpayer or those of a contractor or subcontractor "at the site" of the qualified facility at issue.

Section 3.02(1) of Notice 2022-51 asks for comments as to the factors to be considered regarding the appropriate duration of employment of individuals for construction, alteration, or repair work for purposes of the apprenticeship requirement. While the number of hours worked by apprentices and employed persons are important to the apprenticeship requirement, the duration of employment (i.e., how long from hiring to separation from service) should not be relevant. Whether an employee or apprentice comes on site for one day or the entire duration of the construction and whether the employee or apprentice was employed before construction commenced or after construction completes should all be irrelevant to the apprentice requirement, and the Service and Treasury should make clear that the hours worked (including as to trainings, as discussed above) should be counted "at the site" (as discussed above) regardless of the duration of employment.

7. PWA Requirement Documentation

The PWA Requirement provisions do not contain guidelines describing what documentation or substantiation taxpayers could maintain or create to demonstrate compliance with PWA Requirements. The Service and Treasury specifically raised this issue and asked for comments thereon in Notice 2022-51 (sections 3.01(3) and 3.02(3)).

The Service and Treasury should adopt regulations indicating that, in order to demonstrate compliance with PWA Requirements, a taxpayer need only keep detailed internal records of (1) wages paid to laborers and mechanics employed by the taxpayer itself in the construction, alteration, or repair of a qualified facility, including copies of the wage determinations issued by the Department of Labor used in calculating payment of such wages, and (2) any apprentices hired directly by the taxpayer and the number of labor hours worked by such apprentices as compared to total labor hours worked on the construction, alteration, or repair of qualified facilities.

The Service and Treasury should also adopt regulations indicating that a sworn statement or other certification from a contractor, including as to all subcontractors of that contractor, that the contractor, and its subcontractors, met the PWA Requirements is sufficient, where applicable, for purposes of documentation or substantiation showing that the taxpayer is meeting the PWA Requirements. Absent actual knowledge that such statement or certification is false, taxpayers should not be required to obtain or retain payroll records (i.e., as to wages paid or hours spent or where or what work occurred) from contractors or subcontractors. Further, supervision or inspections of the site and the work being done or of the contractor's offices or records should not be deemed to create knowledge as to the accuracy of such statement or certification unless the taxpayer had actual knowledge from any such supervision or inspection.

8. Worker Classifications

The PWA Requirement provisions do not define "laborer," "mechanic," or "journeyworker." As noted above, section 45(b)(7) regarding prevailing wage requirements references the Davis-Bacon Act, the regulations under which define "laborer or mechanic" to include:

> at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term laborer or mechanic includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.

29 CFR 5.2(m). This definition is adequate for purposes of ensuring compliance with the PWA Requirements, and the Service and Treasury should adopt it in full.

Power Company of Wyoming LLC

The regulations implementing the National Apprenticeship Act define "journeyworker" as:

> a worker who has attained a level of skill, abilities and competencies recognized within an industry as having mastered the skills and competencies required for the occupation. (Use of the term may also refer to a mentor, technician, specialist or other skilled worker who has documented sufficient skills and knowledge of an occupation, either through formal apprenticeship or through practical on-the-job experience and formal training.)

29 CFR 29.2. The Service and Treasury should adopt this definition of "journeyworker" for purposes of implementing the PWA Requirements. The Service and Treasury, however, should clarify that this definition applies regardless of the work title or other proficiencies that a worker has determined, and that the titles or descriptions used for certain workers will be indicative of satisfying the definition. For example, this definition of "journeyworker" should be interpreted to include a "master" worker (i.e., a master electrician) because the definition includes workers who have "mastered" certain skills and competencies.

9. Registered Apprenticeship Program

Section 45(b)(8)(E)(ii) defines "qualified apprentice" as "an individual who is employed by the taxpayer or by any contractor or subcontractor and who is participating in a registered apprenticeship program, as defined in section 3131(e)(3)(B)." Section 3131(e)(3)(B) defines a "registered apprenticeship program" as "an apprenticeship registered under the [National Apprenticeship Act] that meets the standards of subpart A of part 29 and part 30 of title 29, Code of Federal Regulations." Parts 29 and 30 of the CFR outline standards of qualification, recruitment, selection, employment, and training of apprentices, as well as standards prohibiting discrimination in apprenticeship programs based on race, color, religion, national origin, sex, sexual orientation, age, genetic information, or disability.

Taxpayers should be entitled to rely upon certifications from an apprenticeship program that it meets the requirements of the National Apprenticeship Act. It would be duplicative of Department of Labor supervision and overwhelmingly difficult and expensive for each taxpayer to audit the apprenticeship program utilized by the taxpayer. Rather, absent actual knowledge that the certification is false, the taxpayer should be allowed to rely on a certification from an apprenticeship program that it meets the requirements of the National Apprenticeship Act.

It is unclear from the provisions in the Act whether any restrictions were intended to apply on the registered apprenticeship program from which apprentices are obtained for a project. For example, the provisions in the Act as drafted indicate that a taxpayer could meet the apprenticeship requirements by employing qualified apprentices from any registered apprenticeship program. The Service and Treasury should specify as to whether there are any additional requirements, such as any geographic requirements as to the registered apprenticeship program to be used (i.e., must it be near the construction of the qualified facility). We submit that there should be no additional limitations and that a taxpayer should be considered to meet the apprenticeship requirements in section 45(b)(8) by hiring the requisite number of qualified apprentices from any registered apprenticeship program.

10. Good Faith Effort and Failure to Respond or Denial by Apprenticeship Program

Section 45(b)(8)(D)(ii) provides that a taxpayer shall be deemed to have satisfied the apprenticeship requirements under section 45(b)(8) with respect to a qualified facility if the taxpayer requests qualified apprentices from a registered apprenticeship program (as defined in section 3131(e)(3)(B)) and (1) the request is denied, so long as the denial is not a result of the taxpayer or any contractors or subcontractors failing to comply with "established standards and requirements of the registered apprenticeship program," or (2) the registered apprenticeship program "fails to respond" to the taxpayer's request within 5 business days after receiving such request. See § 45(b)(8)(D)(ii)(I)-(II).

The Act does not define "fails to respond." This could be interpreted strictly to mean that a taxpayer could avail itself of the good faith effort provision only if the registered apprenticeship program fails to respond in any sense whatsoever. It could also be interpreted more reasonably to mean that a registered apprenticeship program "fails to respond" where it acknowledges the taxpayer's request but fails to communicate further or in a timely manner regarding the hiring of qualified apprentices. In the latter situation, a taxpayer could be stuck waiting to receive direction from a registered apprenticeship program and, depending on the timing of construction, alteration, or repair of the qualified facility, fail to meet the apprenticeship requirements as a result. The Service and Treasury should clarify the definition of "fails to respond," and, at the very least, indicate a time period within which the registered apprenticeship program has to respond with substantive direction on how to hire qualified apprentices within the program.

Further, the Act does not provide clarity or procedures on how, if a taxpayer's request for qualified apprentices is denied by a registered apprenticeship program, the taxpayer can prove that the denial was not a result of the taxpayer or any contractors or subcontractors failing to comply with "established standards and requirements" of the registered apprenticeship program. The Act does not define "established standards and requirements of the registered apprenticeship program." The Service and Treasury should provide clarity and guidance as to the "established standards and requirements" for which a denial will prevent a determination of "good faith" under Section 45(b)(8)(D) and the documentation and records needed for taxpayers to prove that a denial by a registered apprenticeship program was not due to a failure to comply with such standards and requirements. Further, if a registered apprenticeship program does not provide the documentation and records that a taxpayer must have to prove the denial or the reason for the denial, the Service and Treasury should provide alternative methods for a taxpayer to establish the denial and that the reason was other than failing to comply with the "standards and requirements" (e.g., there should be a presumption that not providing apprentices within a specified period of time is a denial, and there should be a presumption that such denial was not for failure to comply with the "standards and requirements" unless the program expressly states, with specificity, a specific failure that fits a standard or requirement that the Service and Treasury has determined is included in the Section 45(b)(8)(D)(ii)(I)'s "standards and requirements").

11. Domestic Content Certification

Sections 45(b)(9), 48(a)(12), 45Y(g)(11), and 48E(a)(3)(B) provide domestic content requirements that must be satisfied for taxpayers to claim additional credit amounts under those sections of the Code. Section 45(b)(9)(B)(i) provides that the domestic content requirements are satisfied "if the taxpayer certifies to the Secretary (at such time, and in such form and manner, as the Secretary may prescribe) that any steel, iron, or manufactured product which is a component of such facility (upon completion of construction) was produced in the United States (as determined under section 661 of title 49, Code of Federal Regulations)."

Regarding certification by taxpayers to the Secretary that any steel, iron, or manufactured product that is part of a qualified facility was produced in the United States, it is unclear from the provisions in the Act how, in what form, and when this certification is to occur. It is also unclear what documentation or evidence a taxpayer may rely on to make such certification (for example, a taxpayer may receive a certificate from a manufacturer stating that components were manufactured in the United States or a certificate from a supplier that steel or iron was produced in the United States, but it is not clear if this suffices for purposes of providing the certification to the Secretary).

Section 45(b)(9)(B)(i) references 49 CFR 661. Those regulations (the "Buy America Regulations") govern federally assisted procurements and generally require iron, steel, and manufactured products used in such projects to be produced in the United States. 49 CFR § 661.6 provides certification requirements for procurement of steel or manufactured projects and sample certifications. Such sample certifications, which are very simple, could be adapted for purposes of the certification required under section 45(b)(9)(B)(i). The Service and Treasury should require simple certifications from the taxpayer to cut down on administrative costs to claim the domestic content bonus credit amounts. For the same reason, the Service and Treasury should also permit taxpayers to rely on simple certifications from contractors and subcontractors that steel, iron, and manufactured products that are part of the qualified facility were produced in the United States.

12. Steel and Iron versus Manufactured Products

Section 45(b)(9)(B)(i) and (ii) appears to require all steel and iron which is a component of a facility to be produced in the United States, and references 49 CFR section 661.5, which requires that all steel and iron manufacturing processes (except metallurgical processes involving refinement of steel additives) occur in the United States. Section 45(b)(9)(B)(iii) states that only the "adjusted percentage" of the total costs of all manufactured products of the facility must be attributable to manufactured products (including components) which are mined, produced or manufactured in the United States. Thus, it is critical to be able to differentiate which aspects of a facility are "steel and iron" and which are "manufactured products."

Appendix A to section 661.3 (End Products), part of the Buy America Regulations at 49 CFR section 661, defines "steel and iron end products" as "[i]tems made primarily of steel or iron such as structures, bridges, and track work, including running rail, contact rail, and turnouts." It also defines "manufactured end products" as "[i]nfrastructure projects not made primarily of steel or iron, including structures (terminals, depots, garages, and bus shelters), ties and ballast; contact rail not made primarily of steel or iron; fare collection systems; computers; information systems; security systems; data processing systems; and mobile lifts, hoists, and

elevators." Section 661.3 (Definitions) contains its own definition of "manufactured product": "[A]n item produced as a result of the manufacturing process." "Manufacturing process" is defined in section 661.3, in turn, as "the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials."

It is not clear from these definitions precisely how to differentiate steel or iron products from manufactured products. The word "primarily" appears in the definitions but is not itself defined. As a result, it is unclear how much steel or iron must comprise any "end product" used in the construction of a qualified facility or any manufactured product which incorporates steel or iron. The definitions of "steel and iron end products" and "manufactured end products" include "structures," making it unclear how the "domestic content" requirement would apply in the solar and wind energy context. Presumably, "structures" would include, for example, turbine towers, nacelles, anchor bolts, solar racking and fencing, and other like items. The Service and Treasury should make clear that such structures made of steel or iron are to be treated as manufactured products (as they are the result of a "manufacturing process"). Should any facility have steel or iron without such a manufacturing process (e.g., supply rail lines), only such steel or iron should be treated as such (and not as a manufactured product).

13. Domestic Content Waivers (e.g., 49 CFR 661.7)

The Buy America Regulations, referenced in section 45(b)(9) of the Act, provide for waivers of the general requirement that projects use steel, iron, and manufactured products produced in the United States in some circumstances. See 49 CFR § 661.7. For example, the requirement can be waived based on specific circumstances regarding public interest (i.e., waiver granted if requiring U.S. steel and iron would "be inconsistent with the public interest," see 49 CFR § 661.7(b)), non-availability (i.e., waiver granted if steel and iron materials needed "are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality," see 49 CFR § 661.7(c)), and price-differential (i.e., waiver granted if it is determined that using U.S. steel or iron would "increase the cost of the contract between the grantee and its supplier of that item or material by more than 25 percent," see 49 CFR § 661.7(d)). Section 48(b)(10)(D) specifically allows for similar exceptions to domestic content requirements in the context of whether domestic content is required as to taxpayers making elections under section 6417.

The Service and Treasury should adopt a similar waiver regime in the domestic content requirements of section 45(b)(9), 48(a)(12), 45Y(g)(11), and 48E(a)(3)(B). The waivers make good sense from a policy standpoint as eligible taxpayers should not be penalized (or prohibited from claiming the domestic content bonus credit) if U.S.-made steel, iron, or manufactured products are not available when needed for construction of a qualified facility, or if using U.S.-made steel, iron, or manufactured products would be prohibitively expensive. The statute providing such waivers in one context (i.e., as to taxpayers making elections under section 6417) does not exclude such waivers from applying to all taxpayers.

If the Service and Treasury adopt such waivers to the domestic content requirements, the Service and Treasury should also specify how such waivers will be implemented and obtained. The Service and Treasury should specify, as to domestic content requirements in Section 45, 48, 45Y and 48E, a simple procedure with specific documentation requirements that taxpayers can access at the Service to obtain waivers within a reasonable timeframe.

14. Relative Cost of Manufactured Products

For purposes of determining whether manufactured products were produced in the United States under section 45(b)(9) and the corresponding provisions in 48(a)(12), 45Y(g)(11), and 48E(a)(3)(B), section 45(b)(9)(B)(ii) states that such products "shall be deemed to have been produced in the United States if not less than the adjusted percentage (as determined under subparagraph (C)) of the total costs of all such manufactured products of such facility are attributable to manufactured products (including components) which are mined, produced, or manufactured in the United States." Section 45(b)(9)(C) states that, for facilities other than offshore wind facilities, the adjusted percentage is 40 percent.

The Service and Treasury should clarify "total costs of all such manufactured products of such facility." This could be accomplished by indicating that such costs are equal to the taxpayer's unadjusted tax basis of such products. Tax basis adjustments for depreciation, which may apply unequally to different manufactured products, should not be taken into account, as those could skew the test (i.e., depending on whether bonus depreciation applies to particular assets and whether the test occurs before or after such bonus depreciation). Tax basis adjustments under section 50 should likewise not be taken into account.

15. Energy Community Information Sources

Sections 45(b)(11), 48(a)(14), 45Y(g)(7), and 48E(a)(3)(A) provide requirements for taxpayers to satisfy in order to claim additional credit amounts for qualified facilities located within "energy communities." An "energy community" is defined in section 45(b)(11)(B) as (1) a brownfield site (as defined in 42 U.S.C. 9601(39)(A), (B), and (D)(ii)(III)), (2) a metropolitan statistical area ("MSA") or non-metropolitan statistical area (a "NMSA") that has (or had, at any time after December 31, 2009) 0.17 percent or greater direct employment or 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas, and has an unemployment rate at or above the national average unemployment rate for the previous year, or (3) a census tract (i) in which a coal mine has closed after December 31, 1999, (ii) in which a coal-fired electric generating unit ("EGU") has been retired after December 31, 2009, or (iii) that is directly adjoining to any census tract described in (i) or (ii). This definition of "energy community" is adopted by sections 48(a)(14), 45Y(g)(7), and 48E(a)(3)(A).

The energy community provisions in the Act do not provide guidance on sources of information a taxpayer may use to determine, for example, the location of an MSA or NMSA (and whether a qualified facility is located within), the location of any coal mine or EGU (and whether such facilities have been "closed" or "retired"), the location of census tracts, or the tax revenue or employment data specific to a particular community. The Service and Treasury should provide guidance on which sources may be used. For example, the Service and Treasury could specify that particular websites may be used to make such determinations (i.e., the United States Census Bureau (www.census.gov) or the Mine Safety and Health Administration

(www.msha.gov)). Regarding mines and EGUs, the Service and Treasury should also specify that state mining agencies, including their websites, may be used to determine location and status. For example, in Utah, the Utah Division of Oil, Gas and Mining maintains a website (available at www.ogm.utah.gov) where mines are searchable by location and name. The Service and Treasury should further specify that print-outs (including in electronic portable document format) of such websites will be sufficient proof, even if the information on such website changes from when the taxpayer obtained the information to the date that any audit of a facility occurs.

16. "Closed" Mine for Energy Community Purposes

The energy community provisions in the Act do not define "closed" for purposes of determining whether a qualified facility is located within (or in a census tract adjoining to) a census tract in which a coal mine "closed" after December 31, 1999. The Service and Treasury should provide guidance on how a taxpayer may document that such a coal mine is "closed" within the meaning of section 45(b)(11)(B).

The Mine Safety and Health Administration maintains the Mine Data Retrieval System (available at https://www.msha.gov/mine-data-retrieval-system) which is searchable by a number of inputs, including mine name, mine ID, mine location, mine status, or mined mineral. A user can, for example, search for "abandoned" mines located within a particular county in a particular state. When a user clicks through to the "Mine Information" page, information regarding the "Mine Status" appears. The status can range from, among others, "Active" to "Inactive" to "Abandoned" to "AbandonedSealed." The Mine Information page also displays a "Mine Status Date." The Service and Treasury should provide guidance that for purposes of determining whether a mine is "closed" under section 45(b)(11)(B), a taxpayer may use the Mine Data Retrieval System, and that the "Mine Status Date" may be used to determine the last date on which a mine was active. Further, the guidance should state that any status other than "Active" or "Open" will be considered "closed" for purposes of section 45(b)(11)(B).

As noted above, many state agencies maintain websites containing information on active and nonactive coal mines. If necessary, a taxpayer should be able to supplement any information on whether a coal mine is "closed" under section 45(b)(11)(B) using information obtained on a state agency website, such as the Utah Division of Oil, Gas and Mining (available at www.ogm.utah.gov).

The Service and Treasury should also clarify the relevant date for determining that any coal mine is "closed" for purposes of section 45(b)(11)(B). Coal mines may close temporarily or halt production. If production begins again or the mine reopens, the mine's status may change from inactive to active on the Mine Data Retrieval System. We submit that the determination of whether a coal mine is "closed" for purposes of section 45(b)(11)(B) should be made as of the date that construction begins on any qualified project, as determined under Notice 2013-29 and the notices that clarify and/or modify that notice, Notice 2018-59 and the notices that clarify and/or modify that notice, and Notice 2020-12. This would ensure that a taxpayer who has conducted the requisite diligence and determined that its qualified facility is located in or adjoining to a census tract in which a closed coal mine is also located can reliably claim the additional energy community credit amount.

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17. "Retired" Coal-Fired Electric Generating Unit for Energy Community Purposes

The energy community provisions in the Act do not define "retired" for purposes of determining whether a qualified facility is located within (or adjoining to) a census tract in which an coal-fired EGU was "retired" after December 31, 2009. The Service and Treasury should provide guidance on how a taxpayer may document that such an EGU has been "retired" within the meaning of section 45(b)(11)(B).

The energy community provisions in the Act do not explain what it means for an EGU to have been "retired." The Service and Treasury should clarify "retired" for purposes of section 45(b)(11)(B). Similar to our comment on "closed" coal mines above, an EGU may be "retired" temporarily or may begin production again. The provisions in the Act do not provide guidance for this scenario. As we suggested in the comment above, the determination of whether an EGU is "retired" for purposes of section 45(b)(11)(B) should be made as of the date that construction begins on any qualified project, as determined under Notice 2013-29 and the notices that clarify and/or modify that notice, Notice 2018-59 and the notices that clarify and/or modify that notice, and Notice 2020-12. This would ensure that a taxpayer who has conducted the requisite diligence and determined that its qualified facility is located in or adjoining to a census tract in which a retired EGU is also located can reliably claim the additional energy community credit amount.

We have not discovered a database like the Mine Data Retrieval System that contains information on EGUs. The Service and Treasury should provide guidance on how taxpayers may document that their qualified facilities are located within or adjoining to census tracts in which EGUs have been "retired." This may require the Service to begin maintaining a publicly searchable database of "retired" EGUs throughout the country, if no other such database is available.

We note that similar issues arise in determining employment and unemployment rates (and whether such employment is "direct") and in determining tax revenues and what is considered "related" to the extraction, processing, transport, or storage of coal, oil, or natural gas and in determining the precise borders of MSAs and NMSAs and in determining the national average unemployment rate for the previous year. The Service and Treasury should consider creating a Service-maintained publicly searchable database and mapping website where all of this information can be determined and relied upon by taxpayers.

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18. Changes to Census Tracts, Metropolitan Statistical Area, or Non-metropolitan Statistical Area

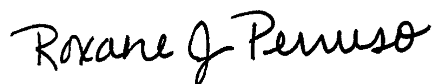
The energy community provisions in the Act do not specify whether additional action, if any, is required by a taxpayer if a census tract, MSA, or NMSA upon which the taxpayer relied to claim an additional credit amount changes after the taxpayer has determined that its qualified facility is located in or adjoining to such a census tract, MSA, or NMSA. Similar to the comments above on status changes to "closed" coal mines and "retired" EGUs, a census tract, MSA, or NMSA could change over the period for which a taxpayer is claiming production tax credits under sections 45 or 45Y. These changes could affect whether a taxpayer's qualified facility is located in or adjoining to a census tract in which a coal mine has closed, an EGU has been retired, or is located in an applicable MSA or NMSA. The Service and Treasury should clarify that the geographic lines that define census tracts, MSAs, and NMSAs as of the date the facility begins construction should apply, regardless of any changes in those geographic areas at any point in time thereafter.

We submit that, as discussed in the comments above on closed coal mines and retired EGUs, the determination of whether a qualified facility is located in or adjoining to an applicable census tract, or in an applicable MSA or NMSA, should be made as of the date that construction begins on any qualified project, as determined under Notice 2013-29 and the notices that clarify and/or modify that notice, Notice 2018-59 and the notices that clarify and/or modify that notice, and Notice 2020-12. This would ensure that a taxpayer who has conducted the requisite diligence and determined that its qualified facility is located in or adjoining to an applicable census tract, or in an applicable MSA or NMSA, can reliably claim the additional energy community credit amount.

19. Conclusion

We appreciate the opportunity to provide these comments, and PCW looks forward to the upcoming guidance under the Act.

Sincerely,



Roxane J. Perruso
Executive Vice President & Chief Operating Officer