Comment from TVA

The attached document includes TVA's consolidated responses to Notice 2022-50 and Notice 2022-51. A separate copy of this document will be filed in each respective docket. TVA at this time does not intend submit comments on Notice 2022-46, Notice 2022-47, Notice 2022-48, or Notice 2022-49.

TENNESSEE VALLEY AUTHORITY

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Internal Revenue Service
CC:PA:LPD:PR (Notices 2022-50 and 2022-51)
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To Whom it May Concern:

COMMENTS ON PREVAILING WAGE, APPRENTICESHIP, ENERGY COMMUNITIES AND ELECTIVE PAYMENT OF APPLICABLE CREDITS

The Tennessee Valley Authority ("TVA") appreciates the opportunity to comment on Internal Revenue Service ("IRS") Notices 2022-50 and 2022-51 regarding prevailing wage, apprenticeship and energy community requirements and direct payment for certain credits under Sections 45(b)(7), (8) and (11), 45Q(e)(3), 45V(e)(3), 45U(d)(2), 48(a)(10), (11) and (14), and 6417 of the Internal Revenue Code (the "Code").

As described further below, we would like guidance to clarify the following key points:

1. TVA should be deemed to meet prevailing wage requirements through its compliance with existing prevailing wage rate compliance obligations under federal law.

2. TVA should be exempt from recordkeeping or information reporting requirements related to prevailing wage requirements.

3. Where a facility is jointly owned by one or more "applicable entities" (within the meaning of section 6417 of the Code), each applicable entity with an ownership interest in the facility should be able to make a direct pay election individually.

4. Rules similar to section 1397C(f) should apply to projects straddling energy community boundaries.

5. For determining an energy community, whether a project is located in an energy community should be interpreted for purposes of the IRA to include projects that are within 20

miles of a coal mine that has closed after December 31, 1999, or a coal-fired electric generating unit that has been retired after December 31, 2009.

6. A project should not be excluded from qualifying as located in an energy community based solely on the fact that it is or comes under TVA's jurisdiction, custody, or control.

BACKGROUND ON TVA

TVA is a corporate agency and instrumentality of the United States that was created in 1933 by federal legislation. It was created to, among other things, improve navigation on the Tennessee River, reduce the damage from destructive flood waters within the Tennessee River system and downstream on the lower Ohio and Mississippi Rivers, further the economic development of TVA's service area in the southeastern U.S., and sell the electricity generated at the facilities TVA operates. Today, TVA operates the nation's largest public power system and supplies power to a population of approximately 10 million people. TVA also manages the Tennessee River, its tributaries, and certain shorelines to provide, among other things, year-round navigation, flood damage reduction, and affordable and reliable electricity. Consistent with these primary purposes, TVA also manages the river system to provide recreational opportunities, adequate water supply, improved water quality, cultural and natural resource protection, and economic development. TVA performs these management duties in cooperation with other federal and state agencies that have jurisdiction and authority over certain aspects of the river system.

Initially, all TVA operations were funded by federal appropriations. Direct appropriations for the TVA power program ended in 1959, and appropriations for TVA's stewardship, economic development, and multipurpose activities ended in 1999. Since 1999, TVA has funded all of its operations almost entirely from the sale of electricity and power system financings.

TVA was built for the people, created by federal legislation, and charged with a unique mission - to improve the quality of life in a seven-state region through the integrated management of the region's resources. TVA's mission focuses on three key areas:

- Energy — Delivering reliable, low cost, clean energy;
- Environment — Caring for the region's natural resources; and
- Economic Development — Creating sustainable economic growth.

TVA seeks to balance production capabilities with power supply requirements by promoting the conservation and efficient use of electricity and, when necessary, buying, building, or leasing assets or entering into power purchase agreements. TVA also seeks to employ a diverse mix of

energy generating sources and works toward obtaining greater amounts of its power supply from clean (low or zero carbon-emitting) resources. TVA is making investments in its generating portfolio to modernize the fleet while also allowing TVA to maintain competitive rates and high reliability and work toward carbon emission reductions. As TVA continues to evaluate the impact of retiring its coal-fired fleet by 2035, it is also evaluating adding flexible lower carbon-emitting gas plants as a strategy to maintain reliability, such as the ongoing projects at TVA's Paradise and Colbert sites. In addition, TVA is committed to investing in the future of nuclear with the evaluation of emerging advanced nuclear technologies, such as small modular reactors. TVA is also implementing the Hydro Life Extension Program with a focus on improving the availability and flexibility of the hydroelectric fleet.

Power generating facilities operated by TVA on September 30, 2022, included three nuclear sites, 17 natural gas and/or oil-fired sites, five coal-fired sites, 29 conventional hydroelectric sites, one pumped-storage hydroelectric site, one diesel generator site, and 13 solar installations.

TVA COMMENTS

1. TVA Should be Deemed to Meet Prevailing Wage Requirements through its Compliance with Existing Prevailing Wage Rate Compliance Obligations under Federal Law.

TVA requests guidance recognizing TVA's existing prevailing wage rate compliance obligations under section 3 of the Tennessee Valley Authority Act of 1933, as amended (the "TVA Act")[1] as meeting applicable prevailing wage requirements under the Inflation Reduction Act of 2022 (the "IRA").[2] TVA believes that separately tracking and reporting prevailing wage rate efforts for purposes of establishing its qualification for increased federal income tax credit amounts would result in unjustifiably duplicative compliance efforts that are unnecessary in light of TVA's obligations under the TVA Act.

The paragraphs below describe TVA's existing prevailing wage obligations in more detail.

Section 3 of the TVA Act provides:

> All contracts to which the Corporation is a party and which require the employment of laborers and mechanics in the construction, alteration, maintenance, or repair of buildings, dams, locks, or other projects shall contain a provision that not less than the prevailing rate of wages for work of a similar nature prevailing in the vicinity shall be paid to such laborers or mechanics.

[1] 16 U.S.C. § 831 et seq.
[2] Public Law 117-169, 136 Stat. 1818 (August 16, 2022).

> In the event any dispute arises as to what are the prevailing rates of wages, the question shall be referred to the Secretary of Labor for determination, and his decision shall be final. In the determination of such prevailing rate or rates, due regard shall be given to those rates which have been secured through collective agreement by representatives of employers and employees.
>
> Where such work as is described in the two preceding paragraphs is done directly by the Corporation the prevailing rate of wages shall be paid in the same manner as though such work had been let by contract.[3]

Accordingly, the TVA Act requires a prevailing wage for laborers and mechanics employed by both TVA and its contractors, and the Secretary of Labor gives "due regard" to collectively bargained wage rates in resolving any disputes.

In accordance with the TVA Act, TVA's process for determining prevailing wage rates for both TVA employees and TVA's contract workforce is covered by TVA's collectively bargained agreements with its union partners. Under TVA's collectively bargained agreements, the parties hold annual wage conferences where wage data is jointly collected from an agreed-upon list of entities in the vicinity and reviewed to determine the prevailing wage for both TVA annual employees and contractors. To perform work on TVA construction or repair projects, TVA contactors must agree to be bound by TVA's collectively bargained agreements for contract work. These agreements are entered into between the contractors and the unions representing TVA's contract workforce and set forth the salary schedules for employees requiring the agreed-upon prevailing wage.

The TVA Act requirements described above involve a collectively bargained wage determination process that uses substantially similar wage data collection methods as those used by the Secretary of Labor under the Davis-Bacon Act, and should in practice substantially meet or exceed the prevailing wage requirements under the IRA.

2. TVA Should be Exempt from Recordkeeping or Information Reporting Requirements Related to IRA Prevailing Wage Requirements.

TVA requests that it be exempt from recordkeeping and information reporting requirements related to prevailing wage under the IRA because (i) its existing prevailing wage rate compliance obligations described above are enforceable and verifiable, and (ii) as a federal agency, and otherwise pursuant to the TVA Act, TVA is already subject to comprehensive government oversight and audits.

[3] 16 U.S.C. § 831b(b).

If not entirely exempt from IRA recordkeeping and information reporting requirements for prevailing wage, TVA requests in the alternative that it be allowed to use documents created for purposes of compliance with section 3 of the TVA Act to demonstrate its compliance with applicable IRA requirements so that it is not required to produce and maintain largely duplicative sets of documentation.

3. Guidance Should Clarify that each Applicable Entity with an Ownership Interest in a Facility is Eligible to Individually Make a Direct Pay Election.

Certain entities may own a project that qualifies for a direct payment for an applicable credit under section 6417 through a joint ownership structure, for example, through tenancies in common or otherwise through undivided ownership interests. This is a structure commonly used by TVA as well as municipally owned utilities and cooperative electric companies. TVA requests guidance confirming that applicable entities holding an interest in an eligible project through such an ownership structure may individually make an election for direct payment with respect to their proportionate share of any applicable credit. Such guidance would give significant comfort and certainty to TVA and other similarly situated entities. This should be true whether or not the other owners in the joint ownership structure are eligible to make direct pay elections under section 6417.

Section 6417 provides rules for partnerships and S corporations that wish to make a direct pay election. Under these rules, an entity that holds the facility eligible for an "applicable credit" may make the direct pay election if the entity is eligible to do so, but the partners or shareholders of the entity may not make an election at the partner or shareholder level. Section 6417 does not explicitly address joint ownership structures. Section 45(e)(3) provides that, for purposes of the production tax credit, in the case of a project which has multiple owners, production from the facility is allocated among the owners in proportion to their respective ownership interests. A similar rule should apply in the context of direct payments.

Confirming that applicable entities owning an interest in a project through a joint ownership structure should be able to elect direct pay at the owner level is entirely consistent with the Congressional goal of allowing entities such as TVA to use direct pay as a means to achieve more equal footing with for-profit entities. That an applicable entity has entered into a joint ownership structure with another co-owner that is not itself an applicable entity should not prevent the applicable entity from receiving a direct payment for its proportionate share of ownership. Preventing an applicable entity from receiving a direct payment in such a scenario would be contrary to the Congressional goal.

As a related point, permitting direct pay elections at the owner level is really the only result that makes sense in the context of a jointly owned project. Otherwise, there is no taxpayer (such as a partnership) that would be able to make an election.

4. *Rules Similar to Section 1397C(f) Should Apply to Projects Straddling Energy Community Boundaries.*

Section 3.04(1) of Notice 2022-51 asks, "[s]hould 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 determining whether a qualified facility is located in an energy community?

Rules similar to the rules described above should generally provide that a project would qualify as being in an energy community if the portion of the project located within the energy community is substantial compared to the portion of the project located outside the energy community, and that "substantial" would be measured as more than 50%, either on a square footage basis or a total cost basis.

As an alternative, larger projects should also be able to qualify as being in an energy community based only on a minimum footprint in an energy community. For example:

- For a facility meeting the definition of an energy community based on being in a census tract or a metropolitan statistical area or non-metropolitan statistical area, the facility should qualify if at least 1 acre of such facility is in the applicable census tract, metropolitan statistical area or non-metropolitan statistical area, as applicable; or

- For a facility meeting the definition of an energy community due to being on a brownfield site, a facility should qualify if at least 10,000 square feet of the facility is on a brownfield site. This approach would align with the purposes of the IRA and CERCLA to allow for beneficial utilization of brownfield sites. And it would avoid the unfair result of larger projects being excluded from the definition of energy community based on their overall size even when they utilize greater amounts of brownfield area than other (smaller) projects that would qualify (e.g., a 10,000-square-foot facility with 5,000 square feet on the brownfield site).

We believe that the suggestions above would be a workable framework and a reasonable way to address projects that straddle energy community borders.

In the preamble to the publication of final regulations under the opportunity zone rules in Treasury Decision 9889, the Treasury Department and IRS rejected suggestions to eliminate a square footage test based on the principles of section 1397C(f) or to require a stricter 75% square

footage or value standard because parcels of real property commonly extend across census tract lines, and "guidance addressing such situations would provide flexibility for potential investors in [qualified opportunity zones], and therefore is consistent with the underlying policy of section 1400Z-2." Larger renewable energy projects are similarly likely to straddle energy community boundaries, and it is TVA's hope that guidance will adopt a similar rule for purposes of determining a project location's qualification as an energy community.

5. *For Determining an Energy Community, Whether a Project is Located in an Energy Community Should be Interpreted for Purposes of the IRA to Include Projects that Are Within 20 Miles of a Coal Mine that has Closed After December 31, 1999, or a Coal-Fired Electric Generating Unit that has Been Retired After December 31, 2009.*

The term "energy community" should be interpreted to include projects which are located within 20 miles of a coal mine that has closed after December 31, 1999, or a coal-fired electric generating unit that has been retired after December 31, 2009. This should be so as a matter of ensuring that Congress's goal of incentivizing further economic development in these communities is achieved, as a matter of fairness to owners of renewable energy projects who develop projects close to communities in which a coal facility has closed but which projects happen not to otherwise qualify as being located within an energy community due to the way census tract boundary lines have been drawn, and as a matter of administrative convenience.

The term "census tract" would seem to ordinarily refer to an area "delineated by the United States Bureau of the Census ["Census Bureau"] in the most recent decennial census."[4] Though section 45(b)(11)(B)(iii) does not provide a general definition of "census tract," for purposes of determining an energy community such ordinary definition seems workable and seems to make sense within the IRA in the vast majority of cases, and TVA believes that the IRS should rely on this definition.[5]

However, TVA believes that Congress did not intend to refer to the term "census tract" for purposes of defining an "energy community" in the IRA to exclude areas that are in close proximity to—indeed, in the same community as—a closed coal facility solely on account of census tract line drawing that was done without regard to the IRA's purposes. The policy behind the energy community provisions is to incentivize further renewable energy development in communities in which prior operating coal facilities have closed. A strict reliance on census tract boundaries could result in unexpected results in which a new renewable energy facility is located near such a community and therefore achieves the goal of furthering economic development in that community, yet nonetheless does not meet the technical test under section 45(b)(11)(B)(iii) of being in the qualifying census tract or adjoining census tract. Not only does this not align with

[4] *E.g.*, 15 U.S.C. § 657a.
[5] *See also, e.g.*, 26 U.S.C. §§ 30C(c)(3)(B), 45D(e)(2).

Congress's intent, but it would also create an unfair result for some renewable energy projects as compared to other similar projects depending on how the census tract lines in the vicinity of the project have been drawn (which lines would have been drawn without regard to the IRA's purposes). Finally, it may be difficult for owners of renewable energy projects to identify whether a particular project site is in a qualifying census tract (or adjoining census tract), especially given that census tract lines may change over time. It is easier to measure the distance from a project site to a closed coal facility than it is to work through census tract maps to figure out whether a project site and a closed coal facility are in the same census tract or adjoining census tracts. So as a matter of administrative convenience, if a project is close enough to a closed coal facility (within 20 miles), the project should be deemed to be located in an energy community.

In section 13404 of the IRA, Congress refers to a "census tract (as defined by the Bureau of the Census)," but no such parenthetical or further definition appears in the definition of "census tract" used for defining an energy community. Thus, we believe that the term "energy community" in the IRA (including as it appears in section 48E of the Code) is the controlling term and that the IRS has been given implicit authority to interpret an energy community under section 45(b)(11)(B)(iii) to be slightly more expansive than the technical definition in that section referring to census tracts as delineated by the Census Bureau so as to be consistent with a common-sense understanding of an energy community. (We note that without such implicit authority the phrase "(as defined by the Bureau of the Census)" in section 13404 of the IRA would appear superfluous.) And we believe that the IRS, based on the policy and purposes of the credits provided in the IRA, should expand that definition slightly to mean: an area delineated by the Census Bureau in the most recent decennial census, but solely as such term is used in section 45(b)(11)(B)(iii)(I) thereof (i.e., not for purposes of subsection II), no less expansive than a 20-mile radius around a coal mine that has closed after December 31, 1999, or a coal-fired electric generating unit that has been retired after December 31, 2009.

In part, this interpretation is necessary to ensure that facilities placed within close proximity to a closed coal-fired facility will not be arbitrarily and unnecessarily excluded. As one particular example of how a strict reliance on census tract boundaries would result in an unexpected and unfair result, in 2019, the TVA Board approved the retirement of Bull Run Fossil Plant ("Bull Run") by December 2023. Bull Run is located on the Clinch River in the community of Oak Ridge, Tennessee, which is a small city having a population of approximately 32,000 residents. TVA also has an Early Site Permit to potentially construct and operate a (zero-carbon-emitting) small modular reactor at TVA's Clinch River Nuclear Site ("CRN"), which is also located in Oak Ridge. The CRN is less than 15 miles from Bull Run, point to point on a map. Yet, based on the census tracts most recently designated by the Census Bureau, it appears the CRN is not only not in the same census tract as Bull Run, but is also not in an adjoining census tract (per Census Bureau definitions and designations).

While it might otherwise seem intuitive that the CRN is in the same energy community as Bull Run, the Census Bureau's approach to drawing census tracts seems unintentionally opposed to this common-sense understanding. First, coal-fired facilities are specifically limited by the Census Bureau's line-drawing. The Census Bureau has explained, "Census tract boundaries generally follow visible and identifiable features."[6] Coal-fired facilities, like small modular reactors, rely on a water source and are thus often located on a river. Being in such location means that in many cases, coal-fired facilities (like Bull Run) will be located on a Census Bureau line. Second, the land area of a census tract is based on target population numbers, meaning that the land size of a census tract is generally smaller the greater the population density.[7] These features of census tract boundary-drawing, which make sense for the Census Bureau's purposes,[8] lead to an odd result that seems clearly out of line with Congress's purposes in the IRA: The more people that live in the vicinity of a coal-fired plant, the less likely they are on a statistical basis to be considered within the same Census Bureau census tract as such facility. This issue is exacerbated by the fact that coal facilities often sit on the edge of a census tract—and perhaps, one would presume, more likely on the side of a river that is less populated. These realities create the high probably of an unintuitive and incongruous delineation of "energy community" under the IRA as related to coal facilities.

TVA believes that Congress's broad delegation of rulemaking authority given to the IRS under the IRA allows for interpreting the definition of "energy community" in section 45(b)(11)(B)(iii)(I) to include projects located within a 20-mile radius of a closed coal facility. TVA urges the IRS to take this position in part to ensure that the CRN is properly designated as being in the same energy community as Bull Run and that similarly situated projects are likewise properly designated as being in an energy community.

6. *A Project Should not be Excluded from Qualifying as Located in an Energy Community Based Solely on the Fact that it is or Comes Under TVA's Jurisdiction, Custody, or Control.*

TVA believes that the brownfield site determination needs additional clarification. Pursuant to 42 U.S.C. § 9601(39), facilities that are "subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States" are excluded from the definition of a brownfield site. While Congress used the definition from section 9601(39) to delineate brownfield sites under the IRA, we think that Congress could not have intended by such use to have excluded from the IRA definition of brownfield site property under TVA's jurisdiction, custody, or control. This would seem to lead to the result that TVA would be the only entity listed in section 6417 that would have restrictions on qualifying for a portion of a credit based on its own custody or control of a site. Congress clearly indicated its intent in section

[6] *See Glossary*, U.S. CENSUS BUREAU (Apr. 11, 2022), https://www.census.gov/ (https://tinyurl.com/yx86jc55).
[7] *See id.*
[8] *See id.*

6417(d)(1)(A)(iii) for TVA to be able to utilize credits as other entities who qualify for such credits. The elective payment provision was further intended to ensure that entities like TVA would not have to utilize alternative financing structures to take advantage of credits, including by contracting with third parties to own and operate facilities for them. If property under TVA's jurisdiction, custody, or control were per se excluded from the definition of a brownfield site under the IRA, TVA might under relevant circumstances be in a position where it would yet need to employ a third-party ownership model to take advantage of a portion of certain credits. Congress's intent to the contrary in the IRA is clear. To avoid this inconsistent result, guidance is necessary to specify that property will not be excluded from the definition of an energy community under the IRA based solely on its being under the jurisdiction, custody, or control of TVA.

Alternatively, TVA requests that the determination of a brownfield site be made applicable to TVA when (and only when) the IRS issues guidance on such. Thus, if TVA were to later acquire or lease an area that had previously been designated as a brownfield site, the determination would not change based solely on it coming under TVA's jurisdiction, custody, or control. If brownfield site determinations of eligibility were made at the time that the IRS guidance is issued, and not at the time when TVA considers purchasing or leasing property on a brownfield site for a beneficial reuse, then TVA would be treated fairly as compared to other utilities and similarly situated entities. Interpretation in a different fashion might partially undo a value that the IRA presents in incentivizing the revitalization and reuse of blighted properties and might unfairly restrict TVA's access to tax credits that other utilities can obtain.

Sincerely,

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