esVOLTA
100 Bayview Circle
Newport Beach, CA, 92660
www.esvolta.com

November 4, 2022

Internal Revenue Service
CC:PA:LPD:PR (Notices 2022-50 and 2022-51)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Comments on Prevailing Wage, Apprenticeship, Energy Communities and Transfers of Certain Credits

To Whom it May Concern:

esVolta 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 transferability of certain credits under sections 45(b)(7), (8) and (11), 48(a)(10), (11) and (14), and 6418 of the Internal Revenue Code (the "Code").

As described further below, we request that guidance clarify the following key points:

Prevailing Wage and Apprenticeship

1. Certified payroll records should satisfy prevailing wage and apprenticeship recordkeeping and information reporting requirements.

2. Prevailing wage and apprenticeship requirements only apply to on-site construction, alteration or repair work.

3. The good faith exception to the apprenticeship requirements should be interpreted to address additional situations in which taxpayers exercise good faith efforts to comply.

4. Existing IRS start of construction guidance applies to section 48(a)(9)(B)(ii) grandfathering.

5. Federal Davis-Bacon Act prevailing wage rates apply for purposes of the prevailing wage requirement, irrespective of local prevailing wage rates.

Energy Communities

1. There should be a single authoritative source to determine "energy community" status.

2. Unemployment data for purposes of determining "energy community" status under section 45(b)(11)(B)(ii) should be measured before a project begins construction.

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

Transferability

1. Eligible taxpayers under section 6418 of the Code should bear investment tax credit ("ITC") recapture risk.

2. Dispositions described in Treas. Reg. §1.47-6(a)(2) should not be treated as dispositions for purposes of section 6418(g)(3).

BACKGROUND ON ESVOLTA

esVolta, LP is a developer, owner and operator of standalone, front-of-meter, utility-scale energy storage projects. Our battery storage projects provide electric utilities and power grid operators with fast responding capacity, energy, and ancillary services, and are designed to help transition the electrical grid to a lower emissions and more reliable future.

esVolta currently owns 5 energy storage projects in operations or construction totaling over 100 MWh, and we are developing a pipeline of additional storage projects totaling nearly 20 GWh. Our projects are predominantly located in the California, Texas, and other western US markets.

We are headquartered in Newport Beach, California, and have employees located in multiple states across the US.

esVolta is indirectly wholly-owned by Generate Capital, PBC, a San Francisco-based sustainable infrastructure company focused on investing in projects and companies that help the fight against climate change, water scarcity, food insecurity and energy poverty.

PREVAILING WAGE AND APPRENTICESHIP

1. *Certified Payroll Records Should Satisfy Prevailing Wage and Apprenticeship Recordkeeping and Information Reporting Requirements.*

The recordkeeping and information reporting requirements related to prevailing wage and apprenticeship should allow taxpayers to rely on a certified payroll from a contractor that states, among other information, the employment classification of the payee, the hours worked, and the amount paid. The U.S. Department of Labor uses Wage Hour Form 347 for this purpose. A similar system has been successfully implemented in California, where contractors and subcontractors on most public works projects are required to submit certified payroll records to the Labor Commissioner of the State of California Department of Industrial Relations using an online portal. Because of the substantial difficulty and cost for a taxpayer to independently verify the information provided by the contractor or subcontractor, a taxpayer should be able to rely on the information provided by a contractor or subcontractor in a certified payroll document as long as the taxpayer does not know or have reason to know that such information is inaccurate.

In addition, for purposes of correcting a prevailing wage deficiency, a taxpayer who reasonably relies on information provided to it by a contractor (e.g., in the form of certified payroll records) should be deemed to have complied with section 48(a)(10). As discussed in the prior paragraph, it would be difficult and costly for a taxpayer to independently verify the information provided by a contractor or subcontractor. Requiring a taxpayer who had no reason to know of an underpayment and received a certified payroll to later correct a deficiency would be unfair.

As a related technical point, for purposes of the deficiency rules section 45(b)(7)(B), the "amount of wages required to be paid to such laborer or mechanic…during such period" should refer to the prevailing wages in effect as of the date the project began construction (within the meaning of the Beginning of Construction Notices (as defined below)).

2. Guidance Should Confirm that the Prevailing Wage and Apprenticeship Requirements Only Apply to On-site Construction, Alteration or Repair Work.

A plain reading of the prevailing wage and apprenticeship provisions in sections 45 and 48 of the Code – which apply to the construction of an energy project or the alteration or repair of an

energy project – suggests that the requirements are limited to on-site construction work and on-site alteration or repair work. Though this appears clear from the statute, it would be helpful for guidance to confirm that this is the case given the massive importance of prevailing wage and apprenticeship compliance to the renewables industry moving forward.

A complicating factor in interpreting these provisions is that existing beginning of construction guidance (i.e., IRS Notices 2013-29, 2013-60, 2014-46, 2015-25, 2016-31, 2017-4, 2018-59, 2019-43, 2020-41, 2021-5 and 2021-41) (the "Beginning of Construction Notices") generally takes the position that "construction" includes both on- and off-site physical work, and also includes the incurrence of eligible project costs. Although there is no link in section 45 or 48 to the Beginning of Construction Notices, were this interpretation to apply to prevailing wage and apprenticeship, the implication would be that nearly every single contract related to a project, including equipment supply contracts and long-term warranty contracts, would be subject to prevailing wage and apprenticeship requirements. Extending prevailing wage to off-site work would be administratively impractical, bordering on impossible, for taxpayers to enforce with vendors. Such a requirement would multiply the documentation and compliance requirements for projects, increasing costs and the risk of foot faults. Further, off-site work frequently involves non-US vendors and subcontractors, and we assume it is unlikely that Congress intended that US renewables companies subsidize non-US vendors by paying prevailing wages for work by non-US employees. Confirming that prevailing wage and apprenticeship applies only to on-site construction, alteration or repair work would give the renewables industry significant comfort as it acclimates to these new requirements.

Relatedly, it would be helpful to clarify the terms "construction," "alteration" and "repair" in a manner that excludes commissioning activities, warranty service activities, and any other on-site work performed by equipment suppliers (or others) that is not primarily in the nature of construction, alteration or repair. For example, commissioning (i.e, the final installation step for a vendor's equipment) often includes on-site assistance from the vendor's employees or subcontractors, but does not involve actual "construction" work at the site. These kinds of ancillary on-site activities should not fall within the scope of the prevailing wage and apprenticeship requirements.[1]

---

[1] In negotiating project labor agreements with unions, we routinely see unions permit certain categories of work to not utilize union labor. Examples include off-site construction work, shipping, work conducted by equipment manufacturers (e.g., commissioning), and work performed by a utility or governmental agency. That unions do not currently advocate for this kind of ancillary project work to be performed by union labor is further reason for it to be excluded from prevailing wage and apprenticeship requirements.

3. The Good Faith Exception to the Apprenticeship Requirements Should be Interpreted to Address Additional Situations in Which Taxpayers Exercise Good Faith Efforts to Comply.

Taxpayers may not always be able to find sufficient apprentices to meet the apprenticeship requirements. Section 45(b)(8)(D)(ii) provides a good faith effort exception specifying that a taxpayer is deemed to meet the apprenticeship requirement if the taxpayer has requested qualified apprentices from a registered apprenticeship program and the request has been denied or the registered apprenticeship program does not respond within five business days. This is a helpful starting point, but there are a number of other situations in which a taxpayer may make good faith efforts to comply with apprenticeship requirements, but ultimately fails to do so. Examples include the following:

- a project starts construction with sufficient apprentices who later leave and are not readily replaced with a sufficient number of other apprentices;
- a taxpayer initially expects to have sufficient apprentices, but due to unforeseen circumstances, the total labor hours required for construction are greater than initially expected such that the labor hours performed by non-apprentices fail the apprenticeship requirement;
- a taxpayer reasonably relies on a contractor or subcontractor to provide sufficient apprentices and monitor their hours; or
- a taxpayer initially complied with section 45(b)(8)(D)(ii), but the registered apprenticeship program is unable to sufficiently replace apprentices who leave employment at the project.

As we hope these examples illustrate, there are multiple situations in which a taxpayer may be making good faith efforts that would technically fall outside of the good faith efforts exception. To address situations such as these, the exception should be interpreted to also address situations in which a taxpayer uses good faith efforts to comply with the requirements based on all of the facts and circumstances.

As it is difficult to predict all situations in which a taxpayer made a good faith effort to meet the apprenticeship requirement, guidance should provide a catch all exception based on facts and circumstances in addition to the specific situations mentioned above.

As a related technical clarification, it would be helpful for guidance to confirm that a taxpayer may avail itself of the good faith exception if it initially meets the criteria under

section 45(b)(8)(D)(ii)(I) or (II), but the registered apprenticeship program subsequently approves the initial request.

4. Guidance Should Confirm that Existing Start of Construction Rules Apply to Section 48(a)(9)(B)(ii) Grandfathering.

Confirming that whether a project has begun construction for purposes of prevailing wage and apprenticeship grandfathering under section 48(a)(9)(B)(ii) by reference to the existing Beginning of Construction Notices would give significant comfort and certainty to the renewables industry. Project sponsors have been relying on the Beginning of Construction Notices for nearly a decade, and the rules are generally well understood at this point. Advancing a different start of construction standard for grandfathering purposes now could significantly increase project costs for developers who had incurred costs or commenced off-site or on-site physical work based on reliance on the existing guidance. These developers would either have to scramble to meet a new start of construction standard within 60 days or re-negotiate contracts to satisfy prevailing wage and apprenticeship requirements for which they had not budgeted.

5. Guidance Should Confirm that the Federal Davis-Bacon Act Prevailing Wage Rates Apply, Irrespective of Local Rates.

Certain jurisdictions have prevailing wage rates that are either lower or higher than Davis-Bacon prevailing wages. It would be helpful for guidance to confirm that Davis-Bacon is the relevant reference point in all cases.

ENERGY COMMUNITIES

1. There Should be a Single Authoritative Source to Determine Energy Community Status.[2]

Accurately determining whether a project is located in an energy community is critically important not only for project developers, but also for ensuring Congress' goal of incentivizing energy transition and the deployment of renewable assets in energy communities is achieved.

[2] Section 45(b)(11)(B) provides that an "energy community" means: (1) A brownfield site (as defined in 42 U.S.C. 9601(39)(A), (B), and (D)(ii)(III)), (2) A metropolitan statistical area or non-metropolitan statistical area 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 (as determined by the Secretary), and has an unemployment rate at or above the national average unemployment rate for the previous year (as determined by the Secretary) (this clause (2) referred to below as the "Employment Prong"), or (3) A census tract (i) in which a coal mine has closed after December 31, 1999; or (ii) in which a coal-fired electric generating unit has been retired after December 31, 2009; or (iii) that is directly adjoining to any such census tract.

Though in some cases energy community status can be readily determined now (e.g., if a project is located squarely on a brownfield site), there should be an easily accessible, authoritative, and freely available source to find data to determine if a project site is located in an energy community (taking into account relevant metropolitan statistical areas and non-metropolitan statistical areas, census tracts, brownfield sites, closed coal mines and retired coal-fired electric generating units, employment data and local tax revenues). Absent an authoritative source, there are multiple competing data sets that may be relevant to determining whether a particular project is located in an energy community, especially with respect to the various factors under the Employment Prong.

The more certainty that can be provided to taxpayers in determining energy community status, the more likely it is that projects will be developed in the areas targeted by Congress. To that end, it would be enormously beneficial to project developers if the Treasury Department or the IRS were able to provide authoritative information on energy community locations. This would ideally be in the form of an interactive online mapping tool that covers all of the data points necessary to determine energy community status, but any authoritative guidance to confirm energy community locations would be helpful. However formatted, taxpayers should be able to rely on the published information so that they can site projects with confidence that they are in an energy community.

2. Unemployment Data under the Employment Prong Should be Measured Before a Project Begins Construction.

Whether a particular project will qualify as being located in an energy community under the Employment Prong depends on the unemployment rate for the "previous year;" however, section 45(b)(11)(B)(ii)(II) does not say which two years are supposed to be compared.

Finding and securing a project site can be a very slow and expensive process, so it is important for developers to be able to know with confidence whether they can rely on the Employment Prong. Given that unemployment rates naturally fluctuate from year to year, if the relevant comparison point begins in the future (e.g., in the year the project is placed in service), then in many cases the inherent uncertainty of a future-looking test could drive projects away from a perfectly valid site and to another location that may otherwise be more economic (e.g., because it is closer to a point of interconnection).

A more workable solution would be for the unemployment rate in effect for the year before the project begins construction (within the meaning of the Beginning of Construction Notices) to be measured against the previous year. This would give developers the opportunity to site projects

using currently available data and would help maximize the development of projects in locations that meet Employment Prong criteria.

3. 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. We believe that this would be a workable framework and reasonable way to address projects that straddle energy community borders.

TRANSFERABILITY

1. Eligible Taxpayers Should Bear ITC Recapture Risk.

Section 6418(g)(3)(B) of the Code suggests that ITC recapture exists in the transferability context where ITC property is disposed of or otherwise ceases to be ITC property before the close of the recapture period. However, it does not go so far as to say whether a project owner/eligible taxpayer (a "Seller") or a tax credit purchaser/transferee taxpayer (a "Buyer") would bear the risk of increased tax in the year of recapture if such an event were to occur. As between a Seller and a Buyer, the Seller should be the party to bear the risk of ITC recapture in the form of an adjustment to taxable income. This result would both (i) incentivize the rapid deployment of renewable assets, and (ii) ensure that recapture risk ultimately lies with the party best positioned to prevent it.

Confirming that the Seller bears ITC recapture risk would incentivize the deployment of renewable assets because it would reduce transaction costs and make it easier for developers without longstanding tax equity relationships to access the market.

Tax equity is a scarce resource. One of the benefits of transferability for project developers is that it is an alternative way to monetize ITCs, the proceeds of which can be used to grow a business and reinvest in additional projects. Tax equity investors have historically required

esVOLTA
100 Bayview Circle
Newport Beach, CA, 92660
www.esvolta.com

developers to indemnify them for ITCs lost because of valuation issues or other recapture events. These indemnities require credit support in the form of parent guarantees and (increasingly often) tax credit insurance, raising transaction costs for developers and creating a barrier to entry for developers without a tax equity financing track record.

If Buyers bear the risk of ITC recapture (i.e., in the form of an increase in tax in the year of recapture), Buyers will effectively become tax equity providers in the sense that they will require the exact same kinds of indemnities and credit support. This would negate much of the benefit of transferability as a meaningful alternative to tax equity, as developers would be faced with largely the same kinds of costly credit support requirements.

Aside from transaction cost-related concerns that can hamstring project developers, from a least cost avoidance perspective, the risk of recapture should lie with the party best positioned to manage it. A Buyer can claim the tax credits from a particular project, but is otherwise not involved in project ownership, and will have no say in day-to-day management or general operations. The developer, as project owner and operator, is best positioned to manage recapture risk.

2. Dispositions Described in Treas. Reg. §1.47-6(a)(2) Should Not be Treated as Dispositions for Purposes of Section 6418(g)(3).

As noted above, section 6418(g)(3)(B) is focused on project dispositions and events in which a project ceases to be ITC-qualifying property. It does not describe how recapture should (if at all) work in the context of a project owned by a partnership in which a partner disposes of its interest. In the transferability context, where the tax credit recipient has no equity stake in project ownership, it makes little sense to apply the rules in Treas. Reg. §1.47-6(a)(2) that would trigger recapture if a partner's interest is reduced below 66⅔%. As long as the taxpaying entity that placed the project in service and made the election under section 6418(c) continues to exist such that there is not a true disposition of the ITC property, it should be irrelevant whether the entity undergoes a change in control or whether one or more of its partners sells an equity position in the partnership.

Sincerely,

Randolph Mann

Randolph Mann
Founder and President
esVolta, LP