November 4, 2022
Submitted electronically to www.regulations.gov

The Honorable Lilly Batchelder
Assistant Secretary
Department of Treasury
Washington, DC 20220

The Honorable Charles Rettig
Commissioner
Internal Revenue Service
Washington, DC 20224

Re: Notice 2022-50: Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

Dear Assistant Secretary Batchelder and Commissioner Rettig:

The American Public Power Association (APPA) appreciates this opportunity to provide feedback in response to the Department of Treasury (Treasury) and Internal Revenue Service (IRS) Notice 2022-49 Request for Comments on Certain Energy Generation Incentives (Notice).

APPA is the national trade organization representing the interests of the nation's 2,000 not-for-profit, community-owned electric utilities. A public power utility is a "state utility" as defined under the Federal Power Act (16 USC 824q(a)(4)) and includes utilities owned or authorized by a state, utilities owned by a political subdivision of a state, such as a municipality or utility district, and joint action agencies formed to serve, collectively, other public power utilities.

Public power utilities are load-serving entities, with the primary goal of providing the communities they serve with safe, reliable electric service at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of the utilities with the long-term interests of the residents and businesses in their communities.

Public power utilities are in every state except Hawaii; collectively they serve more than 49 million people and 2.6 million businesses; and account for 15 percent of all sales of electric energy (kilowatt-hours) to end-use customers. Public power utilities serve some of the nation's largest cities, including Los Angeles, Jacksonville, Austin, and San Antonio. They also serve some of the smallest counties, towns, and villages. In fact, most public power utilities serve small communities. All but 160 of the nation's

2,000 public power utilities are considered "small entities" as defined under the Regulatory Flexibility Act, and roughly 1,300 have 10 or fewer employees.

APPA and its members worked for years with other stakeholders to make federal energy investment incentives available to all market participants, and strongly supported the direct pay tax credit provisions in the Inflation Reduction Act (IRA). Now, we look forward to working with the Administration and Congress to ensure that the IRA reaches its full potential in implementation. While there are myriad suggestions that could help guide this task, APPA's comments today focus on issues that can be addressed through guidance, are important and time sensitive, and are uniquely important to public power utilities, or likely to be made only by public power.

For clarity, APPA's comments repeat the specific questions to which they are responding, and the order follows the organization of the Notice.

.01 <u>Elective Payment of Applicable Credits (§ 6417).</u>

(4) With respect to an election under § 6417(a) made by a partnership or S corporation pursuant to § 6417(c)(1) for any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation:

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues?

Under IRC section 6417(c), the decision to elect to receive tax credits as a direct payment – rather than as a general business credit – is made at the partnership, not partner level. Partnership under the Code is defined as "a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a corporation or a trust or estate" (IRC section 761(a)).

Public power utilities routinely join in joint ventures with other entities. APPA strongly believe that this approach, coupled with universal access to the value of energy tax credits, is consistent with the goals of the IRA and will encourage collaboration on large projects needed to transition to a cleaner energy generation. As such, APPA strongly aligns itself with the comments of the National Multifamily Housing Council and other real estate trade associations in response to Notice 2022-50 (Oct. 28, 2022). To summarize their comments, we respectively request that partnerships with both taxable and tax-exempt entities be allowed to elect direct payment and/or transfer of tax credits, as applicable to their partners. Specifically, a partnership should be permitted to elect direct payment with respect to the share of qualified tax credits allocable to its tax-exempt partners under the partnership agreement.

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

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

Among others, applicable entities under IRC section 6417(d)(1)(A) includes "any State or political subdivision thereof." The legislative history of this provision would indicate that Congress intended state and local governmental entities and other entities exempt from tax to qualify to make an election for direct payment. For example, the Senate Finance Committee in "Summary of Subtitle D – Energy

Security" (July 31, 2022) summarizes IRA section 13801 (which included the amendments creating IRC section 6417) as allowing eligible taxpayers to elect direct payment and that "(e)ligible taxpayers include tax-exempt entities, state and local governments (and subdivisions thereof), tribal governments, and the Tennessee Valley Authority." However, state and local governmental entities are more diverse in form and structure than a strict reading of "state or political subdivision" might imply and so APPA would strongly encourage guidance take an expansive view when defining applicable entities.

By way of example, IRC section 103 provides in part that the term "State or local bond" means an obligation of a "State or a political subdivision thereof" – the same language defining a governmental entity in IRC section 6417(d)(1)(A)(i). In regulations (26 CFR 1.103-1) Treasury has expanded on this seemingly narrow definition. The regulation there provides in part that "interest upon obligations of a State, territory, a possession of the US, the District of Columbia, or any political subdivision thereof (a "State or local governmental unit") is not includable in gross income." The next sentence of these regulations addresses constituted authorities – which includes instrumentalities, agencies, and governmental entities otherwise described in IRC section 115 – by stating: "obligations issued by and on behalf of any State or local government unit by constituted authorities empowered to issue such obligations are obligations of such unit."

IRC section 6417(h) directs Treasury to "regulations or guidance as may be necessary to carry out the purposes of this section," broad authority that APPA believes could be used to address the concerns above. As such, APPA would respectively request that guidance take a similarly expansive approach as Treasury has taken under 26 CFR 1.103-1 when clarifying which entities are applicable entities for purposes of IRC section 6417(d)(1)(A).

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

A number of factors affecting the decision of whether to elect direct payment could be difficult to know or be simply unknowable until a project is completed and placed into service. For example, a recent survey of 97 public power utilities showed that the average delivery time for a distribution transformer has increased from roughly three months to 12 months, with some respondents reporting that suppliers will simply not take a contract for future delivery. This question of the origin of supply determines not only the amount of credit available, but also whether direct payment of the credit is available at all. An election, once made, is irrevocable.

Under IRC section 6417(d)(3)(A)(i)(II), the due date for an election for other entities is the "due date (including extensions of time) for the return of tax for the taxable year for which the election is made, but no earlier than 180 days after the date of enactment of this section."

APPA can see no policy reason for why the due date for an election for a governmental entity should be earlier than for other entities, and so would ask that an election for a governmental entity be filed with that governmental entity's claim for refund for the related year, or at the same time that claim for refund is due.

(8) Section 6417(d)(4)(A) provides that, in the case of any government, or political subdivision described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), the payment described in § 6417(a) is treated as made on the later of the date that a return would be due under § 6033(a) if such government or subdivision were described in § 6033 or the date on

which such government or subdivision submits a claim for credit or refund at such time and in such manner as the Secretary provides. What factors should the Treasury Department and the IRS consider when providing guidance to clarify the timing and manner of a payment made by these governments or political subdivisions?

As to the manner of submitting a claim for refund, under current law, a U.S. corporation seeking to claim a renewable energy production tax credit must file a Form 8835, Renewable Electricity, Refined Coal, and Indian Coal Production Credit, as an attachment to Form 3800, General Business Credit, which is itself an attachment to Form 1120, U.S. Corporation Income Tax Return.

Because the calculation of any credit for direct payment is identical to the calculation of a credit for use as a general business credit, presumably the calculation of both would be done on the same form, such as the current Form 8835.

However, for a public power utility (or other state, local, or tribal entity) exempt from tax, there is no equivalent to the Form 3800 or Form 1120. APPA would strongly urge Treasury and the IRS to look to the Form 8849, Claim for Refund of Excise Taxes, as a model for claiming direct payment for governmental entities not required to file a return under IRC sections 6011 or 6033(a). Such a form would allow the governmental entity to identify itself, and thus establish that it is per se otherwise exempt from federal tax. And rather than attach excise tax related schedules, a Form 8835 or equivalent, would be attached.

In turn, payment should be made under a similar time and manner as those currently for credit payments for direct payment bonds, such as Build America Bonds and New Clean Renewable Energy Bonds. It is worth mentioning that historically, such payments have been timely and dependable, but recently our members and other state and local entities report unexplained delays in Build America Bond and New Clean Renewable Energy Bond credit payments. We believe and hope this is a temporary anomaly, and – in any case – would request that direct payment credits be refunded in the same timely and dependable manner as provided historically for direct payment bond credit payments.

As to the timing of filing a claim for refund, allowing a claim for refund to be filed on an "as needed" basis also akin to Form 8849 would ensure that the benefits of these credits flow to project owners as quickly as possible. At the very least, if Treasury decides to require such claims to be filed on an annual basis, owners should be able to elect a calendar year, or fiscal year, depending on their own accounting practices.

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

Again, APPA believes that for a governmental entity, the model of the Form 8849, Claim for Refund of Excise Taxes, could suffice for purposes of documentation or registration for purposes of filing an election and claiming a refund for direct payment credits. We understand issues about fraud related to

new entities, but more than a third of all public power utilities have been in operation since World War II, and half have been in business for a century or longer. In contrast, just 10 have been established in the last 20 years and all should be well known and established entities with the IRS, paying employment taxes, amounts withheld on wages, and the like.

For the purposes of substantiating the underlying claim for credit, the exact same requirements, including documentation, should apply to a public power utility claiming a qualifying credit through direct payment as a for-profit company seeking direct payment (where applicable) or claiming a credit as a general business credit. Likewise, the underlying Form 8835, or equivalent, should be subject to the same process and time limitations, whether it is attached to a corporate tax return, or a governmental request for refund.

While APPA understands that there is some history with non-governmental entities and energy-related grants, and with individuals and certain refundable tax credits, neither involved governmental entities as claimants. In any case, it would be unfair and inefficient to create and maintain entirely separate processes to review claims for credits for direct payment from that applied to general business credits.

Thank you in advance for your consideration of these comments. If you have any questions, please feel free to contact me at jgodfrey@publicpower.org or via phone at (202) 467-2929. Additionally, APPA would be happy to meet with you or your staff to discuss these issues in detail.

Sincerely,

John Godfrey
Senior Government Relations Director