AN ALLETE COMPANY

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SUBMITTED ELECTRONICALLY VIA THE FEDERAL ERULEMAKING PORTAL AT www.regulations.gov AND VIA USPS

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 ("IRA")	)))))	**Treasury Department Notice 2022-51**

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

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
United States Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

Mr. William M. Paul
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Internal Revenue Service
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COMMENTS OF NEW ENERGY EQUITY LLC

Dear Madam and Sir:

New Energy Equity LLC ("NEE") respectfully submits these comments regarding implementation of the Inflation Reduction Act of 2022 ("IRA") pursuant to Notice 2022-51. NEE is a major national solar energy project development and financing company. It has successfully developed more than 330 MW of commercial scale solar projects in 26 states. NEE submits these comments on the need for clarity and certainty regarding the new categories of tax credits enacted in the IRA.

The IRA reflects important bipartisan policy objectives for Congress and the Administration and these comments are offered in the spirit of ensuring that the Treasury Department's guidance provides the certainty needed to incentivize clean energy projects and help meet broader Congressional clean energy and climate goals.

- ***The Treasury Department Should Create Safe Harbors Regarding Prevailing Wage and Apprenticeship Requirements***

Clear guidance regarding the Prevailing Wage and Apprenticeship ("PWA") requirements is vital to support continued deployment of the clean energy infrastructure envisioned by Congress when it passed the IRA. The 30% tax credit represents a large portion of the overall incentive program and the Treasury Department's guidance should provide clarity on the PWA requirements for financing.

Developers recognize that they are responsible for achieving the statutory requirements and that the program will include appropriate remedies (including penalties) to ensure compliance. However, the enforcement framework should not include the threat of recapture of tax credits. The solar industry is dependent on third-party tax investors, and these tax investors will have concern that a project will receive the full 30% credit. The willingness of such parties to finance and lend to projects will depend upon the extent to which they are confident that the full 30% credit will apply. This, in turn, will depend upon satisfaction of the PWA requirements. The Treasury Department should provide a clear safe harbor establishing that, if a project meets certain requirements, then the tax credits themselves will not be subject to recapture in any circumstance other than for fraud.

Thus, the Treasury Department's guidance should clarify that a developer is deemed to have satisfied the PWA requirements if it enters into a binding written contract requiring that contractors and subcontracts abide by the PWA requirements.

Section 45(b)(7)(A) provides that "the taxpayer *shall ensure that* any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in (i) the construction of [the solar] facility …. shall be paid wages at rates not less than the prevailing rates for construction…." (Emphasis added.) Section 48(a)(10) similarly requires that a taxpayer satisfies the PWA requirements.

Section 45(b)(7)(B)(i) generally provides a correction and penalty mechanism for a taxpayer that claims the increased credit amount but fails to satisfy the PWA requirement. Section 48(a)(10)(B) contains similar "cure" provisions for failure to satisfy the PWA requirements.

NEE is concerned that these rules will be interpreted as being satisfied only by future performance, *i.e.*, payment of PWA as construction occurs (or, if such payment does not occur, by future performance of payment of the cure payments). Yet lenders and investors will be looking for comfort that the project <u>*has*</u> satisfied the PWA requirements such that they can be confident that the full 30% credit will apply.

Currently, a project developer can only offer financing parties its representation that it contractually requires all contractors to pay prevailing wages. But the developer cannot control the actual performance by these contractors (and subcontractors). Without clear certainty that developers' contractual requirements will be deemed to <u>*ensure*</u> compliance with the prevailing wage obligations, lenders and tax investors cannot make investment decisions on the assurance that they will be able to receive the full 30% tax credit – which is the underlying purpose of their investment.

It should be noted, however, that sections 45(b)(7)(A), (b)(8) and sections 48(a)(10)(A) and (a)(11) do not phrase the PWA requirements as being the payment of wages or the use of apprentices but, rather, state that the requirement is one of *ensuring* the called-for payment and use of apprentices. In other words, the requirement is not that such payments must occur; the requirement is that the taxpayer *ensure* such payments occur and such apprentices are used.

Accordingly, in its guidance the Treasury Department should clarify that the taxpayer has satisfied its obligation to "ensure" that the required payments occur if the taxpayer enters into a binding written contract requiring such payments. The guidance would therefore deem the requirements to have been satisfied if, for example, the developer and the contractor enter into a binding written contract in which the contractor covenants to pay prevailing wages and use apprentices in accordance with the requirements.

Contractual commitments have been recognized as the equivalent to performance in many areas of the tax law. For example, section 45Q(f)(3) attributes the credit to the person who owns the carbon capture equipment and physically or contractually ensures the capture and disposal of the carbon oxide. Treas. Reg. section 1.45Q-1(h)(2) implements this rule by specifying the terms of a binding written contact pursuant to which a taxpayer will be treated as having contractually ensured such performance. Similarly, with respect to the construction commencement requirements in sections 45Q, 45 and 48, prior Treasury Department's guidance has treated binding written contracts as the equivalent of performing or satisfying the relevant requirements. *See, for example*, Rev. Proc. 2020-12, section 8.02 (work performed for taxpayer under binding written contract taken into account in determining taxpayer satisfaction of beginning of construction safe harbor for carbon oxide sequestration); Notice 2013-29, section 4.03 (work performed for taxpayer under binding written contract taken into account in determining beginning of construction for sections 45 and 48).

The Treasury Department's guidance should specify under what circumstances an agreement would be considered binding and what terms it must contain (such as enforceability under law and absence of minimal liquidated damages provisions).

If the department's guidance provides that the PWA requirements are deemed satisfied by entering into a binding agreement that obligates all parties to abide by PWA requirements, then taxpayers would be in a position to represent to lenders or investors that such requirements had been satisfied and be more likely to obtain necessary financing for their solar facilities. Potential investors would not have to make their decisions dependent upon their assessment of the likelihood that the parties would, in the future, satisfy such requirements.

Although the provisions in the statute provide that the taxpayer's obligation is merely to ensure that the requirements are met, without guidance that describes how a taxpayer may so ensure the requirements are met, taxpayers lack an objective means of proving to investors that the 30% tax credit is secure. Providing a means for such requirements to be deemed currently satisfied would be certain to facilitate investment in clean energy projects.

- ***The Treasury Department's Guidance Should Clarify That De Minimis Failures To Meet PWA Requirements Do Not Put The Entire 30% Tax Credit At Risk*.**

There will inevitably be situations in the market where a contractor or subcontractor pays a single laborer below the prevailing wages. This could be because a subcontractor hires a day laborer to fill in for a missing employee. Or it could be because one type of employees was misclassified under the Department of Labor's classification system and should have been paid a higher wage (reviewing the Department of Labor's website, it is not always clear how each worker should be classified). A single uncured underpayment of a nominal amount could, without clear guidance, put millions of dollars of tax credits at risk. The Treasury Department should clarify that developers making good faith attempts to abide by the PWA requirements will not lose their entire 30% tax credit for minor errors in complying with the requirements.

- ***The Guidance Should Clarify That Developers Need To Satisfy The PWA Rates In Place As Of The Beginning Of Construction*.**

Project budgets are established at the outset of project construction and will be designed based on the prevailing wages at that time. Subsequent changes to wages should not be required to be met in order to maintain compliance during the construction period. Further, requiring constant monitoring and compliance with published wage rates will create an unnecessary contractual and compliance burden.

- ***The Treasury Department Should Clarify How The Davis-Bacon Prevailing Wage Requirements Apply***

In its notice, the Treasury Department asked whether guidance is necessary to clarify how the prevailing wage requirement applies. Such guidance would be very helpful. Solar developers and EPC contractors have little to no experience with the Davis-Bacon requirements. Simply navigating the Labor Department's website on Davis-Bacon requirements can be confusing.

Reviewing the Labor Department's site regarding prevailing wages, it is not entirely clear how to determine which classes of laborers certain solar construction employees belong to (this could change if the Labor Department adjusts its classification systems based on the IRA). And parties will need time to learn the ins and outs of the rules. For example, are laborers paid the prevailing wage (which appear to be set by county) applicable at the project site or the EPC contractor's headquarters? If one uses the location of the project site, for example, employees doing similar jobs for the same company in relatively close proximity might have to be paid different wages, which could be confusing or problematic for the contractor (and prevent the contractor from moving workers between projects).

It is likely that entities familiar with Davis-Bacon requirements know how to deal with these issues, but solar developers do not. And considering how much solar developers rely on the credits, it is imperative that the Treasury Department help the renewable industry navigate these new standards.

- ***The Treasury Department Should Consider Multiple Factors When Developing Rules To Correct Deficiencies For Failure To Satisfy Prevailing Wage Requirements***

Section 48(a)(10)(B) states that "rules *similar* to the rules of section 45(b)(7)(B) shall apply" (emphasis added). The Treasury Department should recognize the flexibility in that wording and not necessarily use the exact same rules for Section 48 as set forth in Section 45.

Section 45(b)(7)(B) sets forth a rather onerous set of requirements and penalties for failure to satisfy the prevailing rate requirement: (1) repaying the worker the difference in wages, (2) adding on a significant interest rate (essentially prime plus six percent points), and (3) a paying a penalty equal to $5K times the number of workers not paid the prevailing wage. Cumulatively, these provisions are burdensome for the typical C&I solar project.

Violations of Section 48 not only put developers at risk of these onerous penalties – it also could put the 30% tax credit at risk as well. For this reason, the Treasury Department should be cautious when imposing penalties on solar developers.

Another key factor for the Treasury Department to consider when developing rules for correcting prevailing wage deficiencies is that the developer – the party at risk – is most likely not the party hiring the laborers and setting their wages. As alluded to above, it is plausible that in those cases where the contractor or subcontractor does not abide by the prevailing wage requirement, the developer will have difficulty correcting such deficiency because it is not the employer of the laborer. In such cases, there will likely be some confusion as to who has what responsibility. For example, would the developer have to pay the difference in wages (the party held responsible in the IRA) or the EPC contractor (the actual party that failed to pay the proper wages and that is the actual employer)? What if the EPC contractor is slow to compensate the laborer (because the contractor is not the party at risk of losing its ITC)?

And when would the developer learn of the contractor's failure? During construction? After construction? After filing its taxes?

All of these factors – the impact on the developer, the lack of control, timing issues – suggest that the Treasury Department should be lenient in those instances where the developer can demonstrate that it intended to abide by the prevailing wage requirements and entered into contracts with such an intent.

This may mean providing developers with extra time to abide by the requirements (including, if necessary, time to pursue legal options against non-compliant contractors), or waiving the $5K per worker penalty in cases where there was a contract in place, or providing a safe harbor with a high bar to cross before revoking the 30% ITC.

Because this is the beginning of new paradigm, trial periods, leniency, and cure periods are warranted at this stage.

- ***The Treasury Department Should Provide Clear Guidance Regarding The Apprenticeship Requirements***

All of the concerns raised earlier by the prevailing wage requirements apply to the apprenticeship requirements as well. As well as some others. For example, are contractors required to pay apprentices the same wages as experienced laborers? How does a company go about establishing a "registered apprenticeship program"? How long can individuals remain in the apprenticeship program (i.e., if they graduate from the program, do contracts have to get rid of experienced laborers on their payroll to make room for more apprentices)? The language in Section 48 is vague regarding the apprenticeship requirement (it merely references Section 45). Does violating the apprenticeship requirements put the 30% tax credit at risk in the same manner that violating the prevailing wages requirement does? All of these questions require answers from the Treasury Department.

- ***The Treasury Department May Wish To Issue Interim Guidance Regarding These Issues While The Industry Gains Experience In These Matters***

NEE recognizes that the Treasury Department is probably under pressure to "publish[] guidance with respect to the requirements of [prevailing wage and apprenticeship standards]" so that the 60 day clock in Section 48(a)(9)(B)(ii) begins to toll. This is understandable. But considering that the loss of the 30% tax credit could literally bankrupt smaller solar developers, it might be more prudent for the Treasury Department to take its time, issue interim guidance, and revisit the guidance after at least one years' experience. Many federal government agencies issue "advance notices of proposed rulemaking" or interim guidelines and provide industry with time to adapt to new regimes and regulations. The Treasury Department should strongly consider whether a similar strategy would be appropriate here.

By issuing interim guidelines (and clarifying that the 60 day clock in Section 48(a)(9)(B)(ii) has not yet begun), the Treasury Department and industry participants could gain actual experience with the prevailing wage and apprenticeship requirements without putting the 30% tax credit at risk. The Treasury Department could still require industry participants to comply with these standards, report on their experience with these standards, and perhaps even issue the $5K fines pursuant to 45(b)(7)(B) to industry participant willfully ignoring the standards. This experience and feedback would allow the Treasury Department (and also the Labor Department) to evaluate whether its proposed guidance was appropriate and met the needs of the industry or whether the guidance needs to be revised and amended, while at the same time providing time for the industry to adapt to and understand these new rules without incurring massive penalties or losing their tax credits.

- ***The Treasury Department Should Clarify That Projects That Have Begun Construction Before The Department Issues Guidance On The PWA Requirements Are Exempted From The PWA Requirements.***

The Treasury Department should make it absolutely clear that projects that have begun construction (either by beginning physical construction or having already spent at least 5% of the capital costs per prior guidance letters) prior to the "date that is 60 days after the" Treasury Department's issuance of PWA guidance are exempt from the PWA requirements and entitled to the full 30% tax credit. The industry is used to the existing safe harbor rules and it is important the department simplify the transition to the new PWA requirements.

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We appreciate the opportunity to submit these comments and are available to discuss these issues in greater detail or answer any questions you may have.

Respectfully Submitted,
New Energy Equity, LLC

By: ________________________
James Wrathall