November 4, 2022

SUBMITTED ELECTRONICALLY

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-49 and Notice 2022-50)
Room 5203
P.O. Box 5203, Ben Franklin Station
Washington, D.C. 20044

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

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief
Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: Request for Comments on Regulatory Implementation of the Inflation Reduction Act and Sections 6417 and 6418 of the Code Pursuant to Notice 2022-50

Dear Ms. Batchelder and Mr. Paul:

NextEra Energy, Inc. ("NextEra") appreciates the opportunity to respond to the Internal Revenue Service's request for comments regarding the Inflation Reduction Act ("IRA") pursuant to Notice 2022-50.

I. Background

The Treasury Department and the Internal Revenue Service ("IRS") plan to issue guidance regarding several sections, including Section 6417 and Section 6418, of the Internal Revenue Code, as added by Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022.

Treasury and the IRS have issued Notice 2022-50 (the "Notice"), requesting comments on general as well as specific questions pertaining to elective payment of applicable credits and the transfer of certain credits. In response to the Notice, NextEra submits the following responses.

II. Questions Raised by the IRS

Sec. 3.02. Transfer of Certain Credits (§ 6418).

(1) What, if any, guidance is needed to clarify the meaning of certain terms in § 6418, such as eligible credit, eligible taxpayer, and excessive credit transfer? Is there any term not defined in § 6418 that should be defined in guidance? If so, what is the term and how should it be defined?

Guidance should clarify that a transferee taxpayer includes an applicable entity as defined in section 6417(d)(1)(A). This is supported by section 6418(f)(2), which defines the term eligible taxpayer as any taxpayer which is not an applicable entity; and by section 6418(g)(2)(A), which imposes an additional tax for an excessive credit transfer on the transferee taxpayer (regardless of whether such entity would otherwise be subject to tax under chapter 1). Both of these provisions strongly suggest that a taxpayer (including a transferee taxpayer) includes an applicable entity that is generally not subject to U.S. federal income tax.

(2) Section 6418(c)(1) provides that, in the case of any eligible credit determined with respect to any facility or property held directly by a partnership or S corporation, the Secretary determines the manner in which such partnership or S corporation makes an election under § 6418(a) with respect to such credit.

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6418(a) and what, if any, guidance is needed with respect to such issues?

With respect to a partnership, any transfer of credits or special allocations or distributions in connection with a transfer of credits under section 6418 will not affect satisfaction of the safe harbor for wind farm partnerships provided under Revenue Procedure 2007-65. For example, assume 99% of a wind farm partnership's income or loss and the section 45 credits will be allocated to the investor, 1% will be allocated to the developer, and the partnership structure otherwise satisfies the safe harbor under Revenue Procedure 2007-65. The partnership may elect to transfer 1% of section 45 credits to a transferee and specially allocate the tax-exempt income resulting from the transfer entirely to the developer member. Such a special allocation would not affect satisfaction of the safe harbor under the Revenue Procedure (i.e., the requirement that the developer have a minimum 1% interest in each material item of partnership income, gain, loss, deduction and credit). Distributions of cash from the transfer among partners can be determined by agreement of the partners, also without affecting satisfaction of the safe harbor under the Revenue Procedure.

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

NextEra has no comment under this paragraph (2)(b).

(3) Section 6418(c)(2) provides that, in the case of any facility or property held directly by a partnership or S corporation, no election by any partner or shareholder is allowed under § 6418(a)

with respect to any eligible credit determined with respect to such facility or property. If the election is made, what issues should be considered regarding the transfer of any portion of an eligible credit and what, if any, guidance is needed with respect to such issues? Further, what, if any, guidance is needed on allocating any amount received as consideration for transferring any portion of an eligible credit?

Section 6418(c)(1)(B) requires that a partner's distributive share of tax-exempt income arising from a transfer of a tax credit under section 6418 be based on such partner's distributive share of the otherwise eligible credit for each taxable year. Guidance should provide that this requirement is satisfied if the sum of the partnership's tax-exempt income arising from the credit transfers and the tax credits that are not transferred by the partnership that is allocated to each partner is in accordance with such partner's distributive share of the otherwise eligible credit for the taxable year. Thus, a 50-50 partnership that elects to transfer half of its tax credits under section 6418 may allocate all of the tax-exempt income arising from such transfer to one partner and all of the tax credits for which no election under section 6418 is made to the other partner. Such allocations would divide the credits (albeit in two different forms) evenly between the partners in accordance with the requirements of section 704(b).

In addition, the IRS should clarify that cash proceeds from the transfer of tax credits pursuant to section 6418 do not have to be distributed in the same proportion as the credits would have been allocated for tax purposes. The sharing of cash among partners should be permitted to be determined by agreement of such partners.

(4) What, if any, guidance is needed with respect to parameters or limitations on a transferee taxpayer's eligibility to claim the credit?

Consistent with our response to (1) above, guidance should confirm that an applicable entity that is transferred a tax credit under section 6418 may elect direct pay with respect to such credit under section 6417.

(5) For purposes of § 6418(d), what, if any, guidance is required to determine the proper taxable year in which to claim any credit that was transferred pursuant to an election made under § 6418(a)?

NextEra has no comment under this paragraph (5).

(6) In determining the amount of eligible credit transferred under § 6418(a), is guidance needed to clarify the application of any other Code provision? If so, what is the Code provision and what clarification is needed?

NextEra has no comment under this paragraph (6).

(7) Is guidance needed to clarify how any other Code provision applies to an eligible taxpayer or a transferee taxpayer when an election is made under § 6418? If so, what is the Code provision and what clarification is needed?

NextEra requests guidance clarifying how transferred credits are treated for purposes of the Corporate Alternative Minimum Tax under section 56A. Section 6418(b)(2)-(3) provides that the consideration for the transfer of credits is not taxable to the transferor or deductible for the transferee. It is expected that renewable credits will not be transferred at 100 percent of their value, but will be traded at a

discount. In practice, GAAP and IFRS may also require the gain on purchase of tax credits to be recorded in the adjusted financial statement income and not be recorded as tax. Under section 56A(c)(9) there is a specific exclusion or adjustment to adjusted financial statement income for amounts attributable to election for direct payments of certain credits. NextEra requests clarification that any discount or premium would also not be deductible or includible in income and that transferable credits under section 6418 would also be an exclusion from or adjustment to adjusted financial statement income for the section 56A Corporate Alternative Minimum Tax, if applicable.

(8) For purposes of preventing duplication, fraud, improper payments, or excessive credit transfers under § 6418, what information, including any documentation created in or out of the ordinary course of business, or registration, should be required by the IRS as a condition of, prior to, or after any transfer of any portion of an eligible credit pursuant to § 6418(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 for all eligible credits? If not, how should the information or registration differ between eligible credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive credit transfers under § 6418?

NextEra has no comment under this paragraph (8).

(9) What, if any, guidance is needed to clarify the application of the excessive credit transfer provisions of § 6418? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6418(g)(2)(B)? What guidance is needed to calculate the excessive credit transfer amount?

Guidance is requested clarifying that the excessive credit transfer under section 6418(g) will be assessed against the transferor to the extent of any transferred credits that are disallowed, and against the transferee to the extent the transferee claims credits in excess of the credits for which the transferee paid the transferor.

On reasonable cause, reference should be made to Treas. Reg. § 1.6664-4(b). The party responsible for any excessive credit transfer amount and any party subject to examination for an excessive credit transfer should have the right to challenge and/or appeal any adverse determination by the IRS or other agency. Other provisions in the Code and the IRA, such as the penalty for prevailing wages in section 45(b)(7)(B), include a specific reference to deficiency procedures and states that those procedures do not apply. See § 45(b)(7)(B)(ii). On the other hand, section 6418(g)(2)(A) says nothing about deficiency procedures. The IRS should make clear that the deficiency provisions apply to a determination of an excessive payment and parties should have the right to appeal any determination to the IRS Independent Office of Appeals.

(10) For purposes of § 6418(g)(3), what, if any, guidance is needed to clarify the application of § 50 for purposes of credit recapture, basis adjustments, and eligibility related to § 50(b)(3)? Pursuant to § 6418(g)(3)(B)(i), an eligible taxpayer must notify the transferee taxpayer if, during any taxable year, the applicable investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period. What factors should be considered in determining the form and manner of this notice? Likewise, pursuant to §

6418(g)(3)(B)(ii), the transferee taxpayer must notify the eligible taxpayer of the recapture amount. What factors should be considered in determining the form and manner of this notice?

It is unclear whether the transferor or the transferee is subject to recapture of a transferred investment tax credit under section 50(a). NextEra requests guidance confirming that the section 50(a) recapture rules will apply to the eligible taxpayer (i.e., the transferor), and that tax credits cannot be recaptured from the transferee.

(11) Is guidance needed to clarify the application of § 6418(g)(4) regarding progress expenditures? If so, what clarification is needed?

NextEra has no comment under this paragraph (11).

(12) Please provide comments on any other topics that may require guidance.

Facility Election Issues

An election must be made separately with respect to each facility for which an eligible credit described in section 6418(f)(1)(B) is determined, and for each taxable year during the applicable credit period. To eliminate confusion around this provision, guidance should confirm that an eligible taxpayer may make an election to transfer all or a portion of an eligible credit determined with respect to a particular facility for one taxable year during the applicable credit period, while deciding not to make an election to transfer any portion of an eligible credit determined with respect to that facility for another taxable year during the applicable credit period.

Guidance should also provide that, for purposes of making the election under section 6418(f)(1)(B), a taxpayer may treat multiple facilities comprising a single project as a single facility, and may use any reasonable method for purposes of allocating the eligible credits generated by the project among those facilities. This would greatly ease the administrative burden on taxpayers and eliminate the need to have to place a meter at each facility within the project.

Payment in Cash

The transferee taxpayer is required under section 6418(b)(1) to pay cash to the eligible taxpayer as consideration for all or a portion of an eligible credit transferred pursuant to section 6418. Guidance should provide that, for this purpose, cash shall include payments of cash prior to the taxable year in which the eligible credit is transferred (cash prepayments), cash paid during such taxable year, and obligations to pay cash in one or more taxable years subsequent to such taxable year (deferred cash payments), provided in each case that the transferee taxpayer cannot and does not transfer any consideration other than cash in connection with the transfer. This would facilitate common credit transfer transactions and would, we believe, be consistent with the intent of the statute.

Audits

Guidance is requested clarifying that with respect to audits conducted on the transferor, underpayments will be assessed against the transferor.

The guidance should clarify that standard procedures apply to any IRS examination and that subchapter B of chapter 63 (relating to deficiency procedures for income taxes), as well as other applicable

provisions of subtitle F of the Internal Revenue Code, applies with respect to the assessment or collection of any taxes imposed with respect to any excessive credit transfer determination under section 6418(g)(2), with respect to any recapture event described under section 6418(g)(3), or otherwise with respect to any assessment or collection of taxes or penalties against the transferor or transferee(s) of an eligible credit.

In order to reduce the risk to a transferee of credits, in the event there is a reduction of credits such reduction should first impact the transferor before impacting the transferee. For example, a project is eligible for $100 of credits and transferor transfers $30 of credits to transferee. If an IRS audit results in a reduction of the tax credits to $70, there should be no reduction to the tax credits sold to the transferee. The transferee would only be impacted if the credit amount is reduced below $30.

Interim Credit Transfers

ACP seeks additional clarification from Treasury on Interim Credit Transfers. The guidance should clarify that interim transfers of credits for cash can be utilized to satisfy estimated payments. For example, suppose that Transferor was to transfer credits for cash to Transferee in February. Those credits can be used as any or all of the first quarter estimated payments for the year.

Affiliated Groups

For ease of administration, guidance should provide that in the case of an eligible taxpayer that is a member of an affiliated group of corporations filing a consolidated return, the election under section 6418 to transfer all or a portion of an eligible credit generated by the eligible taxpayer shall be made by the parent of such group.