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Internal Revenue Service
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Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

SUBMITTED ELECTRONICALLY via Federal eRulemaking Portal at www.regulations.gov

Re: Notice 2022-51

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

The National Rural Electric Cooperative Association ("NRECA") respectfully submits the following comments in response to Notice 2022-51, the "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". These comments are intended to provide the broad perspective of NRECA's member electric cooperatives to the energy generation incentives contained in the Inflation Reduction Act (IRA) of 2022.

The National Rural Electric Cooperative Association (NRECA) is the national trade association representing nearly 900 local electric cooperatives and other rural electric utilities. America's electric cooperatives are owned by the people that they serve and comprise a unique sector of the electric industry. From suburbs to remote farming communities, electric cooperatives power 1 in 8 Americans and serve as engines of economic development for 42 million Americans across 56 percent of the nation's landscape. Electric cooperatives own and maintain 2.7 million miles or 42 percent of the nation's electric distribution lines.

Electric cooperatives operate at cost and without a profit motive. NRECA's member cooperatives include 63 generation and transmission (G&T) cooperatives and 832 distribution cooperatives. G&T cooperatives are owned by the distribution cooperatives that they serve. The G&Ts generate and transmit power to distribution cooperatives that then provide it to the end of line co-op consumer-members. Collectively, cooperative G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives in the nation. The remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

Comments

.01 Prevailing Wage Requirement

(1) Section 45(b)(7)(A) provides that a taxpayer must ensure that any laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, are paid wages at rates not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, which is commonly known as the Davis-Bacon Act. Is guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A)?

It would be most helpful if the IRS could publicize and provide a hyperlink to the website where applicable entities may find prevailing wage data. If this data could be provided by state and by county that would be ideal. It would also be helpful if such a website had a comprehensive listing of the types of jobs for which current prevailing wages were provided. This website might be a good candidate: *https://www.flcdatacenter.com/OesWizardStart.aspx*

(2) Section 45(b)(7)(B)(i) generally provides a correction and penalty mechanism for failure to satisfy prevailing wage requirements. What should the Treasury Department and the IRS consider in developing rules for taxpayers to correct a deficiency for failure to satisfy prevailing wage requirements?

We need the IRS to define what constitutes an alteration and repair in years after the unit is placed in service for purposes of the continuation of the payment of prevailing wages and apprenticeships. Applicable entities may not be familiar with such definitions under the tax law.

The IRS should consider defining construction, alteration, or repair for purposes of prevailing wage and apprenticeships during the construction period.

(3) What documentation or substantiation should be required to show compliance with the prevailing wage requirements?

The applicable entity should require contractors and subcontractors to show hourly rates by job category and an attestation that such wages were determined in accordance with a website on prevailing wages provided by the appropriate federal government entity. With respect to its own employees, the applicable entity could provide payroll records which could be matched with a prevailing wage website. The IRS should clarify that prevailing wages should be measured once, at the beginning of construction, and that wage should be the prevailing wage that is paid throughout the construction period.

(4) Is guidance for purposes of § 45(b)(7)(A) needed to clarify the treatment of a qualified facility that has been placed in service but does not undergo alteration or repair during a year in which the prevailing wage requirements apply?

(5) Please provide comments on any other topics relating to the prevailing wage requirements for purposes of § 45(b)(7)(A) that may require guidance.

The IRS should issue guidance to clarify that a project could be placed in service in 2022 and still satisfy the prevailing wage and apprenticeship requirements through the "grandfather" provision of the IRA (i.e., assuming guidance is issued after November 2, 2022, construction of a facility placed in service in 2022 necessarily began prior to the date that is 60 days after the Secretary published guidance with respect to the wage and apprenticeship requirements).

<u>.02 Apprenticeship Requirement</u>

(1) Section 45(b)(8)(C) provides that each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to a qualified facility must employ one or more qualified apprentices from a registered apprenticeship program to perform that work. What factors should the Treasury Department and the IRS consider regarding the appropriate duration of employment of individuals for construction, alteration, or repair work for purposes of this requirement?

(2) Section 45(b)(8)(D)(ii) provides for a good faith effort exception to the apprenticeship requirement.

(a) What, if any, clarification is needed regarding the good faith effort exception?

The IRS should clarify that the good faith exception to the apprenticeship requirement is determined at the beginning of construction and need only be justified once. It is exceptionally difficult for electric cooperatives in

rural areas to access apprenticeship programs which are typically limited to the larger cities and towns. As a result, it is especially important that electric cooperatives have a reasonable and expedited good faith effort exception process.

(b) What factors should be considered in administering and promoting compliance with this good faith effort exception?

An applicable entity could provide correspondence (which may be phone or email records) with appliable union or trade organizations as well as state labor departments which would support their assertion of the good faith effort exception. As we noted, the good faith effort exception should be applied at the beginning of construction and should be resolved as rapidly as possible. Perhaps an electric cooperative could rely on no response to a request after a specified period of time (for example 5 days from initial contact) as evidence of lack of available apprenticeships. In this manner, projects would not be unduly delayed by lack of response to the applicable entity.

(c) Are there existing methods to facilitate reporting requirements, for example, through current Davis-Bacon reporting forms, current performance reporting requirements for contracts or grants, and/or through DOL's Registered Apprenticeship Partners Information Management Data System (RAPIDS) database or a State Apprenticeship Agency's database?

(3) What documentation or substantiation do taxpayers maintain or could they create to demonstrate compliance with the apprenticeship requirements in § 45(b)(8)(A), (B), and (C), or the good faith effort exception?

Please see our response to question (b) above.

(4) Please provide comments on any other topics relating to the apprenticeship requirements in § 45(b)(8)(B) that may require guidance.

The IRS should provide guidance on what are the applicable percentage of total labor hours and the labor hour requirements for apprentices.

What are the labor hour requirements for apprenticeships?

<u>.03 Domestic Content Requirement</u>

(1) Sections 45(b)(9)(B) and 45Y(g)(11)(B) provide that a taxpayer must certify that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was produced in the United States (as determined under 49 C.F.R. 661).

(a) What regulations, if any, under 49 C.F.R. 661 (such as 49 C.F.R. 661.5 or 661.6) should apply in determining whether the requirements of section §§ 45(b)(9)(B) and 45Y(g)(11)(B) are satisfied? Why?

(b) What should the Treasury Department and the IRS consider when determining "completion of construction" for purposes of the domestic content requirement? Should the "completion of construction date" be the same as the placed in-service date? If not, why?

(c) Should the definitions of "steel" and "iron" under 49 C.F.R. 661.3, 661.5(b) and (c) be used for purposes of defining those terms under §§ 45(b)(9)(B) and 45Y(g)(11)(B)? If not, what alternative definitions should be used?

(d) What records or documentation do taxpayers maintain or could they create to substantiate a taxpayer's certification that they have satisfied the domestic content requirements?

(2) Sections 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) provide that manufactured products that are components of a qualified facility upon completion of construction will be deemed to have been produced in the United States if not

less than the adjusted percentage of the total costs of all of such manufactured products of such facility are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States.

(a) Does the term "component of a qualified facility" need further clarification? If so, what should be clarified and is any clarification needed for specific types of property, such as qualified interconnection property?

(b) Does the determination of "total costs" with regard to all manufactured products of a qualified facility that are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States need further clarification? If so, what should be clarified? Is guidance needed to clarify the term "mined, produced, or manufactured"?

(c) Does the term "manufactured product" with regard to the various technologies eligible for the domestic content bonus credit need further clarification? If so, what should be clarified? Is guidance needed to clarify what constitutes an "end product" (as defined in 49 C.F.R. 661.3) for purposes of satisfying the domestic content requirements?

We believe additional clarification of what constitutes a "manufactured product" would be very helpful to applicable entities which may not have had experience with such a concept.

(d) Does the adjusted percentage threshold rule that applies to manufactured products need further clarification? If so, what should be clarified?

(e) Does the treatment of subcomponents with regard to manufactured products need further clarification? If so, what should be clarified?

(3) Solely for purposes of determining whether a reduction in an elective payment amount is required under § 6417, §§ 45(b)(10)(D) and 45Y(g)(12)(D) provide an exception for the requirements contained in §§ 45(b)(9)(B) and 45Y(g)(10)(B) (respectively) if the inclusion of steel, iron, or manufactured productions that are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent or relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

(a) Does the determination of "overall costs" and increases in the overall costs with regard to construction of a qualified facility need further clarification? If so, what should be clarified?

We believe the term "overall costs" should be defined in such a way that it is easily understood by applicable entities. Perhaps, overall cost should be related to costs capitalized under GAAP for accounting purposes. In many cases, book and tax basis may be the same but if there are differences, we feel that overall costs should relate to book costs.

(b) What factors should the Secretary include in guidance to clarify when an exception to the requirements under section §§ 45(b)(10)(D) and 45Y(g)(12)(D) applies? What existing regulatory or guidance frameworks, such as the Federal Acquisition Regulation (FAR) and Build America Buy America (BABA) guidance, may be useful for developing guidance to grant exceptions under §§ 45(b)(10)(D) and 45Y(g)(12)(D)?

We believe that any "Buy America" requirement should suffice to facilitate the granting of exceptions. We urge the IRS to not be too restrictive in selecting a single Buy America requirement such as BABA since there may be other requirements throughout government which apply to entities to which the FAR or BABA do not.

(c) Do the "sufficient and reasonably available quantities" and "satisfactory quality" standards need further clarification? If so, what should be clarified?

Yes, we believe that clarification of these terms would be helpful and take the otherwise subjective burden off an applicable entity. Greater certainty would benefit the applicable entity as well as the IRS.

(4) Sections 48 and 48E have domestic content bonus amount rules similar to other provisions of the Code. Section 48(a)(12) has domestic content requirement rules similar to § 45(b)(9)(B) and § 48E(a)(3)(B) has domestic content rules similar to the rules of § 48(a)(12). What should the Treasury Department and the IRS consider in providing guidance regarding the similar domestic content requirements under § 48(a)(12) and § 48E(a)(3)(B)?

(5) Please provide comments on any other topics relating to the domestic content requirements that may require guidance.

We believe that further clarity regarding what is a manufactured product would be most helpful.

.04 Energy Community Requirement

(1) Section 45(b)(11)(A) provides an increased credit amount for a qualified facility located in an energy community. What further clarifications are needed regarding the term "located in" for this purpose, including any relevant timing considerations for determining whether a qualified facility is located in an energy community? Should a rule similar to the rule in § 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines), the rules in C.F.R. §§ 1.1400Z2(d)-1 and 1.1400Z2(d)-2, or other frameworks apply in making this determination?

(2) Does the determination of a brownfield site (as defined in subparagraphs (A), (B), and (D)(ii)(III) of § 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(39))) need further clarification? If so, what should be clarified?

For energy communities, the concept of "brownfield site" should be defined such that a portion of a site could be used for a project as opposed having to use the entire site.

For the definition of an energy community, the IRS should define areas which have or had a certain amount of employment or tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas and has an above-average unemployment rate broadly. An above average employment rate should pertain to a national or state average, not a local average which may be difficult to quantify or measure.

With respect to energy community, the IRS should define a census tract or adjacent area very expansively. Those census tracts or areas in which a coal mine has closed after 1999 or a coal-fired electric generating unit has been retired after 2009 should include partial use of such places.

The award certification process for qualified investments in energy communities should be clear, concise, and as expeditious as possible in order to keep cost as low as practicable.

(3) Which source or sources of information should the Treasury Department and the IRS consider in determining a "metropolitan statistical area" (MSA) and "nonmetropolitan statistical area" (non-MSA) under § 45(b)(11)(B)(ii)? Which source or sources of information should be used in determining whether an MSA or non-MSA meets the threshold of 0.17 percent or greater direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas, and an unemployment rate at or above the national average unemployment rate for the previous year? What industries or occupations should be considered under the definition of "direct employment" for purposes of this section?

(4) Which source or sources of information should the Treasury Department and the IRS consider in determining census tracts that had a coal mine closed after December 31, 1999, or had a coal-fired electric generating unit retired after December 31, 2009, under § 45(b)(11)(B)(iii)? How should the closure of a coal mine or the retirement of a coal-fired electric generating unit be defined under § 45(b)(11)(B)(iii)?

(5) For each of the three categories of energy communities allowed under § 45(b)(11)(B), what past or possible future changes in the definition, scope, boundary, or status of a "brownfield site" under § 45(b)(11)(B)(i), a "metropolitan statistical area or non-metropolitan statistical area" under § 45(b)(11)(B)(ii), or a "census tract" under § 45(b)(11)(B)(iii) should be considered, and why?

(6) Under § 45(b)(11)(B)(ii)(I), what should the Treasury Department and the IRS consider in determining whether a metropolitan statistical area or non-metropolitan statistical area has or had 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas? What sources of information should be used in making this determination? What tax revenues (for example, municipal, county, special district) should be considered under this section? What, if any, consideration should be given to the unavailability of consistent public data for some of these types of taxes?

(7) Please provide comments on any other topics relating to the energy community requirement that may require guidance.

.05 Increased Credit Amount for Qualified Facility with Maximum Net Output of Less than 1 Megawatt

Section 45(b)(6)(A) provides for an increased credit amount in the case of any qualified facility that satisfies the requirements of § 45(b)(6)(B). One way that a qualified facility can satisfy the requirements of § 45(b)(6)(B) is if it is a facility with a maximum net output of less than 1 megawatt (as measured in alternating current). Similarly, § 48(a)(9)(A) provides for an increased credit amount in the case of any energy project that satisfies the requirements of § 48(a)(9)(B), and one way that an energy project can satisfy the requirements of § 48(a)(9)(B) is if it is a project with a maximum net output of less than 1 megawatt of electrical (as measured in alternating current) or thermal energy. Sections 45Y(a)(2)(B) and 48E(a)(2)(A) also provide similar rules. Does the determination of when a facility or project will be considered to have a maximum net output of less than 1 megawatt need further clarification? If so, what should be clarified?

Thank you for your consideration of our comments. If you have any questions, please don't hesitate to contact us.

Sincerely,

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Senior Director of Regulatory Affairs
The National Rural Electric Cooperative Association