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

To Whom It May Concern:

The American Public Power Association (APPA) appreciates this opportunity to comment on the Notice of Proposed Rulemaking, Section 6417 Elective Payment of Applicable Credits[1] (Proposed Rule, hereafter) and the provisions of Temporary Regulations for Pre-Filing Registration Requirements for Certain Tax Credit Elections[2] (Temporary Regulation) also incorporated into the Proposed Rule.

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.[3] Public power utilities include 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, joint powers agencies and similar entities formed to collectively serve other public power utilities, and in all instances are exempt from federal income taxes under section 115.[4]

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 serves 49 states (all except Hawaii) and the territories of American Samoa, Guam, Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands. Collectively, public power utilities 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,

[1] Prop. Reg §§ 1.6417–1 to -6, 88 Fed. Reg. 40,528 (June 21, 2023).
[2] Temp. Reg. § 1.6417-5T, 88 Fed. Reg. 40,086 (June 21, 2023).
[3] 16 USC 824q(a)(4).
[4] References to a "section" are to a section of the Internal Revenue Code of 1986 (as amended), unless otherwise specified.

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 1,600 are considered "rural" by the U.S. Department of Agriculture Rural Utility Service.

Before commenting, APPA would like to express its appreciation to the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (Service) for the work done to date to implement the provisions of Public Law 117-169, commonly referred to as the Inflation Reduction Act (IRA), incorporated into the Internal Revenue Code of 1986 (IRC or Code). This legislation not only extended and expanded existing energy tax credits, but also created wholly new regimes intended to give all entities the opportunity to receive certain federal energy investment and production incentives delivered through the Code. Previously, these tax-based incentives excluded tax-exempt entities, including public power utilities. Collectively, with rural electric cooperatives (another form of community-owned tax-exempt electric power utility), prior law had the effect of excluding utilities serving nearly 30 percent of the nation's retail customers.

With IRA's enactment, incentivized direct ownership of these types of energy facilities will have significant implications for communities seeking to transition to cleaner power generation while maintaining reliability. It will also have significant financial implications, with the value of tax credits being retained by communities either to offset the cost of further investments or returned to customers in the form of lower rates rather than being retained by project developers and their tax-equity partners.

Finally, domestic content requirements with respect to elective payments are imposed as part of investment and production tax credit provisions of the Code, rather than the elective payment provision.[5] As such, guidance related to these domestic content requirements, including exceptions to those requirements, are not discussed in the Proposed Rule. However, the penalty for failing to meet these requirements applies to the construction of projects that begin after December 31, 2023 – 20 weeks from when these comments are being filed. APPA has commented previously on the need for these requirements to be clear, simple, and reliable. However, we now must emphasize that they must also be timely. There are headwinds to commencing construction where such a key aspect of project costs remains unknown. We understand the enormity of this task, but we strongly encourage Treasury and the Service to provide guidance as soon as possible. To avoid whipsawing entities that do proceed with construction rather than awaiting guidance – in keeping with congressional intent – we would ask you to issue this guidance in proposed form to allow for public comment and urge that it include safe harbors available to projects that take the risk of moving forward pending the release of such guidance.

APPA Comments

The following comments follow the organization of the Proposed Rule, with APPA's specific comments following the relevant description of the proposed rule.

[5] *See*, I.R.C. §§ 45(b)(10), 45Y(g)(11), 48(a)(13), and 48E(d)(5).

Proposed Rule Section 1.6417-1 – Elective Payment Election of Applicable Credits

(b) Annual Tax Return

The Proposed Rule provides the mechanism by which an applicable entity may make an election for elective payment under section 6417. However, there is no indication in the Proposed Rule or other public comments about how and when the Service will act on such an election. For example, a June 2023 Treasury presentation slide deck provides a hypothetical timetable for an applicable entity to make an elective payment election including when the facility is placed in service, when the entity would complete pre-filing registration with the Service, and the deadline for filing a return to make an elective payment election.[6] That slide deck, however, only states that payment will be received "after (the) return is processed" with no indication as to when that might occur.[7]

Public power utilities typically finance large capital investments with an up-front bond issuance that plays the dual role of covering up-front project costs, but also allowing for the repayment of those costs over time. Tax credit payments that are not received until after project completion will likely require bridge financing before longer-term financing is secured. Uncertainty as to the timeframe in which the payments will be made will hinder the assembly of the financial package because it will create uncertainty in the assurances to financiers that the entity can meet financing, funding, and repayment project requirements. This will drive up project costs, perhaps blocking financing entirely, and will reduce the willingness of some to take advantage of elective payment.

COMMENT: *For the elective-payment mechanism to be effective, final regulations should provide a timeline by which Treasury and the Service intend to make elective payments. For example, this could include providing that elective payment will be made no later than 30 to 60 days after the later of (1) the date the applicable entity timely files its tax return electing to receive the applicable credit payment or (2) the due date (without extensions) for filing the return.*

Additionally, under the Code and the Proposed Rule, an applicable entity may make an elective payment election with respect to any applicable credit. Where elective payment was made available to certain existing credits (i.e., Code sections 45 and 45Q), elective payment is effective for facilities "placed in service after December 31, 2022."[8] However, in an uncodified provision, the IRA provides that the elective payment provisions are effective "for taxable years beginning after Dec. 31, 2022."[9]

The Code provides latitude to taxpayers in determining their applicable taxable year, including calendar year, taxable year, and part year taxable years where needed.[10] Neither the IRA, nor the Code as modified by the IRA, specifically defines "taxable year" for a governmental entity that is not otherwise required to file a return. The Code as amended by the IRA does provide that the due date for an elective payment election is generally the due date for the tax return the applicable entity would otherwise file. However, section 6417 does provide that for a governmental entity for which no return is otherwise required the due

[6] U.S. DEPT. OF TREAS., INFLATION REDUCTION ACT ELECTIVE PAY 16 (JUNE 2023) (ELECTIVE PAY WEBINAR SLIDES).
[7] *Id.*
[8] I.R.C. §§ 6417(b)(2) and (3).
[9] Pub. L. No. 117-169, § 13801(g), 136 Stat. 1818, 2013.
[10] I.R.C. § 441(b).

date will be "such date as is determined appropriate by the Secretary."[11] In response to Treasury's request for comments,[12] APPA on November 4, 2022, requested that governmental entities not otherwise required to file a return be allowed to seek elective payment on a rolling basis, akin to the process by which a governmental entity seeks reimbursement of federal excise taxes on a Form 8849, Claim for Refund of Excise Taxes.

The Proposed Rule would require governmental entities not otherwise required to file a return to make an elective payment election by filing a Form 990-T.[13] Service instructions for Form 990-T establish a deadline for filing the return[14] and also establish a taxable year for those filing the return by requiring entities to adopt their accounting year as their taxable year.[15] In effect, by adopting the Form 990-T as the mechanism by which a governmental entity not otherwise required to pay taxes may make an elective payment election, the Proposed Rule is also imposing a requirement that a governmental entity that is not otherwise required to file a return must adopt its accounting year as its taxable year for purposes of an elective payment election.

This decision creates a transitional issue where an entity (a) placed a credit property into service after December 31, 2022, but before June 14, 2023, when the Proposed Rule was published, and (b) operates on a fiscal year rather than a calendar year. Specifically, the problem occurs where the credit property was placed in service after December 31, 2022, but before the entity's accounting year begins in 2023. As a result, while the credit property was placed in service after December 31, 2022, the Proposed Rule would have the effect of treating the credit property as having been placed in service in a tax year beginning before January 1, 2023.

Had notice of such a decision been provided prior to January 1, 2023, this could arguably be a justified outcome. The Service has an interest in administrability, including not having to change forms after the fact or to process high volumes of amended returns due to a change in law. Likewise, with prior notice, an applicable entity would have had known to avoid placing a unit into service prior to the beginning of its newly mandated taxable year. However, this requirement was imposed after the fact and without notice, creating an unjust and unintended outcome.

COMMENT: *APPA would strongly urge Treasury and the Service to amend the Proposed Rule to provide transition relief to projects falling into the window of time described above for affected public-power entities. Specifically, we would encourage Treasury to allow on a transitional basis, a part-year taxable year beginning on January 1, 2023, and ending at the usual end of an entity's usual accounting year. The Code already accommodates such an approach.*[16] *And while it would create some additional administrative burden, this would apply only to governmental entities that are not otherwise required to file a return and so would not require consideration of any amended returns. More importantly, though, this would provide horizontal equity to all governmental entities. The converse – punishing those that rushed to place energy property in service as intended by this historic policy change – would be unfair and contrary to congressional intent of encouraging rapid and robust use of elective payment.*

Alternatively, such an entity could be allowed to adopt a calendar year taxable year. The usual concerns with such an approach causing conflict between an entity's accounting books and tax books simply do not

[11] I.R.C. § 6417(d)(3)(A)(i).
[12] Notice 2022-49, 2022-43 I.R.B.
[13] Prop. Reg. § 1.6417–1(b)(2).
[14] Instructions for Form 990-T: Exempt Organization Business Income Tax Return (and Proxy Tax Under Section 6033(e)), (March 7, 2023) at 7 (return must be filed by the 15th day of the 5th month after the end of tax year).
[15] *Id.* (return must be filed using the organization's established annual accounting period).
[16] I.R.C. § 441(b)(3).

apply where the entity would not otherwise be required to file a return. And again, the Code is expansive, not restrictive, in its flexibility in adoption of taxable years, including a calendar year.

(c) Applicable Entity

The Proposed Rule would provide that applicable entities include any agency or instrumentality of any state, the District of Columbia, Indian tribal government, U.S. territory, or political subdivision thereof.[17] As explained in the notice, this is intended to address concerns that state and local government agencies and instrumentalities be included as applicable entities. Specifically, stakeholders asked for clarification that applicable entities include a number of governmental entities, including public utility districts and special purposes entities such as joint action agencies and joint powers authorities.

COMMENT*: APPA strongly supports this clarification and appreciates Treasury's attention to the input from the public sector.*

Section 1.6417-2 Rules for Making Elective Payment Elections

The Code provides that an election for elective payment must be made at the partnership, not partner, level.[18] The Proposed Rule would provide that:

- If an applicable entity is a co-owner of an applicable credit property through an ownership arrangement treated as a tenancy-in-common or pursuant to a joint operating arrangement that has properly elected out of subchapter K of chapter 1 of the Code (subchapter K) under section 761;

- Then each owner is considered to own an undivided interest in, or share of, the underlying applicable credit property, and thus, any applicable credits are determined separately with respect to each owner.[19]

COMMENT: *APPA supports this approach and appreciates Treasury's attention to the input from the public section. The mechanisms for co-ownership allowed under the Proposed Rule are in common practice today and would allow applicable entities to join with other entities in developing credit properties without precluding elective payment election choices by project participants.*

In addition, the Code provides that, for facilities that begin construction after the date of enactment and are financed with tax-exempt debt, the amount of certain credits are reduced by the lesser of 15 percent or the fraction of proceeds of a tax-exempt obligation used to finance the facility over the aggregate amount of additions to the capital account of the facility (Tax-Exempt Financing Calculation).[20] The Proposed Rule does not address the Tax-Exempt Financing Calculation provisions and so does not discuss how these calculations would be made for a credit with respect to property treated as a tenancy-in-common or pursuant to a joint operating agreement that has opted out of subchapter K.

[17] Prop. Reg. § 1.6417–1(c)(7), 88 Fed. Reg. 40,528 (June 21, 2023).
[18] I.R.C. § 6417(c)(1).
[19] Prop. Reg. § 1.6417–2(a)(1)(iii).
[20] *See*, I.R.C. §§ 45(b)(3), 45Q(f)(8), 45V(d)(3), 45Y(g)(8), 48(a)(4), and 48E(d)(2).

COMMENT: *APPA would ask that the final regulations also clarify that the Tax-Exempt Financing Calculation would be determined separately with respect to each owner and solely with respect to their undivided interest in, or share of, the underlying applicable credit property.*

Treasury and the Service in the Notice of Proposed Rulemaking ask whether additional rules are needed in the partnership area.

COMMENT: *With the exception of the clarification discussed above, APPA believes the Proposed Rule accommodates cooperative efforts where ownership and the offtake of power are an applicable entity's purpose for that "partnering." For example, as discussed above, the mechanism of operating a co-owned facility as tenants-in-common is already commonly used and allows co-owners to rely on a third party or one of the project participants to operate and manage the facility.*

Likewise, the Proposed Rule would allow a governmental entity to make an elective payment election in a "P-3" arrangement where it is the ultimate owner of the facility. For example, a governmental entity could make an elective payment election where a private contractor is hired to design and build a facility which the governmental entity ultimately owns. Under the same scenario, the private contractor could also operate and maintain the facility, and the governmental entity could still make an elective payment election, so long as the government entity remained the owner of the facility. This private contractor – or project "partner" – could even own part of the facility so long as the governmental entity and private partner owned their shares of the facility as tenants-in-common as discussed above. These are all ways in which public power utilities currently partner with the private sector to bring projects online and we support the Proposed Rule for allowing them in the context of elective payment.

The Proposed Rule would not allow a group of applicable entities to form a partnership and claim elective payment, but they could still join through other mechanisms and do so. For example, dozens of joint action agencies and joint powers agencies formed for the joint ownership of power generation, or joint provision of power, already exist and are fully accommodated under the Proposed Rule. Likewise, community choice aggregation is authorized in 10 states.[21] *Again, we support the Proposed Rule for accommodating these public-private collaborations.*

Conversely, the Proposed Rule does not accommodate arrangements where a private entity would seek to enlist an applicable entity as a conduit to elective payment, whether through "chaining" or so-called "mixed partnerships." APPA believes this is consistent with the legislation's intent.

Proposed Rule section 1.6417–2(c)(3) would allow for the "stacking" of applicable credits and other grants and subsidies. However, it also would provide that if the total of such assistance plus the applicable credit otherwise determined exceeds the cost of the credit property, then the amount of the applicable credit is reduced so that the total amount of such assistance and applicable credit equals the cost of investment credit property. Also, as discussed above, various provisions of the Code reduce the amount of certain credits for projects financed with tax-exempt debt.

[21] Environmental Protection Agency, Community Choice Aggregation, https://www.epa.gov/green-power-markets/community-choice-aggregation, last accessed Aug. 1, 2023.

COMMENT*: APPA asks that the* p*roposed section 1.6417–2(c)(3) calculation of the total of assistance plus the applicable credit be made after the Tax-Exempt Financing Calculation, i.e., after the applicable credit is reduced on account of tax-exempt financing.*

Section 1.6417-5: Pre-Filing Registration

Balancing taxpayer burden and fraud protection are Treasury's and the Service's stated goal for the pre-filing registration requirements for elective payment included in the Proposed Rule. We believe the pre-filing registration has the potential to achieve such an appropriate balance. However, we do have concerns outlined below about simplicity and reliability.

Applicable entities seeking elective payment must complete pre-filing registration through an as-yet-to-be released electronic portal. Specifically, without a pre-filing registration number an applicable entity cannot file for elective payment. In pre-filing registration, the applicable entity will be required to provide information about itself and the "credit property" for which the entity intends to seek elective payment.

The types of information that will be collected could be relatively simple to provide, but that remains uncertain because the online portal through which that information will be provided has yet to be released and the details about which specific items will be required are unknown. For example, Temporary Regulation section 1.6417-5(b)(5)(vii)(C) includes a list of possible documentation relating to construction or acquisition of an applicable credit property. However, it is unclear whether the intention is to require the provision of one such document, or all possible documents: e.g., whether the taxpayer will need to provide permits, certificates, and evidence of ownership, or permits, certificates, or evidence of ownership.

COMMENT: *APPA would strongly encourage Treasury and the Service to choose the simplest route where possible. Again, using the example cited above, Treasury and the Service should allow an applicable entity to use a certificate, permit, or evidence of ownership rather than all three, especially since applicable entities will be required to maintain all books and records supporting the underlying credit, subject to audit.*

Likewise, the Proposed Rule provides that each credit property must have its own registration number.[22] In turn, the Proposed Rule defines a credit property as being the various tax creditable properties and facilities for which elective payment is allowed.[23] The guidance does not further clarify the term and past precedent is ambiguous. For example, the Service has found that each individual wind turbine in a wind farm could be considered a separate facility for purposes of the Code section 45 production tax credit.[24] Conversely, in proposed rules for the low-income bonus credit program created by the IRA, the Service

[22] Prop. Reg. § 1.6417-5(b)(4).
[23] Prop. Reg. § 1.6417-1(e).
[24] Rev. Rul. 94-31; 1994-1 C.B. 16.

will aggregate multiple facilities or energy properties of the same type (solar or wind) that are operated as part of a single project.[25] Additionally, while guidance is not yet available, it seems likely that the Service will impose similar aggregation rules for purposes of determining whether a property has a capacity of less than one megawatt for purposes of determining whether the property is excepted from domestic content requirements for making an elective payment election.

COMMENT: APPA recommends that for purposes of meeting the requirement of obtaining a pre-registration number for each credit property, the term "credit property" be defined at the project level, rather than requiring pre-registration of individual pieces of equipment (e.g., each wind turbine) contained within that project. To do otherwise could require an applicable entity to aggregate equipment for certain purposes but disaggregate them for other purposes on the same return, a result that will increase the burden on taxpayers and the Service, and increase the likelihood of unintended errors.

APPA is also concerned about the reliability and timeliness of the pre-filing registration process. Under the Proposed Rule, a taxpayer must have a pre-filing registration number on its original return (including automatic extension) to seek elective payment.[26] The Proposed Rule provides no relief for a taxpayer that seeks pre-filing registration in a timely manner but does not receive a registration number before its original return due date (including automatic extension). This imposes a huge amount of risk on the taxpayer seeking elective payment, particularly in the near term for an online portal that has yet to go live and will be used by an unknown number of entities for an unknown number of credit properties.

COMMENT: *APPA believes that Treasury should provide a safe harbor for applicable entities that have sought to pre-filing register a credit property in a timely manner, but for which the Service fails to provide a pre-filing registration number in time for the applicable entity to include such a number in an original return. At a minimum, this safe harbor should apply for the first year of the pre-registration system.*

The issue of reliability could be compounded depending on the degree of scrutiny that Treasury and the Service intend to apply to the information provided on the pre-filing registration. For example, if the intention is to review some or all of the information provided in every registration, such as the lease contracts provided as part of proof of ownership, or the address and longitude and latitude to confirm the physical presence of credit property, APPA is greatly concerned that the processing of such registrations will overwhelm Service resources. Nevertheless, under the Proposed Rule, the burden of the Service's failure to provide a timely pre-filing registration number would fall on the applicable entity.

[25] Notice of Proposed Rulemaking, Additional Guidance on Low-Income Communities Bonus Credit Program, 88 Fed. Reg. 35,791, 35,793 (June 1, 2023).
[26] Prop. Reg. § 1.6417-2(b)(2).

COMMENT: *In addition to the safe harbor discussed above, APPA strongly encourages the Service to streamline its processing of pre-filing registration so applicants can obtain a valid registration number in a timely manner, leaving more detailed review of the information for future examinations*

Under the Proposed Rule, applicable entities seeking ongoing credits related to a credit property are required to pre-filing register such properties annually, even if the information reflected in that registration has not changed.

COMMENT: *APPA recommends that if no factual information required for such registration has changed, the Service portal should include a "short form" through which an immediate new pre-filing registration number would be provided, akin to the process and timing needed to obtain a new employer identification number.*

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 staff would be happy to meet with you or your staff to discuss these issues in greater detail.

Sincerely,

John Godfrey
Senior Government Relations Director