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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, Election to Exclude Certain Unincorporated Organizations Owned by Applicable Entities from Application of the Rules on Partners and Partnerships (Proposed Rule)."[1]

- We supported the "Notice of Proposed Rulemaking, Section 6417 Elective Payment of Applicable Credits (Initial Proposed Rule, hereafter)"[2] because we felt that it appropriately accommodated active co-ownership of credit property.
    - We now understand some applicable entities may – for various reasons – need to own credit property via a passthrough entity.
    - We do not object to accommodations to allow for such needs.

- We are concerned that the Proposed Rule's easing of joint marketing requirements would allow applicable entities to claim elective payment for projects in which they are merely passive investors[3] in contravention of congressional intent, which was for elective payment to encourage active ownership[4] of credit property.
    - However, we have heard from some public power utilities and other applicable entity stakeholders that they may need flexibility in joint marketing of co-owned facilities,

[1] Prop. Treas. Reg. § 1.761–2, 89 Fed. Reg. 17,613 (March 11, 2024).
[2] Prop. Treas. Reg. § 1.6417, 88 Fed. Reg. 40,528 (June 21, 2023).
[3] For purposes of these comments, the term "passive investor" is intended to mean an investor that holds an ownership interest in a project, but that can relinquish functional control of the output of the facility and may have no nexus with the facility other than its ownership interest.
[4] For purposes of these comments, an active owner is intended to mean an entity holding an ownership interest in a project with the intention of using the output of the facility to serve its own needs, the needs of its community, or for sale to its community or customers.

particularly as relates to ancillary services and renewable energy credits.

- Therefore, we support the current proposed rule, but would strongly argue against loosening these rules any further.
- Further loosening of these rules is unnecessary and not only contrary to congressional intent but may also be contrary to the interests of applicable entities seeking to be an active ownerof such facilities.
- We would support expanding the Proposed Rules' regime to other credits eligible for elective payment.

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.[5] 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.[6]

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, Commonwealth of the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. Collectively, public power utilities serve more than 54 million people and 3 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 1,600 are considered "rural" by the U.S. Department of Agriculture's Rural Utility Service.

Public power utilities also include joint action agencies and joint powers agencies (collectively, JAAs), which are formed to serve the collective interests of their retail public power utility customers. This includes the resale of power from generation owned by the JAA or acquired by the JAA from third parties from the market or through bilateral contracts. Of the roughly 90 JAAs in the U.S, there are 40 operating in 40 states that own 22,481 megawatts (MW) of generation capacity. These 40 JAAs serve 1,046 public power utilities, which – in turn – provide power to 10,293,906 retail customers (roughly 23 million people). JAAs vary in their structure with customers in some instances being members of the JAA, and sometimes as owners. In all instances, the JAA is considered a separate legal entity, and generally a

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[5] 16 USC 824q(a)(4).

[6] References to a "section" are to the Internal Revenue Code of 1986, as amended (IRC or Code), unless otherwise specified.

political subdivision of the state or an instrumentality, but can also be a cooperative utility organized under section 501(c)(12).

Before proceeding, APPA would like to express its continued appreciation to Treasury and the 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). 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 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.

Background: Ownership of Generation Facilities

The proposed changes to the partnership rules are justified by a perceived inadequacy of current rules to accommodate applicable entity ownership and co-ownership of generation facilities. However, there is substantial history of co-ownership of generation facilities within the current rules.

In 2022 in the United States, there was 1.26 terawatts (TW) of generating capacity and energy storage from all sources, including 215,000 MW of capacity from wind and solar facilities.[7] Of this 1.26 TW of capacity, roughly 220,000 MW was owned by applicable entities – including public power utilities, electric cooperatives, the Tennessee Valley Authority, and other governmental owners. Additionally, of this 1.26 TW of capacity roughly 148,000 MW (11 percent) was at jointly-owned facilities, rather than single-owner facilities, and of the 220,000 MW of capacity owned by applicable entities roughly 33,000 MW (15 percent) was at jointly-owned facilities, rather than single-owner facilities.[7,8] Another 22,000 MW of capacity was owned by joint action agencies, i.e., entities formed to serve the collective needs of their retail utility customers.

The following tables provide more detailed information about joint ownership of generation facilities in the United States. For purposes of these tables and these comments, "joint ownership" means ownership of one or more units at a facility by more than one distinct entity, whereas "mixed joint ownership" refers specifically to joint ownership involving both taxable and tax-exempt entities.

We include this data, which is attached in the appendix to this letter, to make several observations.

First, as noted above, the vast majority of generation capacity is currently held by single owners, including single owners that would be defined as applicable entities under section 6417.

Second, the experience – in years, capacity, and facilities – of joint ownership of wind and solar facilities is dwarfed by the experience of mixed joint ownership of other generation sources. While it is likely that

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[7] American Public Power Association, 2024 Public Power Statistical Report, 4 (April 2024) (https://www.publicpower.org/system/files/documents/2024-Public-Power-Statistical-Report.pdf).
[8] Energy Information Administration Form EIA-860, 2022. https://www.eia.gov/electricity/data/eia860/

many of the "single" owners of wind and solar capacity are, in fact, passthrough entities with multiple owners, it is hard to say what proportion of those were created to facilitate the monetization of tax credits rather than to facilitate investment by multiple partners. Data from the Joint Committee on Taxation would appear to indicate that the vast majority of the value of the investment tax credit and production tax credit are flowing to banks and utilities and to entities with more than $1 billion in gross receipts, rather than small "retail" investors in partnerships.[9]

Third, the experience of mixed joint ownership of wind and solar facilities is quite limited. Of the two wind or solar facilities co-owned by tax-exempt and taxable entities, one involved solar panels providing power to a 650 MW combined cycle natural gas facilities co-owned by three electric cooperatives and an investor-owned utility.[10] Another involved CalPERs, which bought its share of a solar facility to generate revenue for its pension fund.[11] Both were accomplished through direct ownership, not a partnership with other project owners.

Fourth, there is extensive experience – in years, capacity, and facilities – of applicable entities with joint ownership without the involvement of taxable entities, including facilities with joint applicable entity owners and facilities owned by joint action agencies to serve their collective members.

Background: Elective Payment

The Inflation Reduction Act amended the Code to allow for the elective payment of certain energy tax credits.[12] As Treasury and the Service state in the preamble to the Proposed Rule, Congress intended elective payment to "encourage applicable entities to build, operate, and own renewable energy projects."[13] Incentivized direct ownership of these – and other types of tax-incentivized 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.

The Code states that, in the case of energy facility or property held through a partnership, an election to take elective payment of energy tax credits must be made by the partnership.[14] The Code further clarifies the effect of this prescription by providing specifically that "in the case of any facility or property held directly by a partnership or S corporation, no election by any partner or shareholder shall be allowed."[15]

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[9] Robert Harvey, Joint Committee on Taxation, Memorandum, Tentative Energy Credits by Industry (March 31, 2023); Robert Harvey, Joint Committee on Taxation, Memorandum, Distribution Data (March 31, 2023).
[10] Paynecrest, Riverside Energy Center, http://www.paynecrest.com/project/riverside-energy-center/ (explaining the use of solar generation to provide power to the natural gas generating facility).
[11] https://www.desertsun.com/story/tech/science/energy/2016/03/25/calpers-buys-stake-huge-riverside-county-solar-farm/82264278/.
[12] Pub. Law 117–169 § 13801, 136 Stat 1818, 2003 (codified as 26 USC 6417).
[13] 89 Fed. Reg. at 17,614.
[14] Code § 6417(c)(1).
[15] Code § 6417(c)(2).

The Code further defines a partnership 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.[16]

The initial Proposed Rule further stated that a partnership could not seek elective payment.[17] However, to accommodate co-ownership, the initial proposed rule provided that where co-ownership of a facility is structured as a tenancy in common or where the co-owners have chosen to opt out of partnership treatment as is allowed under section 761(a)(2) (commonly referred to as opting out of subchapter K), then the co-owners may make an elective payment election with respect to their undivided ownership interest.[18]

Treasury Regulation section 1.761-2(a)(3) states that to opt out of subchapter K, co-owners must:

i. Own the property as co-owners, either in fee or under lease or other form of contract granting exclusive operating rights;
ii. Reserve the right separately to take in kind or dispose of their shares of any property produced, extracted, or used, and
iii. Not jointly sell services or the property produced or extracted for the time being for his account.[19]

The latter is referred to as the "joint marketing requirement" and includes one exception:

> [E]ach separate participant may delegate authority to sell [its] share of the property produced or extracted for the time being for [its] account, but not for a period of time in excess of the minimum needs of the industry, and in no event for more than 1 year….[20]

The initial Proposed Rule provided that:

> If an applicable entity is a co-owner in an applicable credit property through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code to be excluded from the application of subchapter K, then the applicable entity's undivided ownership share of the applicable credit property will be treated as a separate applicable credit property owned by such applicable entity, and the applicable entity may make an elective payment election in the manner provided in paragraph (b) of this section for the applicable credits determined with respect such

[16] Code § 761(a).
[17] Prop. Treas. Reg. § 1.6417-2(a)(1)(iv).
[18] Prop. Treas. Reg. § 1.6417-2(a)(1)(v).
[19] Treas. Reg. § 1.761-2(a)(3).
[20] Treas. Reg. § 1.761-2(a)(3)(iii).

applicable credit property.[21]

As such, the initial Proposed Rule also provided that a co-owner of an applicable credit property could delegate the authority to its offtake for up to a year and still qualify for elective payment.

While applicable entities generally supported the initial Proposed Rule, some have raised concerns that precluding ownership through a passthrough entity would limit the ability of certain entities – including tribal entities – to own credit property and, so, qualify for elective payment. As stated above, APPA does not object to the Proposed Rule changes necessary to allow applicable entities to own credit property.

In addition, we have also heard from other applicable entities that loosening the joint market requirement as provided in the Proposed Rule may be necessary to facilitate project development. This flexibility is necessary to accommodate the joint sale of ancillary services and RECs, however, some applicable entities also would like the ability to delegate the authority to sell the offtake of power itself.

Renewable energy project developers have consistently argued in favor of relaxing the partnership rules to accommodate business practices with which they are more familiar. For example, the Tax Executives Institute (TEI) notes that "Many [renewable] energy projects utilize passthrough structures as individual companies often are not interested or able to assume the entire investment commitment for a project."[22] We are not aware of how common partnerships formed to accommodate multiple for-profit investors actually are relative to the overall ownership of wind and renewable capacity. In any case, TEI's comment assume that applicable entities will have the same limitations and concerns as for-profit companies seeking to be passive investor partners in large projects and concludes that as "partnerships and S corporations are entities frequently utilized for [renewable] energy projects, the inability of their partners and shareholders to make these elections will drastically limit the utility of this provision and the accessibility of the credit marketplace."[23]

In response to these and other longstanding concerns, the Proposed Rule loosened the joint marketing requirement for opting out of subchapter K for applicable entities seeking elective payment. While co-owners of a facility still may not delegate the authority of the offtake of power from their share of a co-owned facility for more than a year, there is no limit as to the period for which such a delegate may sell the power. An example in the regulation describes two co-owners delegating the authority to sell their joint offtake to a third party who, in turn, sells the offtake to a utility for 15 years.[24] Except for the technical requirement limiting the time during which the 15-year contract can be negotiated, we think the arrangement described in the example is functionally a partnership and would be precluded under long-standing partnership rules as incorporated into the initial Proposed Rule. Nonetheless, some applicable entities now argue that they may need such flexibility, particularly where co-owners intend to sell power into the wholesale market, or smaller utilities may wish to band together in a structure outside of a joint

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[21] Prop. Treas. Reg. § 1.6417–2(a)(1)(iii).
[22] Letter from Sandhya Edupuganty, Int'l Exec, Tax Exec. Inst., to IRS (Aug. 14, 2023) (https://downloads.regulations.gov/IRS-2023-0029-0084/attachment_1.pdf).
[23] *Id*., at 4.
[24] Prop. Treas. Reg. § 1.761–2(a)(4)(vi).

action agency.

We remain concerned about the Proposed Rules' loosening of joint marketing requirements, but support it nonetheless based on the collective desires of applicable entities. However, we would strongly urge Treasury and the Service not to relax these rules any further. We are particularly alarmed at increasingly complicated partnership structures being sought by project developers. Ironically, one of the key arguments for allowing these sophisticated structures is that they are necessary because applicable entity investors lack the expertise or ability to take on risk necessary to manage simple direct ownership of such facilities.

Also, it is precisely because Congress wanted to encourage active ownership, not passive investment, that Congress created elective-payment option. The section 6417 prohibition of elective payment for partners is a clear outcome of that intent.

We also believe that the demand for further loosening of partnership rules to accommodate passive investment is from project developers with little input from applicable entities. To argue for this request, project developers point to their past experience with "companies." However, as noted above they have almost no experience with applicable entities as co-owners. For example, in the example provided by Treasury in the Proposed Rule:

- The sale of power to an unrelated utility under a 15-year contract could trigger unrelated business taxable income for a tax-exempt entity not otherwise involved in the generation and/or sale of power. So, while the tax credit for the facility would be exempt from income, the revenue stream from their share of the facility might not be.

- If the applicable entity is governmental, it is unclear whether the collective sale of power from a facility to an unrelated entity would be considered an "essential governmental function" for purposes of section 115.

- It is also unclear how section 115 would treat the collective sale of power from a facility at wholesale where the governmental owner is not otherwise involved in the generation or sale of power, i.e., not otherwise considered to be a public utility.

- It is unclear how the sale of power to an unrelated utility for more than three years would be treated by the three-year limit on short-term sales and whether it would trigger private use rules if the purchase of credit property were financed with tax-exempt debt.

We have not seen any of these issues addressed where developers are arguing for applicable entities to serve as passive investors in tax credit projects.

Likewise, except in the instance of the CalPERS projects discussed above, we can find no indication that applicable entities historically have sought to own generation facilities as purely financial investments. Instead, there is every indication that applicable entities have used mixed-ownership arrangements for

active ownership of generation.

We also believe there is a narrow use case for loosening the joint marketing requirement to allow passive investment.

- For a smaller project of less than one MW of capacity located on the applicable entity's own property, offtake generally will be for the property owner's use, including through a net metering agreement with the local utility, or direct sale to the local utility.

- For a grid-scale project built within a distribution utility's grid, again the offtake will generally be used for the owner's own use (likely through net metering, or perhaps coupled with storage), or for sale to the local utility.

- For a larger utility scale project connected directly to the bulk power systems, most of the capacity owned by applicable entities will be owned by public power utilities and electric cooperatives for sale to their customers. There may be instances where a public power utility is enlisted by the state to provide power at wholesale to the market. That, still, would likely by under single ownership, and if joint ownership, could readily be accomplished through existing structures.

- It is only in the case where a project is large enough for the power to be sold at wholesale to a third party and an applicable entity owner might wish to be passive financial investors to support a further changes to the partnership rules.

    - We do not believe this is what Congress intended nor what the clear reading of the statute provides, and accordingly, the regulations should not be further stretched to accommodate this request.

Finally, we are concerned that further easing partnership rules could do harm to applicable entities seeking active ownership of applicable credit properties.

- First, it will increase competition for domestically produced materials and components needed to qualify for elective payment.

- Second, it will increase competition for the Treasury's and IRS's time and energy to implement elective payment through the pre-filing registration portal.

To qualify for elective payment, a project must meet domestic content requirements or qualify for one of the narrow waivers from those requirements. The supply of domestic content for equipment needed for wind, solar, and hydropower is highly constrained and likely to remain constrained for years to come. As a result, it will be hard for applicable entities seeking active ownership of credit property to source the materials necessary to meet domestic content requirements. It will be harder still, though, if projects with passive applicable entity investors – which also must meet domestic content requirements – are also

competing for those materials. . It is true that all entities seeking to claim a 10-percent domestic content bonus will also be competing for domestic content, but there is a distinction: while the domestic content bonus is optional, for applicable entities domestic content is existential to qualify for elective payment.

Likewise, the Service is a highly burdened agency, tasked with an increasing number of non-traditional activities in recent years. We have already seen the number of for-profit companies seeking to make use of tax credit transferability dwarfs the number of entities seeking to claim elective payment. Again, easing joint marketing requirements to allow what would otherwise be a for-profit enterprise to allow passive investments by applicable entities will increase the demands for implementing elective pay for these facilities. Depending on how rules are drafted, this could be felt most directly as applicable entities seek waivers to domestic content requirements. Obtaining waivers has the potential to be incredibly labor intensive and time consuming and allowing elective payment to be claimed where applicable entities are merely passive financial investors would only increase that demand and the corresponding administrative burden on the IRS.

Conclusion

We understand that changes relating to the use of pass-through entities may be necessary for certain applicable entities to have ownership of credit property. We also understand that some applicable entities support relaxation of the joint marketing requirement for co-ownership of a credit facility, primarily for use in joint marketing of ancillary services and RECs, but also to maintain flexibility in case joint marketing of power is also required to feasibly co-own larger generation facilities. However, we also believe that project developers would like to see partnership rules as relates to elective payment eased even further. In response, we support changes to allow applicable entities to own credit property through pass-through entities if necessary; remain concerned about loosening joint marketing requirements, but support the rule based on the collective desires of applicable entities; but oppose any further loosening of partnership requirements as being unnecessary, in opposition to the purpose of the statute, and possibly harmful to applicable entities seeking direct ownership of credit property

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 comments in greater detail.

Sincerely,

John Godfrey
Senior Government Relations Director

Attachments: Tables 1-6

Appendix: Tables on Ownership of Generation Facilities

Table 1: Mixed Joint Ownership: All Fuel Types

Co-Owners	Applicable Entity Co-Owners	Generating Facilities	Fuel Types	Total Capacity[25] (MWs)	Applicable Entity Owned Capacity (MWs)
198	119	77	Hydropower, Natural Gas, Oil, Coal, Nuclear, Energy Storage, Solar PV, Other Renewable	80,069	27,181

Table 2: Mixed Joint Ownership: Wind, Solar Only

Co-Owners	Applicable Entity Co-Owners	Generating Facilities	Fuel Types	Total Capacity (MWs)	Applicable Entity Owned Capacity (MWs)
10	4	2	Solar[26]	215	51

Table 3: Joint Ownership: Public Power Only

Co-Owners	Applicable Entity Co-Owners	Generating Facilities	Fuel Types	Total Capacity (MWs)	Applicable Entity Owned Capacity (MWs)
45	45	26	Hydropower, Natural Gas, Oil, Coal	4,417	4,417

Table 4: Joint Ownership: Electric Cooperative Only

Co-Owners	Applicable Entity Co-Owners	Generating Facilities	Fuel Types	Total Capacity (MWs)	Applicable Entity Owned Capacity (MWs)
4	4	2	Natural Gas	652	652

Table 5: Joint Ownership: Wind, Solar Only

Co-Owners	Applicable Entity Co-Owners	Generating Facilities	Fuel Types	Total Capacity (MWs)	Applicable Entity Owned Capacity (MWs)
156	4	144	Wind, Solar	6,578	51

[25] "Total capacity" includes only the capacity of mixed joint ownership units at a facility.
[26] There was no wind facility with mixed joint ownership.

Table 6: Use Case Scenarios for Power Generation, including Offtake of Power

<table>
<tr><th>Size of Project</th><th>Location</th><th>Owner</th><th>Power Offtake</th></tr>
<tr><td>Small Scale (Less than 1 MW)</td><td>Onsite (Behind the meter)</td><td>Home, business, or governmental entity</td><td>• Use the power themselves.
• Sell to utility.
• Sell to grid aggregator.</td></tr>
<tr><td rowspan="3">Behind the Meter Utility Scale (Generally, 1 MW to 25 MW)</td><td rowspan="3">Within a utility’s distribution grid</td><td>Community</td><td>• Uses power themselves.</td></tr>
<tr><td>Utility</td><td>• Sell to community members</td></tr>
<tr><td>Developer or Merchant</td><td>• Typically, sell to local utility.
• Can be sold and transmitted via bulk power grid.</td></tr>
<tr><td rowspan="3">Bulk Power Connected Utility Scale (Generally, greater than 25 MW)</td><td rowspan="3">Connected to the bulk power grid</td><td>Utility</td><td>• Distribution utilities sell to retail customers.
• Joint action agencies sell to public power utilities.
• Generation and transmission cooperatives sell to cooperative utilities.</td></tr>
<tr><td>Merchant</td><td>• Wholesale to market, or
• Bilateral agreement, including power purchase agreement (PPA).</td></tr>
<tr><td>Joint Ownership</td><td>• For sale or use individually by owners
• For sale collectively</td></tr>
</table>