June 7, 2021

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2021-28)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: **Priority Guidance—Private use rules for output facilities**

Dear Sir/Madam:

In response to Notice 2021-28, the Large Public Power Council ("LPPC") is writing to suggest inclusion in the 2021-2022 Priority Guidance Plan of amendments to the regulations under Section 141 related to the application of the private activity bond test to output facilities. LPPC's suggested areas for guidance are described below.

Founded in 1987, LPPC is a national organization comprising 27 of the nation's largest public power systems. LPPC's members are locally owned and controlled not-for-profit electric utilities committed to the people and communities we serve. LPPC advocates for policies that allow public power systems to build infrastructure, invest in communities and provide reliable service at affordable rates. From New York to California and from Washington State to Florida, LPPC members provide reliable, low-cost electric service to over 30 million people. Our member utilities represent a cross section of the nation's utility industry, and own and operate 30,000 circuit miles of high voltage transmission lines and over 71,000 MW of generation with a significant amount of renewables, fossil, hydro, efficiency and demand side management.

Treatment of customized contracts with retail customers. LPPC's members have been and will continue to be among the largest issuers of tax-exempt bonds as the capital intensive nature of public power necessitates that our member issue substantial amounts of long-term, tax-exempt bonds. The "private use" rules apply to public power and certain other "output facilities" in a unique manner by treating certain uses of the electrical or other output of a facility as private use even though there is no direct use of the facility by a nongovernmental person. It has been over 30 years since the enactment of the Internal Revenue Code of 1986 and almost 20 years since the regulations under Section 141 for output facilities were updated. During these periods, significant changes in the U.S. electric industry have occurred.

A recent and growing trend in the industry is that large retail electric customers – both existing customers and potential new customers--are seeking to negotiate customized contracts for electric service with public power and other utilities. This situation is particularly common in connection with customers seeking to source their electricity from renewable resources. The private use rules limit the ability of public power utilities to enter into customized contracts and put public power systems at the risk of losing these important customers.

The ability of large retail customers to "shop" for their electric providers did not exist in 2002 when the private use regulations for output facilities were last updated. Importantly, we do not believe that the Code or regulations should treat retail customers in the same manner as wholesale, private utilities that, prior to 1986, could effectively obtain what amounted to tax-exempt financing to acquire a share of an electric generation or transmission facility. We do not believe the same practical or policy concerns exist with respect to retail customers. Moreover, it is inappropriate that customized contracts with wholesale customers are treated more favorably than retail customers.

Based on these considerations, we believe the following provisions of the regulations under section 1.141-7 should be revisited:

(1) Short-term sales. The exception to the private use rules for sales of electricity with terms of up to 3 years should be modified to permit longer term contracts for retail customers.

(2) Retail requirements contracts. The exception to the private use rules for retail "requirements contracts" should be modified to permit municipal systems to charge such customers a guaranteed payment and termination penalties provided that the related facilities are not designed to primarily serve the related customers.

Section 141(d) (the "Rostenkowski Rule"). Section 141(d) was enacted in 1987 and guidance on this provision has yet to be released. Although designed to prevent tax-exempt bonds from being used to "municipalize" privately owned facilities, the rule contains an exception designed to permit the acquisition of existing facilities by a public power system to serve its existing customers. Guidance on this provision is needed to enable public power systems to deal with real world operational and compliance issues that the rules create. Again, these limitations are a particular and growing concern with respect to renewable energy facilities, where the Rostenkowski Rule can work to prevent public power systems from purchasing existing renewalbe facilities to serve their own customers. One suggestion would be to permit issuers to rely on their historic electric loads and reasonable expectations to determine compliance. In addition, the rules should clarify that the exceptions to the private use rules, such as the short-term sale rule, apply for purposes of compliance with the exceptions to section 141(d).

Conclusion. In reviewing the list of considerations that Treasury and the Service will consider in selecting projects for the inclusion in the 2021-2022 Priority Guidance Plan, we note that the recommended guidance would resolve significant issues for both members of LPPC and numerous other public power systems that use tax-exempt bonds to finance their electric facilities. In addition, as indicated above, the recommendations relate to existing regulations that have become outdated and insufficient. We believe the recommended guidance would also promote sound tax administration and can be administered on a uniform basis. Finally, the recommended guidance can be drafted in a manner for public power systems to easily understand and apply the guidance.

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We appreciate your consideration of our suggestions. The LPPC would be happy to meet with you or your staff to discuss these issues in detail.

Sincerely,

John Di Stasio, President
Large Public Power Council

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