

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE:)	
)	
)	DOCKET NO. NOI-2015-0001
DISTRIBUTED GENERATION)	
)	

**RESPONSES/COMMENTS OF
IOWA ASSOCIATION OF ELECTRIC COOPERATIVES**

COMES NOW, the Iowa Association of Electric Cooperatives ("IAEC"), by and through the undersigned counsel, and submits its responses/comments to certain issues raised in the Order Soliciting Additional Comments issued November 3, 2015 by the Iowa Utilities Board ("Board"). As the Board is aware, the IAEC is a trade association representing 36 distribution cooperatives that provide electric service at retail to member consumers in their assigned service areas in the state of Iowa and seven generation and transmission cooperatives that provide wholesale electric service to their distribution cooperative members and certain municipal cooperative associations in the state of Iowa.

The Order Soliciting Additional Comments generally invites stakeholders to comment on: (i) the ownership limits in Iowa Code Chapter 476C and (ii) the Board's ability to consider certain criteria in determining a project's ultimate viability when determining eligibility for tax credits. Both topics are of significant importance given the limited availability of tax credits and the economic impact the failure to qualify for tax credits may have on a proposed project. The IAEC will address the questions posed in the Board's Order as follows:

- 1. In determining whether the ownership limits in Chapter 476C are met, does the statute allow or require the Board to consider not only the legal entity that owns the utility (if not a natural person) but also the equity owners of the legal entity? Explain your legal analysis in reaching your conclusion.**

It is the position of the IAEC that the relevant statutory provisions will require the Board to consider, or at least obtain information concerning the equity owners of a legal entity that applies for eligibility for tax credits under Iowa Code Chapter 476C. An owner of a renewable energy facility that is eligible for tax credits under Iowa Code Chapter 476C "shall not be an owner of more than two eligible renewable energy facilities." Iowa Code 476C.3(7) (2015). If this were the sole limitation on eligibility, then perhaps it would not be necessary to look further into the equity ownership of an applicant. However, as the Board is aware, Iowa Code 476C.3(7) goes on to state that "A person that has an equity interest equal to or greater than fifty-one percent in an eligible renewable energy facility shall not have an equity interest greater than ten percent in any other eligible renewable energy facility. Iowa Code 476C.3(7) (2015)."¹ The Board will not be able to enforce this secondary statutory limitation or restriction without information about the equity owners of the tax credit applicants. Therefore, an inquiry into the identity of the equity owners of an applicant appears to be essential.

- 2. If the equity owners of a chapter 476C facility are not natural persons but another legal entity, does the statute allow or require the Board to drill down through the various legal entities to determine whether the Chapter 476C ownership limits are violated? Explain your legal analysis in reaching your conclusion.**

Iowa Code 476C.3(1)"f" provides that an applicant for a determination of eligibility for tax credits under Iowa Code 476C shall provide "any other information the board may

¹ The IAEC notes that when the Board adopted rules to implement the tax credits under Iowa Code 476B and 476C, the Board indicated that there was not statutory authority to look through the entities listed in Iowa Code 476C.1(6)"b" in order to apply the ownership limits. See, *Order Adopting Rule Making*, Docket RMU-05-8 issued January 26, 2006. However, at that time the Code only limited an owner from owning more than two eligible renewable energy facilities. S.F. 2399 was adopted in May of 2006 to add the language that now appears in the Code to preclude a person that has an equity interest equal to or greater than fifty-one percent in an eligible renewable energy facility from having an equity interest greater than ten percent in any other eligible renewable energy facility. Iowa Acts 2006, Chapter 1135. This change in the law should have prompted a change in the way applications were evaluated, as the statutory authority that was lacking at the time the rules were initially adopted was provided by the Legislature in 2006.

require." As such, the IAEC deems the Board to have broad authority to request information from an applicant, including the identity of the equity owners of a legal entity applicant and the identity of the equity owners of an equity owner of an applicant if deemed necessary. However, the IAEC does not believe the limitation on ownership contained in the statute at Iowa Code 476C.3(7) require an evaluation beyond the initial equity owners of an applicant.

3. **If the Board determines it has the obligation or authority to consider equity owners of the legal entity, what kind of documentation should be required as part of the filing requirements for certification of eligibility in 199 IAC 15.19 to establish who the equity owners are? For example, do you believe an attestation from the equity owners would be sufficient to establish that the ownership limits are satisfied?**

As stated above, the IAEC believes the Board does have the authority to consider the identity of the equity owners of an applicant, as well as an obligation to do so. The IAEC believes an attestation from a representative of the applicant should be sufficient evidence of the ownership; however, the applicant should have an affirmative duty to supplement the information submitted to keep it current. Accordingly, if equity owners change, the changes must be disclosed to the Board.

4. **Concerns have been expressed about entities that apply for eligibility but do not appear to be moving forward with their projects. Does the statute allow the Board to require evidence of the applicant's capability to complete the project and to use this evidence in the Board's initial determination of eligibility? Explain your legal analysis. If your answer is yes, what should the additional filing requirements be? Also, comment on whether the following should be made part of those requirements:**
 - a. **Financial statements or other documentation to establish the owner's financial capability to complete the project.**
 - b. **A timeline for completion of the project.**
 - c. **Information regarding the contractors or others working on the project to establish the owner's operational capability to complete the project.**
 - d. **Information on project steps taken prior to filing the eligibility application.**

As the Board is aware, the Code provides that a "facility that is not operational within thirty months after issuance of an approval for the facility by the board shall cease to be an eligible energy facility." Iowa Code 476C.3(3)"a". The statute further provides that a facility which notifies the board prior to expiration of said time period for becoming operational that "the facility intends to become operational and wishes to preserve its eligibility shall be granted a twelve-month extension." Iowa Code 476C.3(3)"b" (emphasis added). To the extent the word "shall" is used in the statute and the statute only requires the applicant to indicate that the facility still intends to become operational and wishes to preserve its eligibility, it would appear as though the Board may be precluded from placing any more stringent requirements on an applicant who is seeking an initial extension than those required by the statute (i.e, intent to become operational and desire to remain eligible). However, any additional extensions appear to be discretionary, as the statute provides that the original extension "may be renewed for succeeding twelve month periods. . ." Iowa Code 476C.3(b). In connection with such additional extensions, the IAEC believes the Board would have the discretion to require additional information to be submitted in support of the request. Such additional information should include evidence not only of the applicant's intent to complete the project; but the likelihood that the project will ultimately be completed. It would appear reasonable for the Board to require the applicant to describe the steps being undertaken to bring the project to fruition, an anticipated timeline for key milestones, and such other information that the applicant deems relevant to the issue of project viability. The IAEC does not necessarily believe financial statements of the applicant would be necessary, as there are often outside sources of capital utilized in generation projects. The Board

should provide the applicant with some discretion to determine how best to demonstrate the project's viability and then the Board may make a decision based on the evidence provided whether the project merits an additional extension.

5. **Should the determination of initial eligibility be conditioned upon the applicant demonstrating a minimum level of progress prior to the application? If yes, what minimum level of progress should be required? Note that the minimum level of progress should relate to any additional filing requirements you identified in response to the prior question.**

The IAEC does not believe the statute contemplates, nor would it be appropriate, to require any demonstration of progress in completing a project prior to determination of eligibility. Certainly, the information required by Iowa Code 476C.3 shall be required; however, a determination of eligibility for tax credits should be able to be obtained prior to expenditure of significant funds on bringing a project to fruition because such a determination may be a critical element in a developer's determination on whether to proceed or not.

6. **Does Chapter 476C allow a completed project to obtain eligibility after it is operational, or does the statute prohibit what could be termed “free riders”?**

The IAEC is not aware of any provision in Iowa Code 476C that would disqualify a completed project from obtaining eligible status. While it is fair to assume that the statute was adopted for the purpose of encouraging new development, the statute does not indicate that its application is limited to new developments. In fact, the statute contemplates that the tax credit application may be submitted by either a producer or a purchaser of renewable energy. If a producer does not apply for eligibility, a purchaser may want to submit an application at the time it is entering into a power purchase agreement, which could be following completion of the facility. Further, the information to be submitted with an application is identified to include "information regarding the facility's initial placement in service." Iowa Code 476C.3(1)(c). Notably, the statute

does not refer solely to information regarding the date when a facility is anticipated to be placed in service; but rather the date of the facility's initial placement in service, which contemplates existing facilities. Finally, the IAEC notes that the Iowa Department of Revenue rules concerning these tax credits include some instructive language relative to this issue. 701 IAC 42.28(1) provides that "a producer or purchaser of a renewable energy facility must apply to the utilities board for the renewable energy tax credit." The rule goes on to state that "the application for the tax credit must be filed no later than 30 days after the close of the tax year for which the credit is applied." Since this is a production tax credit, the fact that an application can be made up to 30 days after the close of the tax year for which the credit is to be applied clearly contemplates applications being filed for existing facilities, not just proposed facilities.

The IAEC appreciates the opportunity to provide responses to the questions contained in the Order Soliciting Additional Comments. The IAEC looks forward to continuing to participate in this docket and any formal rulemaking docket that may follow this inquiry docket.

WHEREFORE, the IAEC respectfully requests the Board give these comments and responses due consideration as it proceeds to evaluate and consider the method of evaluating tax credit applications.

Dated this 23rd day of November, 2015.

Sullivan & Ward, P.C.

/s/ _____

Dennis L. Puckett
6601 Westown Parkway, Suite 200
West Des Moines, Iowa 50266
Phone: (515)-244-3500
Fax: (515)-244-3599
Attorneys for the Iowa Association of Electric Cooperatives.

CERTIFICATE OF SERVICE

I hereby certify that I have filed this pleading with the Board's Executive Secretary through the Electronic Filing System (EFS) this 23rd day of November, 2015.

/s/ Dennis L. Puckett