
IOWA UTILITIES BOARD
Energy Section

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Memo Date: October 29, 2015

TO: The Board

FROM: Ellen Shaw, Gary Stump

SUBJECT: Recommendation to Solicit Additional Comments on the Board's Wind Energy and Renewable Energy Tax Credit Rules

I. Background

On August 21, 2015, the Board issued the Order Opening Inquiry and Soliciting Comments on possible conditions or milestone requirements upon which a 12-month extension of the operational deadline for an eligibility facility under Iowa Code chapter 476C would be granted. The Board also invited comments on the annual attesting rule for applications on the waiting list and the option for electronic filing of annual tax credit applications.

Participants were invited to provide the information on or before September 25, 2015. The following participants filed written comments: Oneota Solar, LLC; Optimum Renewables, LLC; CGC Methane 1, LLC; Golden Renewable Energy, LLC; Iowa Association of Electric Cooperatives (IAEC); Iowa Association of Municipal Utilities (IAMU); Interstate Power and Light Company (IPL); the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice; and the Environmental Law & Policy Center, Iowa Environmental Council, Iowa Solar Energy Trade Association, and Winneshiek Energy District (collectively the "Joint Commenters").

Board staff prepared a gold memo dated October 12, 2015, that recommended the Board commence a rule making to modify requirements in 199 IAC 15.19. The recommendation incorporated comments received in the NOI into the draft rule amendments. The Board Meeting on October 20, 2015, included a discussion on two topics that were not in the initial round of NOI questions: 1) the interpretation of ownership limits in 476C and 2) whether the Board should consider a project's progress prior to application when reviewing an initial application for eligibility. An option for the Board to consider is to pose additional questions for the NOI participants based on the Board Meeting discussion.

Currently in the 476C wind program, there are 19 facilities with a total capacity of 46.85 MW on the waiting list. There is a total of 21.95 MW of capacity currently available due to recent withdrawals. This available capacity would accommodate nine of the 19 facilities on the waiting list. The Board's historical interpretation of facility ownership would allow the nine facilities to receive eligibility for renewable energy tax credits.¹ A change in the Board's interpretation of ownership limitations may require additional ownership information from the applicants on the waiting list and might preclude the applicants' facilities from receiving eligibility. Appendix A contains the Board's current application eligibility review process.

II. Legal Standards

Iowa Code § 476C.1(6) states:

6. *“Eligible renewable energy facility”* means a wind energy conversion facility, a biogas recovery facility, a biomass conversion facility, a methane gas recovery facility, a solar energy conversion facility, or a refuse conversion facility that meets all of the following requirements:

a. Is located in this state.

b. Is at least fifty-one percent owned by one or more of any combination of the following:

(1) A resident of this state.

(2) Any of the following as defined in section 9H.1:

(a) An authorized farm corporation.

(b) An authorized limited liability company.

(c) An authorized trust.

(d) A family farm corporation.

(e) A family farm limited liability company.

(f) A family trust.

(g) A revocable trust.

(h) A testamentary trust.

(3) A small business as defined in section 15.102.

(4) An electric cooperative association organized pursuant to chapter 499 that sells electricity to end users located in this state.

(5) An electric cooperative association that has one or more members organized pursuant to chapter 499.

(6) A cooperative corporation organized pursuant to chapter 497 or a limited liability company organized pursuant to chapter 489 whose shares and membership are held by an entity that is not prohibited from owning agricultural land under chapter 9H.

(7) A school district located in this state.

c. Has at least one owner that meets the requirements of paragraph “b” for each two and one-half megawatts of nameplate generating capacity

¹ Assuming the nine applicants meet the remaining application criteria.

or the energy production capacity equivalent for hydrogen fuel or heat for a commercial purpose of the otherwise eligible renewable energy facility.

d. Was initially placed into service on or after July 1, 2005, and before January 1, 2017.

e. For applications filed on or after July 1, 2011, is a facility of not less than three-fourths megawatts of nameplate generating capacity or the energy production capacity equivalent if all or a portion of the renewable energy produced is for on-site consumption by the producer.

f. For applications filed on or after July 1, 2011, except for wind energy conversion facilities, is a facility of no greater than sixty megawatts of nameplate generating capacity or the energy production capacity equivalent.

Iowa Code § 476C.3(1)-(3) states:

476C.3 Determination of eligibility.

1. A producer or purchaser of renewable energy may apply to the board for a written determination regarding whether a facility is an eligible renewable energy facility by submitting to the board a written application containing all of the following:

a. Information regarding the ownership of the facility including the percentage of equity interest held by each owner.

b. The nameplate generating capacity of the facility or energy production capacity equivalent.

c. Information regarding the facility's initial placement in service.

d. Information regarding the type of facility and what type of renewable energy the facility will produce.

e. Except when the renewable energy is produced for on-site consumption by the producer, a copy of the power purchase agreement or other agreement to purchase electricity, hydrogen fuel, methane or other biogas, or heat for a commercial purpose which shall designate either the producer or purchaser of renewable energy as eligible to apply for the renewable energy tax credit.

f. Any other information the board may require.

2. The board shall review the application and supporting information and shall make a preliminary determination regarding whether the facility is an eligible renewable energy facility. The board shall notify the applicant of the approval or denial of the application within thirty days of receipt of the application and information required. If the board fails to notify the applicant of the approval or denial within thirty days, the application shall be deemed denied unless the application is placed on a waiting list as described in subsection 6. An applicant who receives a determination denying an application may file an appeal with the board within thirty days from the date of the denial pursuant to the provisions of chapter 17A. In the absence of a timely appeal, the preliminary

determination shall be final. If the application is incomplete, the board may grant an extension of time for the provision of additional information.

3. a. 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 renewable energy facility. However, a wind energy conversion facility that is approved as eligible under this section but is not operational within eighteen months due to the unavailability of necessary equipment shall be granted an additional twenty-four months to become operational.

b. A facility which notifies the board prior to the expiration of the time periods specified in paragraph "a" that the facility intends to become operational and wishes to preserve its eligibility shall be granted a twelve-month extension. An extension may be renewed for succeeding twelve-month periods if the board is notified prior to the expiration of the extension of the continued intention to become operational during the succeeding period of extension.

c. If the owner of a facility discontinues efforts to achieve operational status, the owner shall notify the board. Upon receipt of such notification, the board shall no longer consider the facility as an eligible renewable energy facility under this chapter.

d. A facility that is granted and thereafter loses approval may reapply to the board for a new determination.

Iowa Code § 476C.3(7) states:

7. An owner meeting the requirements of section 476C.1, subsection 6, paragraph "b", shall not be an owner of more than two eligible renewable energy facilities. 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.

III. Analysis

Ownership Limitations:

The Board, at the time the legislation passed and initial rules were adopted, interpreted the ownership limitation in Iowa Code chapter 476C by noting that 476C.1(6) contains a specific listing of the entities that are eligible majority owners of qualifying facilities and there is no statutory authorization in this chapter to look through the indirect ownership of the listed entities when applying the ownership limits. Following legislation that added the percentage of equity interest language to the two-facility ownership limitation, the Board interpreted the legislation with the example that the limited liability company (LLC)² that owns

² Iowa Code § 4.1(20) defines "person" as "individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity."

more than 51 percent of one eligible facility cannot have an equity interest greater than 10 percent in any other eligible facility.

Progress Requirement for Initial Eligibility:

A progress requirement in the eligibility application may give an indication of ability to complete the project within the appropriate time but may also preclude some projects from getting started. Projects that need a future flow of estimated renewable energy tax credits in order to be viable may never commence construction if there is a progress requirement in the application for eligibility. Furthermore, the timeline of progress towards completion potentially varies from project to project.

Next Steps:

If the Board wishes to revisit its interpretation of 476C ownership requirements and implement progress requirements for initial eligibility applications, staff recommends that the Board invite NOI participants to file comments on these subjects. Staff will then incorporate the responses into a revised memo of draft rules. Absent the additional round of NOI comments, staff projects that the final rules (based on staff's October 12, 2015, memo) would be implemented in June 2016. With the additional round of NOI comments, staff projects that the final rules would be delayed by approximately two months. The proposed deadline for the NOI responses would allow the Board time to review and discuss the comments, if the Board wishes, in the December 2015 Board Meeting.

The following are questions for the Board to consider posing to the NOI participants as the Board contemplates whether additional amendments should be proposed for subrule 15.19:

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.
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.
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?

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 determination of initial 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.
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.
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"?

IV. Recommendation

Attached for the Board's consideration is a draft order inviting comments on the questions listed in this memo as the Board considers whether to propose additional amendments to 199 IAC 15.19.

Appendix A Eligibility Application Review Process

Is there eligibility capacity available? (363 MW total for Wind or 63 MW total for other)

- **No** – Draft a waiting list letter to the applicant.
 - Print the letter and envelope.
 - Put the letter in manager's inbox to proof.
 - Put final version of letter in the Administrative Secretary's (Lorraine's) basket for the Chair's signature.
 - Print an envelope.
 - The Administrative Secretary will bring the letter back once the Chair has signed it.
 - Copy the letter.
 - Mail the letter.
 - Convert the electronic letter to PDF with */s/ Geri D. Huser* in the signature field.
 - File the letter in EFS.
 - Update the Renewable Energy Spreadsheet by adding the new application on the bottom – filling in all appropriate columns. Attach the spreadsheet to an email to Teresa requesting that she update the Renewable Energy web page with the spreadsheet attached.

- **Yes (there is eligibility capacity available for new applicants or eligibility capacity has opened for those on the waiting list)** – Review the application
 - Application is Incomplete – Draft a letter requesting additional information.
 - Print the letter and envelope.
 - Put the letter in manager's inbox to proof.
 - Put the final version of the letter in the Administrative Secretary's basket for the Chair's signature.
 - The Administrative Secretary will bring the letter back once the Chair has signed it.
 - Copy the letter.
 - Mail the letter.
 - Convert the electronic letter to PDF with */s/ Geri D. Huser* in the signature field.
 - File the letter in EFS.
 - Update the Renewable Energy Spreadsheet by adding the new application on the bottom – filling in all applicable columns – status should say "Pending." Attach the spreadsheet to an email to Teresa requesting that she update the Renewable Energy web page with the spreadsheet attached.

- Application is Complete and complies with 199 IAC 15.19(1) – Draft a gray memo recommending approval and a letter approving (sample approval letters in Approvals folder in the Letters Folder under the 476C Eligibility on the N: drive. Sample gray memos are in the Gray Memo Folder the 476C Eligibility on the N: drive.)
 - Email memo and letter to manager for review; manager will forward to the Board.
 - Once the Boards deadline to respond has passed, print the letter for the Chair to sign.
 - Print envelope.
 - Put the letter in the Administrative Secretary's basket for the Chair's signature.
 - The Administrative Secretary will bring the letter back once the Chair has signed it.
 - Copy the letter.
 - Mail the letter.
 - Convert the electronic letter to PDF with */s/ Geri D. Huser* in the signature field.
 - File the gray memo and letter in EFS.
 - Update the Renewable Energy Spreadsheet by adding the new application on the bottom – filling in all columns. Attach the spreadsheet to an email to Teresa requesting that she update the Renewable Energy web page with the spreadsheet attached.

Staff's note: A change in the Board's interpretation of facility ownership in 476C would necessitate a substitute of the gray memo for a gold memo that is circulated for Board member signatures.