

**STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES DIVISION
BEFORE THE IOWA UTILITIES BOARD**

IOWA UTILITIES BOARD

IN RE: : **DOCKET NO. NOI-2015-0001**
:
WIND AND RENEWABLE :
ENERGY TAX CREDITS :

ADDITIONAL COMMENTS

OPTIMUM RENEWABLES, LLC submits the following comments in response to the Iowa Utilities Board's November 3, 2015 "Order Soliciting Additional Comments".

General Comment: The objective of the 476C renewable energy tax credit program is to encourage the development of renewables by many different entities, not just by regulated utilities. That being the case, we believe it would be unwise for the Board to change the existing approval process. That process has worked well in the past and has resulted in such development. Changing the existing approval process will discourage small and medium-sized renewable projects in Iowa as the ability to finance such projects depends heavily on the early and timely authorization of 476C renewable energy tax credits by the Board. Any revision of the current program that makes it more cumbersome or more time consuming will likely dampen investor interest in such projects.

Board Question No. 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.

Answer: Iowa Code Chapter 476C sets out very clear and detailed requirements for a facility to be designated an "eligible renewable energy facility". The statute does not provide that the Board is to look beyond the direct owner of any facility in making the determination whether the facility meets all the requirements of the statute. Moreover, there is nothing in the statute that authorizes the Board to add, delete or change those requirements in any way. This is in direct contrast to Iowa Code Chapter 476B, which was adopted prior to 476C and which does not define a "qualified facility" in any detail. In response to the adoption of Chapter 476B, the Board adopted a rule allowing it to look beyond the direct owner of the facility to determine whether the ownership requirements of Chapter 476B had been satisfied. The legislature was certainly aware of the Board's rule when it adopted Chapter 476C a year later. If the legislature had intended for the Board to look beyond a facility's direct owner to determine

whether the ownership requirements of Chapter 476C are satisfied, it could have so provided. It did not do so. Instead, the Legislature expanded upon the definition of “eligible renewable energy facility” in Chapter 476C and listed the specific requirements which must be satisfied to qualify as an “eligible renewable energy facility” under Chapter 476C.

An administrative agency has only such authority as it has been given by the Legislature. Since the Iowa Legislature was clear in setting out the requirements for a facility to be designated an “eligible renewable energy facility”, the Board does not have the authority to modify those requirements in any way, including looking beyond the direct owner(s) of the facility.

Board Question No. 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.

Answer: No. Please see response to Question No. 1.

Board Question No. 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?

Answer: As stated in the response to Board Question No. 1, we do not believe that the Board has either the obligation or the authority to consider equity owners of the legal entity, or to look to any person/entity beyond the direct owner of the facility. If the Board decides otherwise, then an attestation from the equity owners should be sufficient. An attestation is given under oath, making the person providing such attestation legally liable for any false attestation.

Board Question No. 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.

Answer: Iowa Code § 476C.3 relating to the Board’s determination of a facility’s eligibility for 476C tax credits requires that certain information be submitted as well as “any other information the board may require.” At first blush, this would seem to allow the Board to ask for additional information. However, it is clear from a reading of the entirety of Chapter 476C, that the initial determination of eligibility necessarily is a *preliminary* determination only and that initial authorization may be withdrawn if the facility is not or is not likely to be constructed for any reason. Indeed, the statute itself provides for extensions of the in-service date if equipment cannot be obtained timely (§ 476C.3a) or for other reasons (§ 476C.3b). A requirement of a showing of “capability” to complete the project anticipates technical and financial ability and also present satisfaction of all legal requirements for construction of a project. Thus, a requirement that a facility owner prove, in its application for a preliminary determination of tax credit authorization, that he/she has the “capability” to complete the project conflicts with the overall intention of Chapter 476C. Such a requirement will in fact discourage small and medium-sized developments by rendering the application process burdensome and time consuming. Optimum’s answers to the subparts of the Board’s question follow:

- a. Wind project development can take anywhere between two and three years to complete. There are many parties (e.g. engineers, construction contractors, lenders, tax equity investors, equity investors, etc.) involved in the development and financing of wind project. Financing arrangements typically are not finalized until later in project development. The application for 476C tax credits is normally submitted at the beginning of the project development and financing is often dependent upon the grant of preliminary tax credit authorization. To require a project to wait to submit its 476C application until financing is in place will, as a practical matter, prevent the development of renewable projects by smaller developers.
- b. A preliminary timeline could be provided by the developer, but the Board must understand that the timeline is preliminary only and subject to change as conditions on the ground change.
- c. Like financing, the selection of contractors generally occurs well after the 476C application is filed. Presumably if the Board were to require an applicant to submit information on its contractors, the Board would also be making some determination as to the contractor’s capability. To require the information to be filed with the 476C application would delay the overall process and discourage the development of renewable projects by smaller developers. Were the Board were to require such information, it should be maintained as confidential.
- d. Efforts undertaken prior to the filing of the 476C application could be included in the preliminary timeline, to the extent that the Board decides to require submission of the timeline.

Board Question No. 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.

Answer: No. Normally, a project has not progressed to a great extent at the time the 476C application is filed, because progress requires financing and financing is generally not available until the 476C application has been ruled on by the Board. Optimum would not object to the Board asking for periodic progress reports.

Board Question No. 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”?

Chapter 476C clearly anticipates that 476C applications will be filed *in advance* of a project being developed. The Board’s authority is limited its enabling legislation – in this case Chapter 476C. Because Chapter 476C clearly relates only to projects not yet developed, the Board has no authority to grant 476C tax credits to already-developed projects.

Dated November 23, 2015.

Respectfully submitted,

/s/ Sheila K. Tipton

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