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GO TO THE BACK OF THE LINE

When does an amended application for wind energy tax credit eligibility become a "new" application so as to cause one to lose one's place in the queue?

by Paul E. Horvath

On May 4, 2009, the Iowa Utilities Board (IUB) issued two declaratory orders – *In Re: Windharvestors, LLC* DRU – 2009-0002 and *In Re: Blowing In The Wind, LLC* DRU – 2009-0003. The orders regarding these Applicants concerned previously filed applications for wind energy production tax credits which had been placed on a waiting list because the then available credits had been over subscribed. Subsequently, the Iowa legislature increased the capacity of available chapter 476C tax credits and the IUB notified these Applicants that their facilities had been granted preliminary eligibility. The IUB also advised of the need to immediately notify it of any significant changes to the project described in the application.

Claiming the facilities were relocated in order to save expenses related to connection to the power grid, the Applicants asked IUB to determine such relocation not constitute such a significant change so as to jeopardize their place in the tax credit queue. The IUB determined that the Applicants' relocation was significant enough to require it to be treated as a "new" application, with consequent loss of placement in the tax credit queue.

Background

Prior to the subject Applicants' request to IUB, the agency had reviewed amendments to previously-approved eligibility applications on a case by case basis to determine whether the proposed change was significant enough to be regarded as a new application. Review involved a fairness issue, since eligibility applications are processed on a "first come, first served" basis (meaning that applicants with projects that are not fully developed can potentially gain eligibility ahead of others who are still finalizing the details of their projects simply by filing their applications first). To counterbalance this early-filing advantage, IUB had determined that significant changes to a previously-approved application might in some circumstances be regarded as a new application.

In approving facility eligibility IUB recognized that final siting may change because of the broad range of facility identifications submitted in the applications. Some

applications deemed acceptable simply identified the county in which the facility was to be located; others, also deemed acceptable, identified specific sections and quarter sections of the land on which the facility would be located. IUB thus determined that applicants who specified exact locations in their original applications should not be treated more harshly than those who listed only more general locations.

The Safe Harbor Rule

In order to balance the interests of all applicants, the IUB issued its order in *In Re: Green Prairie Energy, LLC,* Docket No. 199 IAC 15.19 (3/2/2008), establishing a safe harbor for the relocation of eligible facilities. IUB allowed (without need for any further action) relocations within the same county, and to different counties if the relocation was 25 miles or less from the original site. Recognizing that a hard and fast rule may not be equitable in every situation and that there may be good cause, *such as enhanced project efficiency,* for a change in location in excess of the safe harbor limits, IUB advised applicants to seek a declaratory order to determine whether such relocation constituted "good cause."

The Applicants' Position

The subject Applicants filed declaratory judgment actions which sought IUB's answer to three questions relating to their ability to relocate their wind project turbines and amend their applications without those amendments being treated as a "new" application with resulting loss of their place in the tax credit queue. The Applicants posed three questions: 1) Do enhanced project efficiencies constitute good cause so as to preserve their original place in the queue? 2) Given the lack of a statute mandating inclusion of wind turbine location in the chapter 476C application, can applicants freely amend the project location without the application being treated as a new one? 3) Given the lack of a statute or rule preventing amendment of an approved application, can they freely amend the project location without the application being treated as a new one? The Applicants urged the IUB to answer each question affirmatively.

The IUB Response

Before addressing the Applicants' specific contentions, IUB addressed its overall authority to determine whether relocation in any given instance is a substantial change requiring it to be treated as a "new" application. IUB contended (as did the Office of Consumer Advocate (OCA), that Iowa Code §476C.3(1) "specifically authorizes IUB to establish requirements for chapter 476C eligibility determinations." §465C.3(1) does not specifically address relocation. It provides:

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

> b. The nameplate generating capacity of the facility…
> 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. A copy of the power purchase agreement or other agreement to purchase electricity…
> f. *Any other information the board may require.* (emphasis added)

IUB Rules, however, specifically provide that the applications contain "a description of the location of the facility in Iowa…." See IAC 199 §§ 15.18 -15.21.

The IUB Decision

IUB determined that the three questions posed by the Applicants be answered in the negative. IUB determined that Applicants had not established good cause for an exception to the safe harbor rule. While increased wind efficiencies might constitute good cause for such an exception, such was not the case here; rather, interconnection cost issues were the driving force behind the Applicants' turbine relocation. IUB maintained that such cost issues could have been known, or should have been known, at the time of the original application. Thus the Applicants were relegated to the back of the tax credit line.

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