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Date:
June 14, 2010

Legend:

Company =

Issuer =

Month =

State =

Year 1 =

Year 2 =

Year 3 =

a =

b =

c =

Dear :

This is in response to your request for a ruling that Issuer's sales of renewable energy certificates will not result in private business use within the meaning of § 141(b)(1) of the Internal Revenue Code (the "Code").

FACTS AND REPRESENTATIONS

Issuer is a public instrumentality that has the authority to acquire, construct, and operate electric generating facilities, to sell electricity generated by such facilities, and to issue bonds to finance the same. Currently, Issuer has *a* members, including Company, which is a political subdivision of State, and *b* municipal electric departments (the “Municipal Departments”).

In Year 1, Issuer issued obligations to finance its acquisition of a partially-constructed wind power generating facility in State (the “Facility”). In Year 2, Issuer issued obligations to refinance the obligations issued in Year 1 and to finance costs of completing the construction and equipping of the Facility. Issuer now expects to issue bonds (the “Bonds”) to refinance the obligations issued in Year 2 and to finance additional costs of the Facility.

Issuer expects that the Facility will commence commercial operation by Month of Year 3. Issuer will sell all of the capacity and output of the Facility to Company. Company will resell such capacity and output to the Municipal Departments.

A number of states, including State, currently impose mandatory compliance programs, known as “renewable portfolio standards,” that require some or all electric utilities providing service within those states to demonstrate that a specified portion of their electric supplies are derived from renewable generating resources. Many states imposing such renewable portfolio standards allow utilities to meet the requirements by purchasing renewable energy certificates (“RECs”) from renewable electric generating resources. RECs represent the environmental attributes of renewable energy, with one REC representing the attributes for one megawatt hour (“MWh”) generated by a renewable energy resource. In addition to being sold in compliance with state-imposed renewable portfolio standards, RECs may be sold to individuals and business entities that participate in voluntary green programs.

Issuer expects that some or all of the MWh of electric energy anticipated to be generated at the Facility upon its completion will give rise to RECs that qualify under one or more of the mandatory compliance or voluntary green programs. The renewable portfolio standards of State do not currently apply to Issuer, Company, or the Municipal Departments purchasing the Facility’s capacity and output. As a result, Issuer intends to enter into one or more contracts (each, respectively, the “Contract”) for the sale of RECs with one or more nongovernmental persons (each, respectively, “Purchaser”).

Under the Contract, if the Facility operates but generates less than the capacity of electricity associated with the full allotment of Purchaser’s RECs in a given month, Issuer is to deliver the RECs associated with such shortfall in the next possible month (taking into account Issuer’s other REC obligations), with the term of the Contract being

extended for the sole purpose of delivering any such shortfall. If Issuer fails to operate the Facility due to force majeure, Purchaser has the option to extend the term of the Contract for a period equal to the time that Issuer's performance under the Contract is affected by such force majeure. If the force majeure delays or prevents Issuer's performance for more than c months, Purchaser has the option to terminate the Contract and receive from Issuer a specified amount for each REC not delivered during the term of the Contract.

In the event Issuer fails to deliver the requisite number of RECs to Purchaser because Issuer sells Purchaser's RECs to another party, or because Issuer abandons or shuts down the Facility for reasons other than maintenance, forced or reasonable planned outages, force majeure, or prudent operating practices (each a "Failed Delivery"), the Contract provides that Issuer is to pay Purchaser liquidated damages equal to the difference between the price for RECs under the Contract and either the cost Purchaser actually incurs in obtaining replacement RECs or the prevailing market price for purchasing replacement RECs.

Alternatively, Purchaser has the right to terminate the Contract in the event that Issuer abandons or shuts down the Facility as described above. If Purchaser so elects, it would receive a specified payment on termination. Purchaser also has the right to terminate the Contract if Issuer fails to register the certificates or if the certificates are not qualified as RECs due to a failure on the part of Issuer to properly effectuate the creation, recognition and transfer of the environmental attributes to Purchaser. Further, if any previously purchased certificates are determined not to be qualified, Issuer is to refund Purchaser's payment for such certificates with interest, whether or not the Contract is terminated.

In the case of a Failed Delivery, the Contract does not limit Purchaser's right to seek other remedies at law or in equity in lieu of (or in addition to) the liquidated damages provided for therein. Nevertheless, Issuer represents that it reasonably expects that, in the event of a breach of the Contract, specific performance would not be awarded so as to require Issuer's operation of the Facility because Purchaser would be able to obtain replacement RECs from another source.

The Contract does not entitle Purchaser to any electric energy from the Facility. Additionally, the Contract does not give Purchaser any rights with respect to how any component of the Facility is to be operated or maintained.

LAW AND ANALYSIS

Section 103(a) of the Code provides that gross income does not include interest on any state or local bond. Section 103(b)(1) provides that § 103(a) does not apply to any private activity bond which is not a qualified bond within the meaning of § 141.

Section 141(a) provides that a private activity bond is any bond issued as part of an issue that meets either (1) the private business use test of § 141(b)(1) and the private security or payment test of § 141(b)(2), or (2) the private loan financing test of § 141(c).

Section 141(b)(1) provides that, generally, a bond issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use. Section 141(b)(6)(A) provides that the term “private business use” means use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit. Section 141(b)(6)(B) provides that, for purposes of § 141(b)(6)(A), any activity carried on by a person other than a natural person shall be treated as a trade or business.

Section 1.141-3(a)(1) of the Income Tax Regulations provides that the private business use test relates to the use of the proceeds of an issue, and, for this purpose, the use of financed property is treated as the direct use of proceeds.

Section 1.141-3(b)(1) provides that both actual and beneficial use by a nongovernmental person may be treated as private business use. In most cases, the private business use test is met only if a nongovernmental person has special legal entitlements to use the financed property under an arrangement with the issuer. In general, a nongovernmental person is treated as a private business user of proceeds and financed property as a result of ownership; actual or beneficial use of property pursuant to a lease, or a management or incentive payment contract; or certain other arrangements such as a take or pay or other output-type contract.

Section 1.141-3(b)(7)(i) provides that any other arrangement that conveys special legal entitlements for beneficial use of bond proceeds or of financed property that are comparable to special legal entitlements such as ownership, leases, or output contracts (or other arrangements not relevant for this purpose) results in private business use. For example, an arrangement that conveys priority rights to the use or capacity of a facility generally results in private business use.

Section 1.141-7 provides special rules to determine whether arrangements for the purchase of output from an output facility cause an issue of bonds to meet the private business tests. Section 1.141-3 applies to determine whether other types of arrangements for use of an output facility cause an issue to meet the private business tests. Section 1.141-1(b) provides that an “output facility” means electric and gas generation, transmission, distribution, and related facilities, and water collection, storage, and distribution facilities.

Section 1.141-7(b)(1) provides that the available output of a facility financed by an issue is determined by multiplying the number of units produced or to be produced by the facility in one year by the number of years in the measurement period of that facility for that issue. Section 1.141-7(b)(1)(i) provides that the number of units produced or to be

produced by a generating facility in one year is determined by reference to its nameplate capacity or the equivalent (or where there is no nameplate capacity or the equivalent, its maximum capacity), which is not reduced for reserves, maintenance or other unutilized capacity.

Proceeds of the Bonds are to be spent on the costs of the construction of the Facility, a wind power generating facility and an output facility within the meaning of § 1.141-1(b). Although RECs are measured based on the quantity of renewable electricity generated, RECs do not increase or otherwise impact the nameplate capacity of a generation facility, and the sale of RECs does not affect the units of electricity that may be sold or entitle a purchaser of RECs to any capacity of the generators. Thus, we conclude that RECs are not output for purposes of § 141, and, as a result, the rules contained in § 1.141-7 do not apply. Therefore, the rules under § 1.141-3 must be examined to determine whether the Contract is an arrangement that would cause the Bonds to meet the private business use test.

In the event Issuer fails to deliver the stated amount of RECs to Purchaser, the Contract provides that, under certain circumstances, Issuer shall pay the difference between the purchase price for the RECs in the Contract and the cost of purchasing replacement RECs from another entity. Under other circumstances, Purchaser has the right to terminate the Contract and receive a specified payment on termination. The amount of such payment is the same whether due to a problem with the certificates or due to the abandonment or shutting down of the Facility.

Under the Contract, Purchaser will receive no legal entitlements to use of the Facility. The RECs themselves are a means to meet renewable portfolio standards and do not represent capacity or use of the Facility. Although the Contract provides for liquidated damages in the event of non-delivery of RECs to Purchaser, these provisions do not rise to the level of control over the Facility or its operations. Rather, Issuer will have exclusive control over the Facility and its operations. Additionally, as it is unlikely that Purchaser would be awarded specific performance for Issuer's nonperformance under the Contract, Purchaser could not use its legal or equitable remedies to force Issuer to operate the Facility at any level. Therefore, Purchaser has no direct or indirect control of the operation of, or any other special legal entitlement to, the Facility under § 1.141-3.

CONCLUSION

Based on the foregoing, we conclude that Issuer's sale of RECs under the Contract will not result in private business use of the Bonds within the meaning of § 141(b)(1).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed concerning whether the interest on the Bonds is excludable from gross income under § 103(a).

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for rulings; however, such material is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Associate Chief Counsel
(Financial Institutions & Products)

By: _____
Johanna Som de Cerff
Senior Technician Reviewer
Branch 5