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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:FIP:BRANCH 5
PLR-120316-08

Date:
June 25, 2008

Legend

Issuer =

Borrower =

State =

Landfill =

County =

a =

b =

c =

d =

Date 1 =

Date 2 =

Dear :

This letter is in response to your ruling request concerning the treatment of the Project (as described below) as a qualified project under § 54(d)(2)(A) of the Internal Revenue Code (the Code).

FACTS AND REPRESENTATIONS

You make the following representations. The Issuer is a not-for-profit member-owned finance cooperative organization exempt from the payment of Federal income taxes under § 501(c)(4) of the Code. The principal purpose of the Issuer is to provide its members with a source of financing to supplement the loan programs offered by the Rural Utilities Service of the United States Department of Agriculture. The Issuer makes loans to its rural utility system members to enable them to acquire, construct, and operate electric generation, distribution, transmission and related facilities. The Issuer also provides its members with credit enhancements in the form of letters of credit and guarantees of debt obligations. The Issuer has a members which include consumer-owned electric cooperatives (including generation and distribution systems), telecommunication members, service members, and associates.

The Borrower is a not-for-profit member-owned cooperative electric company described in § 501(c)(12) of the Code organized under the laws of the State. The Borrower has b members, each of which is a not-for-profit member-owned retail distribution electric cooperative.

On Date 1, the Internal Revenue Service made an allocation of the national clean renewable energy bond (CREB) limitation in the amount of $c under § 54(f)(2) of the Code to the Issuer for the Project to be owned by the Borrower. The Project consists of the addition of d engine-generator units to an existing facility producing electricity from gas derived from the biodegradation of municipal solid waste and upgrades to the existing facility necessary to accommodate the expansion. The Project was placed in service on or after Date 2. The Project and the existing generation facility are owned and operated by the Borrower.

The Project is located adjacent to the Landfill, a municipal solid waste depository in County, in the State. No part of, or interest in, the Landfill or the Landfill gas collection and supply system is owned or operated by the Borrower. The Landfill and the Landfill gas collection and supply system are independently owned and operated. The owner of the Landfill claimed tax credits under §§ 29 and 45K in the respective tax years prior to the year in which the Project was placed in service.

The Issuer plans to issue CREBs a portion of the proceeds of which will be loaned to the Borrower to reimburse the costs incurred in constructing the Project. The Issuer requests a ruling that, in determining whether the Project constitutes a qualified project for purposes of § 54(d)(2)(A) of the Code, the reference in § 54(d)(2)(A) to § 45(d) is construed without taking into account the rules set forth in § 45(e)(9)(A).

LAW AND ANALYSIS

Section 54(a) provides that a taxpayer that holds a clean renewable energy bond (CREB) on one or more credit allowance dates of the bond occurring during any taxable year is allowed as a nonrefundable credit against Federal income tax for the taxable year an amount equal to the sum of the credits determined under § 54(b) with respect to such dates.

Section 54(d) provides that a CREB means any bond issued as part of an issue if, among other requirements, 95 percent or more of the proceeds of the issue are to be used for capital expenditures incurred by qualified borrowers for one or more qualified projects. Section 54(d)(2)(A) defines the term "qualified project" as any qualified facility (as determined under § 45(d) without regard to paragraph (10) (relating to Indian coal production facilities) and to any placed in service date) owned by a qualified borrower. Section 45(d)(6) provides that in the case of a facility producing electricity from gas derived from the biodegradation of municipal solid waste, the term "qualified facility" means any facility owned by the taxpayer which is originally placed in service after the date of the enactment of § 45(d)(6) and before January 1, 2009. Section 54(j)(5) provides that a "qualified borrower" is: (1) a mutual or cooperative electric company described in § 501(c)(12) or 1381(a)(2)(C); or (2) a governmental body.

Section 710 of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) (the "2004 Act") expanded the types of facilities that qualified for the tax credit under § 45. Landfill gas facilities were part of the list of added facilities. Section 710(d) of the 2004 Act added § 45(e)(9), which coordinates § 45 tax credits with those under § 29 (subsequently renumbered as § 45K) by excluding from the term "qualified facility" any facility the production from which is allowed as a credit under § 29 for any current and past taxable year. Section 1301(f)(4) of the Energy Tax Incentives Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (the "2005 Act") amended § 45(e)(9) of the Code to include § 45(e)(9)(A). Section 1322(a)(3) of the 2005 Act renumbered § 29 as § 45K of the Code. Section 1303 of the 2005 Act added § 54 to the Code.

Section 45(e)(9)(A) provides that in general the tem "qualified facility" shall not include any facility which produces electricity from gas derived from the biodegradation of municipal solid waste if such biodegradation occurred in a facility (within the meaning of § 45K) the production from which is allowed as a credit under § 45K for the taxable year or any prior taxable year. Generally, § 45K provides a tax credit for the production and sale of fuel from nonconventional sources, including the sale of gas derived from biodegradation of municipal solid waste.

The issue presented here is whether § 45(e)(9)(A) modifies the definition of a "qualified project" for purposes of § 54(d)(2)(A) as it relates to landfill gas facilities described in § 45(d)(6). If § 45(e)(9)(A) modifies the meaning of the term "qualified project" under § 54(d)(2)(A), then the Project would not meet the definition of "qualified project"

because the landfill gas used for the production of power at the Project was derived from biodegradation of municipal solid waste from a facility the production from which was allowed as a credit under § 45K. For the reasons set forth below, we think that Congress intended that the limitation on landfill gas facilities under § 45(e)(9)(A) did not apply for purposes of the definition of "qualified project" under § 54(d)(2)(A).

Section 54(d)(2)(A) defines the term "qualified project" for purposes of § 54 by specific reference to § 45(d), a subsection of § 45, instead of the entire § 45. Thus, Congress expressly limited the universe of rules defining the term "qualified project" to those in § 45(d). Had Congress intended to apply all the limitations of § 45, it could have merely referenced § 45.

In addition, § 54(d)(2)(A) expressly specifies the extent of application of § 45(d) for purposes of § 54 by excising Indian coal production facilities and the placement in service date for purposes of the meaning of the term "qualified project" under § 54. If Congress intended that § 45(e)(9)(A) modify the meaning of the term "qualified project" for purposes of § 54(d)(2)(A), it could have made a similarly specific reference.

Section 710(d) of the 2004 Act imposed the restriction on the § 45 credit for taxpayers who took credit under § 45K (formerly § 29) by limiting the definition of the term "qualified facility" under § 45(d)(6) to those facilities the production from which has not been claimed as a credit under § 45K. Legislative history to § 710(d) states that no facility that previously claimed or currently claims credit under § 29 (redesignated as § 45K) of the Code is a qualifying facility *for purposes of § 45*, thus limiting the scope of the limitation to § 45 credit takers. *See* H.R. Conf. Rep. 108-755, 512 (2004) (emphasis added).

CONCLUSION

Accordingly, we conclude that in determining whether the Project constitutes a qualified project for purposes of § 54(d)(2)(A) of the Code, the reference in § 54(d)(2)(A) to § 45(d) is construed without applying § 45(e)(9)(A).

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, including for purposes of determining the credits under §§ 45 or 45K of the Code.

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.

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. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Timothy L. Jones
Senior Counsel, Branch 5
(Financial Institutions & Products)