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LEGEND:

Taxpayer =

Subsidiary =

State =
X =

Dear :

This letter responds to your letter dated , supplemented by letters dated , and , requesting rulings concerning the application of section 45 of the Internal Revenue Code (the Code) to the facts described below.

Facts

The facts are represented by Taxpayer to be as follows.

Taxpayer is a regional, consumer-owned rural electric power cooperative incorporated to provide electric power and energy at wholesale to its member systems, all of whom are themselves rural electric cooperatives. Taxpayer is organized on a not-for-profit basis; however, it is taxable for State and federal income tax purposes. It is a membership organization with no capital stock. The qualification for membership and the rights and obligations of the four classes of membership (Classes A, B, C and D) are established in the corporate bylaws. As a cooperative organization, Taxpayer's

margins and reserves belong to its consumer-owners. Taxpayer's margins must be used to improve or maintain operations, set aside in reserves, or distributed to the membership. All margins allocated to the membership are allocated on the basis of business done with Taxpayer.

During the years - , Taxpayer entered into certain Wholesale Power Contracts with its Class A members, each of which are in full force and effect today. Pursuant to these contracts, Class A members agreed to purchase, and Taxpayer agrees to sell and deliver, all of the electric power needed by the Class A member to service their own member systems to the extent that those needs exceed a certain level of power and energy otherwise available to those members.

Taxpayer also participates in the federal loan program established by and under the , which is administered by the

). Under the program, Taxpayer borrows funds to construct generation and transmission facilities to meet the needs of its members, who are themselves eligible borrowers. From time to time, Taxpayer also borrows funds for capital projects from sources other than .

As a consumer-owned borrower, Taxpayer is not regulated by the Federal Energy Regulatory Commission (FERC) or the state utilities commissions. Furthermore, as a utility (although not a "public" utility), Taxpayer is not entitled to sell power under or pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA).

Subsidiary will be established as a Subchapter C corporation organized and operated under the laws of State as a for profit business. It will have one class of common stock. Taxpayer will own all of the outstanding stock and will purchase all of the electric energy produced by the wind generation facilities owed and operated by Subsidiary with such electric power and energy becoming a part of Taxpayer's overall resource mix. Taxpayer and Subsidiary will file a consolidated tax return.

Subsidiary will construct, own and operate at least MW of wind energy generation resources to assist Taxpayer in meeting expected state and federal requirements for renewable resources in the power supply portfolio from which Taxpayer will supply electric power and energy.

Subsidiary will obtain financing approval from equal to percent of the aggregate cost of construction of the X wind turbines that will comprise the total project. Subsidiary will obtain a certification from the ( ) that the rate of interest available to Subsidiary in connection with the project contemplated herein is in fact comparable to the rate Subsidiary could obtain in the private market with a government agency loan guarantee.

Subsidiary will enter into an agreement to sell to Taxpayer the entire output of the wind facilities. Subsidiary's management and administrative needs will be met through an arm's length agreement with Taxpayer to provide management and administrative services. Taxpayer is part of a three-tier delivery system. It sells wholesale power to its Class A members. The Class A members sell power to their respective distribution cooperative members (Taxpayer classifies distribution cooperatives as Class C members) who, in turn, sell power at retail to their respective end-use customers. Taxpayer has certain Class A members that are themselves distribution cooperatives. There are also special membership categories entitled Class B and Class D. From time to time, Taxpayer also sells power at wholesale (primarily on a short-term basis) to unrelated utilities in the normal course of managing generation that is temporarily surplus to the needs of its member cooperatives.

Taxpayer specifically represents that the rates attributable to said wind power will be equal to or less than the member's avoided costs attributable to such power computed in a manner consistent with the "avoided cost" rules promulgated by FERC and referenced in the Code section under discussion.

The wind facilities will be originally placed in service within the dates specified in section 45(d)(1).

Rulings Requested

1. Subsidiary's wind turbine facilities will be "qualified energy resources" and "qualified facilities" within the meaning of sections 45(a)(2)(A)(i) and 45(d)(1) of the Code.

2. The sale of output from Subsidiary's wind facilities to Taxpayer, and ultimately to persons unaffiliated with either Subsidiary or Taxpayer will satisfy the requirement of section 45(a)(2)(B) of the Code, that the output of a qualifying facility be sold to an "unrelated person."

3. Loans made by to Subsidiary in connection with Subsidiary's wind generation facilities will not be considered: (1) grants provided for use in connection with construction or operation of the wind generation facilities, (2) subsidized energy financing provided (directly or indirectly) under a program in connection with financing Subsidiary's wind generation facilities, or (3) any other credit within the meaning of section 45(b)(3)(A)(iv).

4. Taxpayer's sale of power generated by Subsidiary, pursuant to contracts executed prior to January 1, 1987, will not be disqualified by application of the limitation provided under section 45(e)(7)(A).

Law and Analysis

1. Section 45 of the Code provides a tax credit for electricity produced from certain renewable resources. Section 45(a)(2) provides, in part, that the credit is 1.5 cents times the kilowatt hours of electricity produced from qualified resources and at a qualified facility. Under the calculation required by section 45(b)(2), 2.1 cents is substituted for 1.5 cents for the calendar year 2008 on the sale of electricity produced from the qualified energy resource of wind. *See*, Notice 2008-48, IRB-2008-21. Section 45(c)(1)(A) of the Code provides that, in general, the term "qualified energy resources" means wind. Section 45(d)(1) further provides that in the case of a facility using wind to produce electricity, the term "qualified facility" means any facility owned by the taxpayer which is originally placed in service after December 31, 1993, and before January 1, 2009.

In the instant case, Subsidiary will construct, own and operate X wind turbines that will comprise the total project. Further, these facilities will be owned by Subsidiary and placed in service before January 1, 2009. Accordingly, we conclude that Subsidiary's wind turbine facilities will be "qualified energy resources" and "qualified facilities" within the meaning of sections 45(a)(2)(A)(i) and 45(d)(1) of the Code.

2. Section 45(a)(2)(B) of the Code provides that the electricity produced from qualified energy resources and from a qualified facility must be sold by the taxpayer to an unrelated person during the taxable year.

Section 45(e)(4) of the Code provides that persons shall be treated as related to each other if such persons would be treated as a single employer under the regulations prescribed under section 52(b) of the Code. In the case of a corporation that is a member of an affiliated group of corporations filing a consolidated return, such corporation shall be treated as selling electricity to an unrelated person if such electricity is sold to such a person by another member of such group. Section 1504(a) of the Code provides, in part, that an affiliated group includes a parent and its wholly owned subsidiary neither of which is tax exempt.

Further, in the case of electricity produced from any qualified resource, Notice 2008-60, IRB 2008-30, provides, in part, that the requirement of a sale to an unrelated person will be treated as satisfied if the ultimate purchaser of the electricity is not related to the person that produces the electricity.

In the instant case, Taxpayer and Subsidiary are members of an affiliated group of corporations and will be filing a consolidated tax return. Further, although Subsidiary will be selling electricity to Parent, Parent will ultimately sell such electricity to third parties unrelated to Subsidiary or Parent. Accordingly, we conclude that the sale of electricity from Subsidiary's wind facilities to Taxpayer, and ultimately to persons unaffiliated with either Subsidiary or Taxpayer will satisfy the requirement of section 45(a)(2)(B) of the Code.

3. Under section 45(b)(3) of the Code, the amount of the credit with respect to any project for any taxable year is reduced by an amount equal to the product of 1) the amount of the credit otherwise allowable for such year and 2) a fraction, the numerator of which is the sum of i) grants provided by the United States, a State, or a political subdivision of a State for use in connection with the project; ii) proceeds of an issue of State or local government obligations used to provide financing for the project the interest on which is exempt from tax under section 103 of the Code; iii) the aggregate amount of subsidized energy financing provided (directly or indirectly) under a Federal, State or local program in connection with the project; and iv) the amount of any other credit allowable with respect to any property which is part of the project, and the denominator of which is the aggregate amount of additions to the capital account for the project for the taxable year and all prior taxable years.

Section 45 of the Code does not define the term "grant." However, the term is defined in section 1.148-6(d)(4)(iii) of the Income Tax Regulations (the regulations) (involving arbitrage bonds) as a transfer for a governmental purpose of money or property to a transferee that is not a related party to or an agent of the transferor. The transfer must not impose any obligation or condition to directly or indirectly repay any amount to the transferor.

Section 45 of the Code does not define subsidized energy financing. However, under section 48(a)(4)(C) of the Code, the term means financing provided under a federal state, or local program a principal purpose of which is to provide subsidized financing for projects designed to conserve or produce energy.

In Rev. Rul. 2006-9, 2006-1 C.B. 519, the taxpayer was a corporation that built a wind-powered electric generation facility that was a "qualified facility" under section 45(d)(1) of the Code and which produced electricity that qualified for a related production credit. The facility also qualified for tax credits under state law. At issue was whether the section 45 tax credit was subject to reduction under section 45(b)(3) of the Code by reason of the state tax credit. The Service concluded that the term "any other credit allowable" in section 45(b)(3)(A)(iv) of the Code was properly construed to include only federal tax credits allowable with respect to property that was part of a project and did not include state or local credits.

In the instant case, Taxpayer has represented that it will obtain an certification providing that the rate of interest available to Subsidiary in connection with the wind project is comparable to the rate Subsidiary could obtain in the private market with a government agency loan guarantee. In view of these special circumstances, and based upon your representations and our legal analysis, we conclude that Taxpayer and Subsidiary will not receive a subsidy and the funds borrowed from the , in this instance, are not subsidized energy financing as defined in section 45(b)(3)(A)(iii). Accordingly, we conclude that, as a result of the loan from , there is no reduction in

the amount of the credit determined under section 45(a) available to Subsidiary based on the application of section 45(b)(3) of the Code.

4. Section 45(e)(7)(A) of the Code states that:

(A) In general. – The credit determined under subsection (a) shall not apply to electricity:
i. produced at a qualified facility described in subsection (d)(1) which is originally placed in service after June 30, 1999, and
ii. sold to a utility pursuant to a contract originally entered into before January 1, 1987 (whether or not amended or restated after that date).

The statute provides the following exception:

(B) Exception. – Subparagraph (A) shall not apply if –
i. the prices for energy and capacity from such facility are established pursuant to an amendment to the contract referred to in subparagraph (A)(ii),
ii. such amendment provides that the prices set forth in the contract which exceed avoided cost prices determined at the time of delivery shall apply only to annual quantities of electricity (prorated for partial years) which do not exceed the greater of-
(I) the average annual quantity of electricity sold to the utility under the contract during calendar years 1994, 1995, 1996, 1997 and 1998, or
(II) the estimate of the annual electricity production set forth in the contract, or, if there is no such estimate, the greatest annual quantity of electricity sold to the utility under the contract in any of the calendar years 1996, 1997, or 1998, and
iii. such amendment provides that energy and capacity in excess of the limitation in clause (ii) may be-
(I) sold to the utility only at prices that do not exceed avoided cost prices determined at the time of delivery, or
(II) sold to a third party subject to a mutually agreed upon advance notice to the utility.

For purposes of this subparagraph, avoided cost prices is be determined as provided for in 18 CFR 292.304(d)(1) or any successor regulation.

As described above, Taxpayer entered into certain Wholesale Power Contracts with its Class A members during the years 1962-1965; each of these contracts are in full force and effect today. These contracts provided that the Class A members would purchase and Taxpayer agreed to sell and deliver, all of the electric power needed by such members to serve their own member systems (to the extent that those needs exceed a certain level of power and energy otherwise available to those members). Taxpayer represents that the prices paid by the Class A members under the pre-1987 contracts will not exceed the avoided costs. Therefore, for sales of electricity to Class A

members by Taxpayer, none of the electricity sold to the Class A members meets the conditions described in section 45(e)(7)(B)(ii). Further, all of the electricity sold to the Class A members meets the conditions described in section 45(e)(7)(B)(iii)(I). Because the existing contracts for sales to the Class A members provide for sales at a price that does not exceed avoided costs Taxpayer is not required to enter into an amended contract in order to satisfy the exception contained in section 45(e)(7)(B). Therefore, we conclude that the sales of electricity generated by Subsidiary to the Class A members pursuant to contracts executed by Taxpayer prior to January 1, 1987, will not be disqualified from the credit under section 45 because of the application of section 45(e)(7)(A).

Except as specifically set forth above, no opinion is expressed or implied concerning the federal income tax consequences of the above described facts under any other provision of the Code or regulations. No opinion is expressed or implied as to whether the pre-1987 contracts described above comply with the avoided cost requirement of section 45(e)(7)(B)(iii)(I) of the Code.

This ruling is directed only to the taxpayer who requested 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 in this office, a copy of this letter will be sent to your authorized representatives.

Sincerely yours,

Charles B. Ramsey
Chief, Branch 6
(Passthroughs & Special Industries)

cc: