

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>BARTON WINDPOWER, LLC, BARTON WINDPOWER II, LLC, NORTHERN IOWA WINDPOWER II, LLC, AND ENDEAVOR POWER PARTNERS, LLC</p>	<p>DOCKET NO. 199 IAC 15.18</p>
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**ORDER ON REHEARING AND NOTICE OF REQUIREMENT
TO AMEND OR SUPPLEMENT IOWA CODE CHAPTER 476B APPLICATIONS**

(Issued February 3, 2006)

On July 21, 2005, letters were issued by the Utilities Board's (Board) Executive Secretary stating that a preliminary determination had been made that Barton Windpower, LLC, Barton Windpower II, LLC, and Northern Iowa Windpower II, LLC (collectively, the Applicants), were eligible renewable energy facilities under Iowa Code chapter 476B. On July 29, 2005, a letter issued by the Board's Deputy Executive Secretary notified Endeavor Power Partners, LLC (Endeavor), that its application for renewable energy tax credits pursuant to chapter 476B could not be processed because eligibility for the 450 MW reserved under that chapter had been fully subscribed. The letter noted that if there are any reductions in the MW capacity of any of the eligible facilities, or if any eligible facilities are not operational within 18 months pursuant to 199 IAC 15.18(4), any released capacity will be made available to applicants in the queue.

On August 19, 2005, Interstate Power and Light Company (IPL) filed applications for reconsideration of the Applicants' eligibility determinations. IPL had previously objected to the Applicants' applications for eligibility. Among other things, IPL argued that the Applicants did not file executed power purchase agreements as required by Iowa Code § 476B.5(1)"e" and that, because of common ownership, all three LLCs should not be eligible for the credits.

The Applicants filed resistances to the applications for reconsideration on August 26, 2005. The Applicants stated that reconsideration of the Board's eligibility determinations was not available to IPL under chapter 476B and that the filing was untimely pursuant to Iowa Code § 476.12. The Applicants supplemented their resistances on August 29, 2005, with resolutions from the Worth County Board of Supervisors approving their eligibility for the tax credits.

On August 29, 2005, Endeavor filed a notice of appeal to the Board and a request for reconsideration of the determination that its application for chapter 476B tax credits could not be processed. In essence, Endeavor was asking the Board to rescind the seven preliminary determinations of eligibility previously made to other projects, including the Applicants, that were ahead of Endeavor in the queue. Endeavor argued that the emergency rules adopted by the Board for chapter 476B were defective and that the seven other projects were not eligible for the chapter 476B tax credits because none of them had an executed purchase power agreement. Endeavor also claimed the ownership limits contained in chapter 476B were violated.

The revisions to chapter 476B became effective on July 1, 2005. Similar provisions for smaller wind projects contained in chapter 476C became effective on June 16, 2005. The Board issued emergency rules that were identical for both chapters on June 20, 2005. Since the emergency rules were adopted, the rules have been the subject of various meetings of the Administrative Rules Review Committee (Committee), made up of members of the Iowa House of Representatives and Senate. On September 13, 2005, the Committee voted to object to the provisions of the emergency rules as they related to the implementation of House File 882 (Iowa Code chapter 476B) only. The objection was published in the Iowa Administrative Bulletin on October 12, 2005, at page 619.

In an order issued September 13, 2005, the Board granted rehearing for purposes of receiving the additional evidence and argument filed by Applicants, Endeavor, and IPL. In granting rehearing for purposes of receiving the arguments, the Board cited the interest of the Committee and potential changes to the purchase obligation under the Public Utility Regulatory Act of 1978 (PURPA) because of provisions contained in the Energy Policy Act of 2005, which became effective on August 8, 2005. The Board relied on PURPA's legal purchase obligation, at least in part, in determining that the Applicants met the eligibility requirements of chapter 476B.

In the September 13, 2005, order, the Board did not set a procedural schedule. The Board noted that an oral presentation on the noticed rules for chapters 476B and 476C was scheduled for September 21, 2005, in Docket No.

RMU-05-8. The oral presentation addressed the issues raised in the applications for rehearing and responses thereto. The Board said that after the oral presentation, it would determine the procedures and schedule for obtaining additional evidence and argument on the applications for reconsideration, if necessary.

After reviewing the comments in the rule making proceeding, the Board, on January 26, 2006, issued an "Order Adopting Rule Making" with attached adopted and filed rules. This order is incorporated by reference and is available at the Board's website, www.state.ia.us/iub, or from the Board's records center at 350 Maple Street, Des Moines, Iowa. The new rules will become effective on March 22, 2006; the emergency rules expire on March 21, 2006.

In the new rules, the Board made significant changes to the chapter 476B filing requirements as a result of the feedback received from the Committee. The filing requirements for chapter 476B projects (199 IAC 15.18) and chapter 476C projects (199 IAC 15.19) will be separated; in the emergency rules, both were in 199 IAC 15.18. The most significant changes are to the chapter 476B requirements.

First, the Committee, in its objection to the emergency rules as they applied to chapter 476B, noted the legislative intent that only an executed power purchase agreement or other executed agreement that has a similar force and effect should be accepted in the chapter 476B application process. The Board did not have the benefit of this legislative history at the time it adopted the emergency rules. While the Board believes its interpretation of the statute in the emergency rules was reasonable, given the information available at the time, the Committee and other

commenters have persuaded the Board that an executed agreement is required. Therefore, new rule 199 IAC 15.18(1) will require, effective March 22, 2006, that a signed purchase power agreement or other signed agreement be part of the application. If the purchase power agreement has not yet been finalized and executed, the Board will accept as an "other agreement" an executed agreement "signed by at least two parties that includes both a commitment to purchase electricity from the facility upon completion of the project and most of the essential elements of a contract." 199 IAC 15.18(1)"d."

Second, the Committee objected to the ownership provisions of the rules as they applied to chapter 476B facilities. Taken together, sections 476B.5(1)"a" and 476B.5(2) indicate a legislative intent that the Board consider not only the legal entity that actually owns a facility, but also, when the legal entity is other than a natural person, the Board must consider the equity owners of the legal entity when applying the two-facility limitation. Rule 199 IAC 15.18(b) states that the application must contain information regarding equity owners, and that in applying the two-facility limit, the Board will look at both legal and equity owners.

In the preamble to the adopted and final rules, the Board said that it must consider what to do with the existing chapter 476B queue. Several commenters suggested that all pending chapter 476B projects should be rejected and the process begun again. Others argued that the projects that have already been approved have some right and interest in that approval, which cannot be changed without giving them due process of law.

The Board cited its continued belief that, based on the information available to it, the Board's original interpretation of the statute, expressed in the emergency rules, was reasonable at the time it was made. A different interpretation, based on comments from the Committee and others, is reflected in the final rules. As such, the Board concluded that the emergency rules are effective and valid until March 21, 2006, or until replaced by final rules, whichever comes first. The final rules will become effective March 22, 2006. The Board determined it would not reject the applications and start over because "they were filed in compliance with the Board's valid rules at the time they were submitted and processed and should not be undone." (Preamble to adopted rules, p. 12.)

While not rejecting the applications and starting over, the Board noted that each of those projects that received a preliminary determination of eligibility is subject to an application for rehearing. Because the Board in the adopted rules conformed the chapter 476B rules to the statutory intent as explained by the Committee, the Board will require all chapter 476B applicants to amend or supplement their filings to comply with the adopted rules. If an applicant cannot comply on or before March 22, 2006, the effective date of the adopted rules, it will lose its position in the queue. In other words, an executed purchase power agreement or other executed agreement satisfying the new rules will have to be filed. In addition, to the extent a single person or legal entity holds an equity interest in more than two projects in the queue as of March 22, 2006, the Board will remove facilities involving that person or entity from

the queue, beginning with those applications that were last filed, until that person or other legal entity is in compliance with the two-facility limit.

This arrangement gives those entities with current priority in the queue up to March 22, 2006, the effective date of the final rules, to amend or supplement their applications to meet the new requirements. Given that the original applications were filed in July or August 2005, this is sufficient time for an executed purchase power agreement or other compliant executed agreement to be negotiated.

The Board believes its actions in adopting the final rules also dispose of the applications for rehearing and arguments raised therein and that additional evidence or argument would not be useful. Chapter 476B applicants will be required to amend or supplement their applications to comply with the adopted rules on or before March 22, 2006, or lose their positions in the queue. The Board has the authority to consider the subject matter of the adopted rules in these contested case proceedings as a guide and has the choice to develop policy by rule, contested case, or both. Young Plumbing and Heating Company v. Iowa Natural Resources Council, 276 N.W.2d 377 (Iowa 1979). If there are issues with any amended or supplemental applications, they may be raised at the appropriate time.

IT IS THEREFORE ORDERED:

1. The requests for reconsideration filed by Interstate Power and Light Company on August 19, 2005, are granted to the extent discussed in this order and denied in all other respects.

2. The request for reconsideration filed by Endeavor Power Partners, LLC, on August 29, 2005, is granted to the extent discussed in this order and denied in all other respects.

3. Persons who have filed Iowa Code chapter 476B applications shall, on or before March 22, 2006, file amendments or supplements to their applications in conformance with the adopted rules in Docket No. RMU-05-8 or lose their positions in the queue as detailed in the body of this order.

4. Copies of this order shall be mailed to all persons filing applications for tax credits pursuant to Iowa Code chapter 476B and to all persons on the service list for Docket No. RMU-05-8.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 3rd day of February, 2006.