Department of Commerce
UTILITIES DIVISION
OFFICE OF GENERAL COUNSEL

TO: The Board

FROM: Bob Bird

DATE: December 10, 2015

SUBJ: Eligible Owners: Wind and Renewable Energy Tax Credits under Iowa Code Chapter 476C

This memorandum is to discuss arguments for and against the proposition that limitations on owners eligible for renewable energy production tax credits under Iowa Code Chapter 476C, in the case of facilities owned by limited liability companies, should be understood to apply to the ultimate owners of the LLCs, as well as to the LLCs themselves. The memorandum will address the issue primarily from the standpoint of statutory and regulatory interpretation.

I. BACKGROUND: STATUTORY PROVISIONS AND RULES

A. <u>Chapter 476C Tax Credits</u>

This chapter of Iowa Code establishes the tax credit for smaller wind and other renewable energy facilities. The tax credit equals 1.5 cents per kilowatt-hour of energy generated by an eligible facility (and owned by an eligible owner), payable either to the owner or to a purchaser of the energy output under contract. Caps apply to the tax credits. The Board may approve wind energy facilities with up to 363 MW of nameplate generating capacity; and up to 63[1] MW for all other kinds of eligible facilities (solar energy, biomass, and methane recovery, for example), with up to 10 MW at any single non-wind facility. Under an amendment enacted in 2006, if potentially eligible applications would exceed the capacity limits, the Board shall maintain a waiting list in order of the time of filing. If an approved facility is later found ineligible, the next applicant on the waiting list shall be considered for approval.

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1 Increased to 63 MW by House File 645, passed by the General Assembly in 2015 and signed by the Governor on June 26, 2015. In pertinent part, the Act amends Code Section 476C.3(4)(b) to increase the non-wind capacity cap from 53 to 63 MW. The additional 10 MW is reserved for “solar facilities with a generating capacity of 1.5 MW or less owned or contracted for by utilities.”

Chapter 476C also limits the amount of tax credits available to a single owner by limiting the number of eligible facilities a single owner may own. As enacted in 2005, it provided that an entity "shall not be an owner of more than two" eligible facilities. A 2006 amendment added a further restriction: "a person that has an equity interest equal to or greater than fifty-one percent in an eligible . . . facility shall not have an equity interest greater than ten percent in any other" eligible facility. Both restrictions are now set forth in subsection 476C.3(7).

The two elements of this subsection, enacted a year apart, use somewhat different language: "***an owner***" shall not own more than two eligible facilities, while "***a person that has an equity interest*** equal to or greater than fifty-one percent in an eligible facility shall not have an equity interest greater than ten percent" in another facility. This invites the question: do these two restrictions apply to different kinds of entities? In particular, could the meaning of "an owner" have broader scope, including an LLC or other legal entity, while "a person that has an equity interest" is limited to owners that are human individuals?

This appears not to be the case. First, Iowa Code Section 4.1, governing construction of statutes, provides: "Unless otherwise provided by law, 'person' means individual, corporation, limited liability company . . . or any other legal entity." Section 4.1(20). Chapter 476C does not include any contrary or more specific definition of "person."

Second, the Board has interpreted the percentage ownership restriction of subsection 476C.3(7) to apply to LLCs, not just to natural persons. Discussing the new Code language added in 2006:

> The Board will use an authorized limited liability company (LLC) as the example, because most, if not all, of the [eligible] facilities . . . are owned by LLCs. Previously, one LLC could own no more than two eligible facilities. With the statutory change, the LLC cannot have an ownership interest in more than two eligible facilities and, if an LLC owns more than 51 percent of one eligible facility, it cannot have an equity interest greater than 10 percent in any other. . . .

In *Re: Wind and Renewable Energy Tax Credits*, Docket No. RMU-06-7, Order Regarding Compliance, issued December 21, 2006, at p. 2.

As this shows, within the meaning of subsection 476C.3(7), "owner" and "person that has an equity interest" are functionally the same. And both the two-facility and the percentage restrictions apply to a person or legal entity owning interests in eligible facilities. Thus, a particular owner may not have interests in more than two facilities, and the proportion of the lesser interest may not exceed ten percent. It appears implicit that the owner may not claim tax credits in excess of those percentages either.

B. Ownership Eligibility Requirements

In addition to the limits on the number of facilities and owned shares eligible for Chapter 476C tax credits, the statute restricts eligibility to certain kinds of owners. In particular:

> 6. "Eligible renewable energy facility" means a [facility that]: . . .
> b. Is at least fifty-one percent owned by one or more of any combination of the following:
> (1) A resident of this state.
> (2) Any of the following as defined in section 9H.1:
> (a) An authorized farm corporation.
> (b) An authorized limited liability company.
> (c) An authorized trust.
> (d) A family farm corporation.
> (e) A family farm limited liability company.
> (f) A family trust.
> (g) A revocable trust.
> (h) A testamentary trust.
> (3) A small business as defined in section 15.102.
> (4) An electric cooperative association organized pursuant to chapter 499 that sells electricity to end users located in this state.
> (5) An electric cooperative association that has one or more members organized pursuant to chapter 499.
> (6) A cooperative corporation organized pursuant to chapter 497 ***or a limited liability company organized pursuant to chapter 489 whose shares and membership are held by an entity that is not prohibited from owning agricultural land under chapter 9H***.
> (7) A school district located in this state.

Iowa Code Section 476C.1(6)(b) (*emphasis added*).

For each 2.5 MW of generating capacity, a facility must have at least one owner meeting the foregoing qualifications. Section 476C.1(6)(c).

The three categories of LLC owners that may apply for the tax credit are all defined with reference to Iowa Code Chapter 9H: an "authorized limited liability company," a "family farm limited liability company," and an LLC organized under Chapter 489[2] "whose shares and membership are held by an entity that is not prohibited from owning agricultural land under chapter 9H."

Chapter 9H ("Corporate or Partnership Farming") restricts acquisition of agricultural land. In general, a corporation, LLC or unincorporated non-profit organization is forbidden to "acquire . . . obtain or lease" any agricultural land in Iowa. There are certain exceptions for land acquired for research purposes, encumbrances to secure loans, non-farming uses, etc.

Further, certain kinds of entities are exempt from the ban. It does not apply to "a family farm corporation, authorized farm corporation, family farm limited liability company, authorized limited liability company, family trust, authorized trust, revocable trust, testamentary trust, family farm unincorporated nonprofit association, or authorized unincorporated nonprofit association." Section 9H.4(1). Most of these entities, defined in Section 9h.1, share certain characteristics. They are owned by natural persons (or by fiduciaries acting on behalf of individuals) who are either members of a family, or of a small group not exceeding 25 individuals. Except for the trusts, they must be organized "for the purpose of farming and [owning] agricultural land". As for trusts: an "authorized trust" is limited to 25 beneficiaries who are natural persons, while a testamentary trust transfers property of an individual through the operation of a will.[3]

These entities, explicitly excluded from the Chapter 9H ban on ownership of agricultural land, are also allowed to own LLCs that, in turn, may own renewable energy facilities eligible for Chapter 476C tax credits. Section 476C.1(6)(b)(6). Chapter 9H also does not forbid natural persons, partnerships or limited partnerships to own agricultural land; so it appears that they, too, may own LLCs eligible for 476C tax credits.

By way of summary: a facility is eligible for tax credits under Chapter 476C if (in addition to meeting other statutory criteria) it is at least 51 percent owned by: an individual who is an Iowa resident; a small business (gross income under $4 million, or fewer than 20 employees); an electric cooperative; a school districts; a small or family-centered entity organized for farming and owning agricultural land in Iowa, or a trust allowed to own agricultural land; or an LLC

[2] Chapter 489 provides the general authority under Iowa law for formation of an LLC.

[3] By contrast, a revocable trust can transfer property of an entity.

owned by an entity that may own agricultural land within the State. On the other hand, tax credits under Chapter 476C are not available for facilities owned by:

-- corporations (unless qualifying for "small business" status);

-- limited partnerships (except indirectly, as owners of an LLC owning an eligible facility); or

-- limited liability companies (unless the LLC is owned by individuals, limited partnerships, or relatively small, explicitly agriculture-related organizations or trusts).

C. Board Rules under Chapter 476C

The Utilities Board has adopted rules for administration of the Chapter 476C tax credit program, found at 199 IAC 15.19(1) – (6) and 15.21.

An applicant is required, in pertinent part, to submit information "regarding the ownership of the facility," including legal name, "percentage of equity interest held by each owner," and legal status of each owner. "Legal status" refers to the qualification of the owner under the criteria defined by Section 476C, requiring that at least 51 percent of an eligible facility be owned by one of the listed kinds of entity (described above). 199 IAC 15.19(1)(b). The applicant must attest that it "does not have an ownership interest in more than two eligible renewable energy facilities," and that it does not own both a majority interest in any one and more than ten percent of any other eligible facility. Finally, the facility description must show that the total nameplate capacity divided by the number of owners does not exceed 2.5 MW per owner.

D. Tax Credits under Code Chapter 476B

Iowa Code Chapter 476B, enacted in 2004 and subsequently amended, establishes a distinct tax credit program for wind energy projects located in Iowa. Chapter 476C is open to non-wind projects, sets the minimum capacity for an eligible facility at 750kW, and provides a tax credit of 1.5 cents per kWh. By contrast, Chapter 476B offers 1 cent per kWh and excludes non-wind renewable energy facilities. It is also generally intended for larger projects, with at least two MW of capacity, calculated as the sum of nameplate ratings for one or more wind turbines with a common gathering line (up to a maximum of 30MW).[4] Total eligible capacity is capped at 50 MW; facilities must be in service by July 1, 2012.

[4] A lower 750 kW minimum applies to wind turbines owned by schools, colleges, or public hospitals that use the energy output themselves.

Chapter 476B does not disqualify any category or size of entity from owning an eligible facility. A multi-state electric generation operator, investor-owned utility, or a Fortune 500 corporation could propose a facility and apply for the tax incentive. On the other hand, all owners are subject to a strict numerical limit: "An owner shall not be an owner of more than two qualified facilities." Section 476B.5(5). Tax credit applicants must submit information showing the facility's ownership "including the percentage of equity interest held by each owner." Section 476B.5(1)(a).

The Board's rules elaborate on this filing requirement. Among other data, an applicant shall submit "[i]nformation regarding the ownership of the facility, including the legal name of each owner, information demonstrating the legal status of each owner, and the percentage of equity interest held by each," together with an attestation that the owners "are not owners of more than two eligible renewable energy facilities." 199 IAC 15.18(1)(b). So far the rule corresponds closely with the parallel provision for Chapter 476C tax credits (subrule 15.19(1)(b)). But since Chapter 476B does not confine eligibility to certain categories of owners, nor limit the percentage share an owner may have in its two allowed facilities, the rule omits these elements of the 476C rule.

On the other hand, the 476B subrule includes the following additional proviso: "***In determining whether the two-facility limit is exceeded, the Board will consider not only the legal entity that owns the utility, if other than a natural person, but the equity owners of the legal entity***. If the owner of the facility is other than a natural person, information regarding the equity owners must be provided." 199 IAC 15.18(1)(b) (*emphasis added*). No similar language appears in subrule 15.19.

II. ANALYSIS: STATUTORY PROVISIONS AND LEGISLATIVE INTENT

This analysis will address whether Chapter 476C ownership limitations (maximum two facilities; no majority owner may hold more than 10 percent of any second facility) should apply not only to limited liability companies that directly own renewable energy facilities, but also to the ultimate owners of the LLCs themselves. First, the arguments in favor, then those against.

A. Implementing Ownership Limits under Chapter 476C Tax Credit Program, Board Should Look to Ultimate Ownership of Facilities

The use of tax credits to encourage particular investment decisions by private enterprise is a common device of public policy. In addition to certain local benefits (such as spending stimulated by construction projects and incremental tax revenues), participation by businesses in incentivized projects can build capacity and expertise that in turn may facilitate subsequent private-sector investment independently of tax incentives. The more businesses that participate, the more widespread these benefits. Policy-makers may therefore seek to promote wider program participation, and avoid concentration of tax incentive awards in a small number of businesses.

This is particularly true where authorized tax credits are subject to a cap. In such a case, the finite resource may need to be allocated among applicants whose projects exceed the available credits. The principle for allocation, implicit in the waiting-list procedure stipulated by the Legislature (Section 476C.3(5)), is "first come, first served."

1. Avoiding Concentration of Tax Credit Awards

The Iowa Legislature clearly intended to spread the 476C tax credits around, rather than to allow one or a few entities to lock up the limited pool of incentives. This intention is reflected in both Chapters 476B and 476C. Both expressly forbid an owner to own interests in more than two eligible facilities. Sections 476B.5(5) and 476C.3(7). Both also require an owner-applicant to submit "information regarding the ownership of the facility including the percentage interest held by each owner." Sections 476B.5(1)(a) and 476C.3(1)(a). These provisions reflect the purpose in both Chapters.

As one party to the Board's 2005-2006 rule making commented, "the Board should not be constrained by corporate legal fiction such as different LLC names or structures for each project." Iowa Administrative Bulletin, vol. XXVIII no. 17, p. 1296 (ARC 4878B) (to be codified at 199 IAC 15.18, 15.19). In that rule making, the Legislature's Administrative Rules Review Committee "(ARRC," or "Committee") objected to an initial version of subrule 15.18(1)(b), which merely required an applicant to state that it owned no more than two eligible facilities. The Committee found this inadequate, noting that "the statutory language evidences a clear legislative intent that the board should consider both direct and indirect ownership interests and not rely solely on corporate business structures to determine ownership." Id. at p. 1296. The Committee also noted that, out of seven projects awarded credits, at least five applicants were under the same equity ownership.

2. Chapter 476B: "Looking Beyond" LLC Owner

In response to the Committee's objection, the Board referred to Section 476B's two-facility ownership limit and the requirement that an applicant submit ownership percentage data. "Taken together, these provisions indicate a legislative intent that the Board consider not only the legal entity that owns a facility but, when that legal entity is a corporation or [any] other than a natural person, that the Board also consider the equity owners of that legal entity when applying the two-facility limitation." Id. at 1296. The Board accordingly amended its proposed rule to include the requirement that it "consider not only the legal entity that owns the utility, if other than a natural person, but the equity owners of the legal entity." (*See* 199 IAC 15.18(1)(b)).

3. Chapter 476C: Similar Provisions to 476B

Board rule 15.19 implements the tax credit program for smaller renewable energy facilities under Chapter 476C. It requires an applicant to attest that it owns no more than the allowed proportions of two separate facilities and requires disclosure of "the percentage of equity interest held by each owner." 199 IAC 15.19(1)(c) - (e); 15.19(1)(b). Unlike rule 15.18, however, it does not include a provision requiring the Board to look beyond the legal entity owning an eligibility facility to "the equity owners of the legal entity."

This omission by itself is not a prohibition. Provided it is consistent with legislative intent, the Board could presumably adopt an administrative practice of looking beyond an LLC's formal identity to its ultimate owners (subject to prudential considerations in dealing with market expectations, previously approved projects, etc.). Such an approach would be justified on the same grounds that warrant the explicit rule for Chapter 476B tax credits. As discussed above, both Chapters contain similar statutory provisions limiting an owner to two eligible facilities, and requiring the submission of ownership percentage data. And as discussed, these two requirements formed the statutory basis for the Board's 2006 decision to look beyond a Chapter 476B applicant's legal entity to its ultimate ownership. Iowa Administrative Bulletin, vol. XXVIII no. 17, p. 1296 (ARC 4878B). Since Chapter 476C includes essentially similar provisions, its eligibility process should be subject to the same additional restriction.

4. Chapter 476C: Similar Policy Objectives

Moreover, the same policy concerns seem pertinent: to spread tax benefits more rather than less broadly throughout the industry in order to promote the wider adoption of renewable energy technology. Under either Chapter 476B or 476C, tax incentives ultimately flow through a facility-owning intermediary, such as an LLC, to the entities or individuals that own and control the LLC. The decision whether or not to make an investment, and the tax benefits that result, ultimately reside with the upstream owners. The rules for administering the tax incentive program should reflect that economic reality. There is no material difference between the two Code Chapters that calls for a different result.

5. Parties' Comments

In response to the Board's Order Soliciting Additional Comments (issued on November 3, 2015 in *Re: Wind and Renewable Energy Tax Credits*, Docket No. NOI-2015-0001), several parties submitted comments supporting this conclusion.

Interstate Power and Light Company suggests that some developers may be circumventing the statutory limitations through the use of intermediary ownership structures. IPL adds that this practice should be prohibited since it operates to prevent other potential developers from obtaining tax incentives for projects that they might otherwise propose and pursue.

The Iowa Association of Electric Cooperatives claims that enforcement of Code Section 476C.3(7) requires the Board to obtain information about the equity owners, not just of the facilities, but also of "tax credit applicants" (meaning entities such as LLCs that own eligible facilities). The statute would not, however, require inquiry beyond the identity of an applicant's owners.

In a somewhat similar vein, CGC Methane 1, LLC points out that the Board has implied authority to inquire into the ownership of an LLC, for the purpose of determining whether the LLC is a permitted owner of an eligible facility under Section 476C.1(b) (specifically, an LLC must be "held by an entity that is not prohibited from owning agricultural land under chapter 9H"). From this, CGC infers that the Board may also apply the facility ownership limitations of Section 476C.3(7) to the owners of an LLC.

B. On the Other Hand: Applying Chapter 476C Tax Credit Ownership Limitations, the Board Should Not Look Beyond the Legal Entity Owning an Eligible Facility

1. Chapter 476C: Restrictive Definition of Eligible Owner

Among the differences between Chapter 476B and Chapter 476C, the most pertinent is the latter's restrictive definition of the kinds of entities that may own renewable energy facilities eligible for tax credits. Individuals who are Iowa residents are eligible (subject only to the two-facility and ten-percent limits). But significant restrictions apply to the form and ownership of eligible entities: as discussed above, they must fall within certain enumerated categories, generally excluding corporations and larger business enterprises.

Only certain LLCs may own eligible facilities. These include "authorized LLCs" and "family farm LLCs," limited by definition in Code Chapter 9H to farming purposes and either small-group or family ownership. Other LLCs are eligible only if they, in turn, are owned by other entities "not prohibited" by Chapter 9H to own agricultural land. Such entities include those *specifically exempted* from the 9H ban on land-owning (family farm corporations, etc.), and perhaps others *not specifically included* in the scope of the ban (such as limited partnerships).

The relatively narrow and restrictive definition of eligible owner entities tends to argue against an inference of legislative intent that the Board should look beyond the legal entity directly owning an eligible facility, to consider the identity and relationships of the entity's owners as well. This is for three interrelated reasons.

2. No Clear Legislative Intent to "Look Beyond" Legal Entity Owning Facility

First, the general rule in common law countries is to observe the separate legal status of entities such as corporations and LLCs. Under certain circumstances it may be appropriate to "pierce the corporate veil" – to disregard the legal entity and attribute its rights or duties to the shareholders (or partners, members, or others). In general, however, the corporation or LLC is treated as a separate entity, solely responsible for the liabilities it incurs and entitled to enforce its own rights. Where a statute allows an LLC or similar entity to apply for a tax incentive on its own account, the conditions and limits on that right would ordinarily apply to the entity itself, and not beyond it to the persons or entities that are its owners. While the Legislature expressly limited the kinds of entities that may own 476C-eligible facilities, and even defined the eligible owners of LLCs, it did not see fit to specify limits on *how many* LLCs such an owner may hold.

3. Inference from Explicit Statutory Language

The Legislature's omission to apply numerical facility limitations to upstream owners is significant. A general rule of statutory construction ("*expressio unius est exclusio alterius*") holds that, where legislative language explicitly commands or forbids one thing, the mandate or prohibition will not ordinarily be extended by implication to unenumerated categories. Instead, the omission is usually deemed to reflect the authoritative intent of the Legislature.

Here, Chapter 476C expressly limits the number and proportional shares of eligible facilities that may be owned by an applicant for the tax credit. It also expressly defines, in terms of their ownership, the kinds of LLC that can own an eligible facility: only an “authorized LLC” (up to 25 members, all natural persons), or a “family farm LLC” (all natural persons, majority being relatives), or an LLC owned by entities that are not prohibited to own land. To these restrictions the Legislature could easily have added a further provision – applying to owners of LLCs the same limits (maximum two facilities, maximum percentage shares) that apply to an LLC as facility owner.

But the Legislature did not include such a restriction. In the context of statutory language with detailed limitations on ownership of eligible facilities, and in particular on what kinds of LLCs can own them, this omission appears intentional.

4. Contemporaneous Interpretation by Legislative Committee and Board in Rule Making

In this connection, the Board’s rule-making process may be informative. Code Chapter 476B was enacted in 2004 (SF 2298), with amendments thereafter; and 476C in 2005 (SF 390). The Board observed, “Overall, Code [chapters] 476B (for large wind energy projects) and 476C (for smaller renewable energy projects) are very similar, sufficiently similar that the Board adopted a single set of emergency rules to implement both statutes.” Iowa Administrative Bulletin, vol. XXVIII no. 17, p. 1294 (ARC 4878B) (to be codified at 199 IAC 15.18, 15.19).

As described above, the ARRC objected to the Board’s proposed rule. In response, the Board changed subrule 15.18(1), to apply 476B ownership limitations not only to a legal entity directly owning an eligible facility, but also to that entity’s “equity owners.”

By contrast, in the rules for 476C tax credits, the Board added no such look-beyond requirement, explaining its decision as follows.

> [C]hapter 476B establishes ownership limits and requires that applicants identify their equity owners. This indicates a legislative intent that the Board consider equity owners when applying the ownership limit. [Chapter] 476C is different. It includes a limit on ownership and requires that an application include information

> regarding the ownership of the facility, but it also includes a specific list of eligible types of owners.

Id. at 1297. The Board summarized the detailed ownership requirements of Section 476C.1(6), and noted that Chapter 476C "is quite specific in listing the entities that are eligible majority owners of qualifying projects." Id. In conclusion, it found "no statutory authorization in this chapter to look through these listed entities to apply the ownership limits" of Section 476C.3(7) to *owners* of those entities, as well as to the entities themselves. Id. Hence, "the current ownership rules will be retained for chapter 476C projects." Id.

Reaching opposite conclusions for the different statutes in the same rule making, the Board discerned a key difference in the legislative intent. The ARRC apparently did not object to the Board's distinction between the two Chapters (in contrast to its earlier objection concerning subrule 15.18). The Committee's apparent ratification of the Board position seems significant.

5. Additional Policy Objectives, Chapter 476C

Finally, the provisions of Chapter 476C indicate a distinct legislative purpose that may qualify the goal of spreading tax credits among different owners. Unlike Chapter 476B, open to any owner of wind generation, Chapter 476C is available only to certain kinds of owners. In addition to Iowa-resident individuals, school districts and small businesses, eligible owners include: electric cooperative associations (but not investor-owned or municipal utilities); certain entities defined by Chapter 9H and allowed to own agricultural land; and LLCs owned by entities that can own agricultural land. The emphasis on electric cooperatives and ability to own agricultural land suggests a purpose to promote alternative energy in rural areas, and in conjunction with agricultural activities.

Referring to these eligibility restrictions, the Farm Bureau commented that Section 476C.1(6)(b) "provides some guidance as to the intent of the legislature for ownership that is different from the requirements" under Chapter 476B. Iowa Administrative Bulletin, vol. XXVIII no. 17, p. 1297 (ARC 4878B). Hence Farm Bureau recommended that the Board's rule "should facilitate local ownership of wind energy facilities." Id. at 1297.

To promote local ownership and rural siting of renewable energy facilities, the Legislature might well favor a less restrictive approach to indirect ownership than under Chapter 476B. Advantageous uses for small renewable generation in rural areas might include serving load at agricultural and livestock facilities. Facilities under common ownership -- by a family farm LLC, for example -- might be situated at dispersed locations, in which case multiple small generation units might be needed to serve them. Allowing the family farm LLC owning the agricultural facilities to set up special-purpose LLCs to own the generation units would enable the projects to qualify for Chapter 476C tax credits. By contrast, if the Board must “look through” the generation LLCs to the family farm LLC, then only one generation unit would be eligible.

As this example illustrates, treating LLCs under common ownership as distinct eligible generation owners could expand the potential impact of the 476C incentive in rural areas, and in support of Iowa agriculture.

6. Parties’ Comments

Several parties submitted comments opposing alteration of the Board’s current approach to ownership limitations under Chapter 476C.

The Iowa Wind Energy Association acknowledged that several projects may be under common indirect ownership, but this was consistent with Board precedent and the ARRC’s guidance. IWEA further noted that development of small renewable energy projects takes time and financial resources that may only be available from investors interested in pursuing multiple projects. The proposed changes might limit their participation, and inhibit the growth of non-utility wind energy in Iowa.

Optimum Renewables, LLC warns against any change in the present approval process that would discourage small and mid-sized renewable energy projects in Iowa. Chapter 476B omits a detailed definition of eligible facilities, and the Board’s rule to implement it specifically includes a requirement to apply ownership restrictions beyond the immediate owner of a facility. By contrast, Chapter 476C defines eligible facilities in detail, and subrule 15.19 deliberately omits any “look-beyond” requirement.

The Environmental Law and Policy Center and other “Joint Commenters” suggest that Chapter 476C neither requires nor forbids the Board to “drill down” beyond a legal entity owning a facility, to apply ownership limitations to the owners of the legal entity. However, in evaluating the question, the Board should bear in mind the intent of the Legislature to create opportunities for small-scale renewable energy development, which may be viable only when pursued by groups of investors with interests in multiple facilities.

III. STAFF RECOMMENDATION: ALTERNATIVE APPROACHES

Based on the foregoing analysis, Staff submits for the Board's consideration substantive and procedural recommendations concerning the determination of facility ownership for purposes of tax credit eligibility under Chapter 476C.

There are two substantive options. Chapter 476C limits a facility owner to interests in two facilities, and a majority owner of one facility to not more than ten percent of a second facility. In the case of an entity, such as an LLC, that is the direct legal owner of facilities, the Board could "look beyond" the entity and apply the statutory limitations to the individuals or entities owning the LLC (and hence indirectly owning the generating facilities). Or the Board could apply the limitations exclusively to the legal entity that is the direct owner of the facilities. Reasons in favor of either approach are outlined above.

Staff considers that the balance of the analysis favors the latter interpretation, since it gives effect to the contrast in language between subrule 15.18(1)(b) and 15.19(1), and also because it appears more consistent with contemporaneous discussion before the ARRC. This approach would require no change from existing practice.

On the other hand, the Board might find the former alternative interpretation more compelling, and better adapted to statutory objectives. Since this approach would involve a change from past practice, Staff offers two additional suggestions of a procedural character.

First, the Board should give effect to this change on a prospective basis only. In particular, previous determinations of eligibility should not be rescinded on the basis of the new interpretation, since applicants may have invested effort and other resources in reliance on Board approval. Such "grandfathering" treatment might also reasonably be extended to projects at a pre-approval stage, on similar reliance grounds. Should the Board agree, it would be best to define a clear demarcation.

Second, the Board should adopt any change through a rule making to amend subrule 15.19(1). While this would involve some delay in implementing the change, it would also avert a legal challenge based on an argument that, in adopting a new interpretation of subrule 15.19(1) similar in substance to an *explicit provision* of subrule 15.18(1), the Board should have employed a rule making process with notice and opportunity for comment.

Initials: BB