

§ 802.2(a)
"New Facilities"

[REDACTED]

WRITER'S DIRECT DIAL NUMBER

February 10, 2000

Thomas Hancock, Esq.
Premerger Notification Office
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE
JUN FEB 14 4 11:03

Re: Proposed Sale of Membership Interests
of [REDACTED]

Dear Mr. Hancock:

As a follow-up to our recent telephone conversations, please be advised as follows:

For purposes of claiming the federal production tax credit, under Treasury Regulation §1.46-3(d)(1), the turbines are considered to be placed in service in the taxable year in which they are placed in a condition of readiness and availability for a specifically assigned function. Treasury Regulation §1.46-3(d)(2) explicitly states that equipment that is operational may be considered placed in service despite continued testing to eliminate any defects.

Although the turbines were "placed in service" for tax purposes in June 1999, the Project has been undergoing continuous testing and elimination of defects and was not yet complete. The Project has experienced numerous problems after June 1999 which have delayed completion and saleability of the Project. Specifically, in order to achieve the level of completion that would make the Project saleable, the turbines and the facility as a whole would need to:

- Achieve a production output level in excess of 90% of warranted output. Turbine output has been well below 90% of warranted output. The problems affecting production output (as well as passage of the required testing) are described in detail below.
- The most significant problem has been a gearbox manufacturing defect which was widespread and took extensive time and effort to work out appropriately. The resolution requires the turbine manufacturer to swap

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out the defective gearboxes with new or retrofitted gearboxes. As I am sure you can understand, this effort involved the turbine manufacturer, developers, lenders, the lenders' engineer, and the input and concurrence of the prospective purchaser, all of whom needed to be satisfied before the Project could become saleable. This swap-out process is ongoing.

There have been other problems as well that have contributed to the delay in completion and saleability of the Project. The turbines have a blade vibration problem which causes the turbines to shut down. Additionally, the turbines' deploy blade tips for braking which do not realign properly after they are applied, thereby reducing production. Also, the turbines have been experiencing yaw drive failures. Each of these problems is now being addressed.

- Pass the Funding Drawdown Requirement which requires each turbine to operate without fault for 48 continuous hours. This requirement was not met until December 1999.
- Pass the Initial Wind Plant Test which requires the facility as a whole to operate without fault or manual intervention for 72 continuous hours. Although still not fully satisfied, this requirement was "deemed" met in December 1999 and the portion of the test which was not satisfied has been delayed until the final Acceptance Test.
- Have a fully automated and functional central monitoring and control system ("CMCS"). The CMCS did not achieve full integration with all of the site turbines until January 2000.

In addition to the above, the Project is still required to undergo and pass the Acceptance Test which is designed to address the issues delayed from the Initial Wind Plant Test and prove whether the turbines perform in accordance with warranted power output levels.

As you can see from the above, the developers of the Project have experienced quite a number of unforeseeable problems which have had to be resolved in order to prepare the Project for sale. The developers have at all times had the sole intent to sell the Project at the earliest possible time and have been engaged in sole and continuous, uninterrupted efforts to overcome the problems, complete and sell the Project. Any income generated by the Project during this period of time is entirely incidental to the developers' efforts to complete, test and sell the Project.

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We trust this adequately addresses your questions.

Sincerely,
[REDACTED]

2/15/00

This letter is related to a previous one dated 1/22/00 concerning the same windmill "farm". In the earlier letter I concluded that the § 505.2(a) exemption was not available because it appeared that although testing was continuing the windmills were in commercial operation. This letter elaborates and clarifies the situation. The windmills are close enough to being in service to qualify for an available tax benefit.

They have not proven themselves to be ready or reliable enough to be commercially viable. More testing is required to show that they are saleable - which was always the intent of the builder. I therefore concluded based on this letter that the § 505.2(a) exemption is available and I so informed the writer.

TEH

[REDACTED]

management and operations of the Company shall be entrusted to its Board of Directors. The Company shall be administered in accordance with the purposes of this Agreement and in accordance with the by-laws of the Company and the laws of the State of [redacted].

2.2 Board of Directors. The Board of Directors of the Company shall consist of a total of five Directors, of whom (i) three shall be nominated by [redacted] and (ii) two shall be nominated by [redacted]. It is agreed that the initial members of the Board of Directors of the Company shall be [redacted] (Chairman of the Board of Directors) and two other individuals to be identified by [redacted] as soon as reasonably practicable following the date hereof (nominated by [redacted]) and [redacted] and one other individual to be identified by [redacted] as soon as reasonably practicable following the date hereof (nominated by the [redacted]). The Shareholders agree to vote their shares of Capital Stock of the Company in order to elect a Board of Directors of the Company in accordance with the provisions of this Section 2.2.

2.3 Vacancies. In the event that, for any reason whatsoever, a Director ceases to or is unable to continue in that capacity, the party that nominated such Director shall nominate a replacement and the Shareholders shall vote their shares of Capital Stock of the Company to elect the individual so nominated to fill such vacancy.

2.4 Chairman of the Board. There shall be a Chairman of the Board of Directors of the Company who shall be elected by the Board of Directors from among the Directors nominated by [redacted].

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