

802.2

Verne, B. Michael

From: [REDACTED]
Sent: Friday, May 30, 2008 1:58 PM
To: Verne, B. Michael
Subject: RE: New Facilities exemption

Hi Mike --

I need to follow up with you regarding a wind project that we discussed a couple of months ago. (Our original email exchange is below.)

The issue concerns the requirement under 802.2(a) that the new facility has not produced income. It is clear from PNO's informal opinions that incidental income produced by the wind project during testing and debugging would not cause the new facility to lose the exemption under 802.2(a). In this transfer, commercial operation of the wind project is a condition precedent to the transfer of the new facility. There is a possibility, however, that transfer of the new wind project to the acquiring party could be delayed after the achievement of commercial operation due to unanticipated delays in obtaining a variety of regulatory approvals -- or even for other reasons once all of the regulatory approvals are obtained. Delays in transferring the wind project to the acquiring party could include the following:

-- Delay in obtaining a regulatory approval that would permit the acquiring party to acquire the wind project company or the selling party to sell the wind project company, such as the approval of a federal or state regulatory body.

-- Delay in obtaining a regulatory approval that would permit the selling party to acquire other assets -- not related to the wind project -- that constitute, at least in part, consideration for the transfer of the wind project.

-- Delay in satisfying other closing conditions as certain closing conditions may not be completed at the time the wind project achieves commercial operation.

-- Disputes between the parties as to whether all closing conditions have been met, such as (i) disputes regarding whether the wind project in fact is complete and operational, (ii) disputes regarding the satisfaction of conditions precedent under material agreements relating to the wind project, (iii) disputes regarding whether the items on a punch list of requirements regarding the wind project have been satisfied, (iv) disputes regarding the permits acquired for the wind project, and (v) disputes regarding whether all required regulatory approvals have been obtained.

The parties intend to transfer the new wind project to the acquiring party as a new facility as soon as it has achieved commercial operation, provided that all of the regulatory approvals have been obtained and the parties agree the all of the closing conditions have been met. The parties expect that commercial operation of the facility will be the last closing condition to be met, but if any regulatory approval takes longer than anticipated or any closing condition is not met when anticipated, the wind project would continue to generate electricity and therefore produce revenue after it has completed all testing and debugging and achieved commercial operation.

5/30/2008

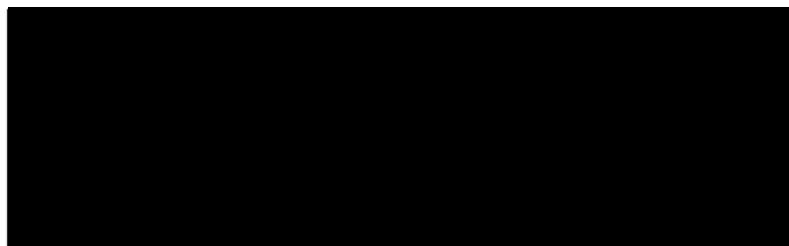
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Would the revenues generated by the wind project because the transfer of the project to the acquiring person is delayed due to (i) a delay in obtaining a regulatory approval, (ii) a delay in achieving the other condition precedent to the transfer or (iii) a dispute between the parties as to whether all closing conditions had been met, cause the project to lose the exemption under 802.2(a)? Informal Staff Opinion No. 0111022 (November 12, 2001) seems to permit a regulatory delay: "However, the closing could be delayed for up to 60 days after all of the turbines have achieved commercial operation due to continued debugging, insufficient wind for testing or delays in obtaining the necessary approvals from the Federal Energy Regulatory Commission." A later Informal Staff Opinion, however, while not addressing the issue of a regulatory delay, seems to indicate that if the wind project becomes "operational" before closing, the 802.2(a) exemption is not available: "The exemption is not compromised if the only income was from the sale of energy produced in testing, but if the project becomes operational before closing, it is not available." Informal Staff Opinion No. 0609012 (dated September 25, 2006).


As always, I really appreciate your help.

Thanks,

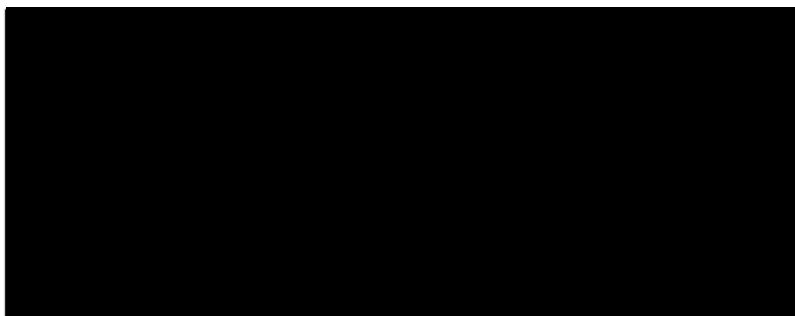




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From: 
Sent: Thursday, March 27, 2008 8:50 AM
To: 'Verne, B. Michael'
Subject: RE: New Facilities exemption

Thanks so much for the speedy reply.



I think that if the delay is due to a regulatory approval delay, the exemption would still be available. If the delay is due to (ii) or (iii) it would not be.

B
6/3/08