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Date:
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Legend:

Utility =

Project =

Joint Operating Agreement =

Bonds =

Issuer =

County =

State =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

Date =

Dear :

This is in response to your request for a ruling that Utility's use of the transmission capacity of the Project under the Joint Operating Agreement will not cause the Bonds as described below to be private activity bonds within the meaning of § 141 of the Internal Revenue Code (the "Code").

Facts and Representations

Issuer is a project-based joint action agency whose members consist of municipal electric utilities and other local government units that provide electric or other utility services at retail in their respect service areas. Issuer's purposes include the planning, development, financing, acquisition, construction, operation and maintenance of various projects for the generation, transmission and management of electric energy for the benefit of its members.

Issuer issued bonds in Year 1 and Year 2 to finance the acquisition and construction costs of a transmission project (the "Project"). All of these bonds have been redeemed and retired at maturity, or with proceeds of bonds that were issued in Year 5. Issuer issued additional bonds in Year 3 and Year 4 to finance additions to the Project. The outstanding bonds of those issued in Year 3, Year 4 and Year 5 are collectively referred to herein as the "Bonds".

Transmission Project

The Project consists of electric transmission facilities in County. Issuer uses the Project to provide transmission service to several of its members in County (referred to as the "Participants"). Each of the Participants owns and operates a municipal electric utility system that provides electric services at retail to industrial, commercial, agricultural and residential consumers located in its service area. The Participants serve approximately two-thirds of the electric loads in County. Electric service to other communities of County is provided by Utility and by a rural electric association organized under the laws of State. The electric generating facilities within County that are owned by the Participants are small peaking facilities that can only be run for limited time periods and account for a small amount of their current electricity requirements. As a result, the Participants rely on outside sources of power supply from Issuer and others to meet substantially all of the electricity requirements of their customers. The transmission facilities of the Project are the only interconnection between the Participants' municipal electric utilities and the regional transmission network.

Issuer has entered into a transmission service agreement with each of the Participants with respect to the Project. Under the transmission service agreements, Issuer is responsible for the ownership, construction, financing, operation and management of the Project. Each Participant is entitled to use a specified percentage of the available transmission capacity of the Project and is obligated to pay the same percentage of all of the operation and maintenance, debt service and other costs of the Project. The payments made by the Participants provide the sole security for and source of payment of the Bonds.

Project Facilities

The electric transmission facilities comprising the Project consist of a substation with two transformers and associated equipment and facilities (the “Substation”); a double-circuit transmission line (the “Transmission Line”) running from the Substation to a switchyard (the “Switchyard”); the Switchyard, which interconnects the Transmission Line with various transmission facilities that transmit electricity to the Participants’ municipal electric distribution systems; and various other transmission lines, substations and related facilities that deliver electricity to the Participants’ municipal electric distribution systems from the Switchyard. The Substation interconnects Utility’s regional transmission system with the Transmission Line. The Substation, Transmission Line and Switchyard comprise the “Issuer’s Existing Facilities” under the Joint Operating Agreement, described below.

The two transformers at the Substation and the double-circuit line design provide one level of redundancy within the Project. However, given the continuing and projected load growth experienced by the Participants, in the event of an outage, a single transformer and transmission circuit would not have sufficient capacity to meet the Participants’ loads. Further, Issuer expects that the outage of a single component of the Project would cause a loss of a load-serving ability within the foreseeable future.

Utility

Utility owns and operates a high-voltage regional transmission network that extends through State. Utility is the sole investor-owned utility serving retail loads in State. Substantially all of the municipal and cooperative load-serving utilities in State depend on Utility’s transmission network for transmission services. Utility provides transmission service across its regional network to Issuer pursuant to a transmission service and operating agreement.

Utility’s transmission facilities in County include two substations and a single circuit transmission line running between them (collectively referred to as “Utility’s Existing Facilities”). One of these substations is adjacent to Issuer’s Substation and includes a single transformer. The other is close to the Switchyard. Utility’s single transformer/single circuit transmission line design means that the loss of either the transformer or the transmission line would cause a complete loss of Utility’s load-serving capability in County.

Joint Operating Agreement

On Date, Issuer and Utility entered into the Joint Operating Agreement to provide for the joint and coordinated use, operation and development of Utility's Existing Facilities, Issuer's Existing Facilities and certain future transmission facilities to be constructed in County (collectively, "the integrated transmission system", or "ITS"). When compared to continued independent planning and operation of Issuer's and Utility's Existing Facilities as separate systems, the Joint Operating Agreement is expected to provide substantially increased reliability and capacity at substantially reduced capital costs and environmental impacts.

Specifically, the purpose of the Joint Operating Agreement is to provide for the joint and coordinated development of the ITS in order to (a) promote and enhance the reliability of Utility's Existing Facilities and Issuer's Existing Facilities in accordance with prudent reliability standards; (b) better accommodate emergency operating conditions, temporary outages and the parties' respective peak demands; (c) effectuate delivery of electricity by the parties to their respective loads; and (d) provide for such other transmission service needs of the parties as they may mutually agree upon.

Currently, Issuer's and Utility's Existing Facilities cannot be effectively interconnected to provide backup service to either party in case of a failure of any component of their respective facilities. The existing single transmission line between the Switchyard and Utility's substation can only be interconnected through a manual switch when the Issuer's or the Utility's Existing Facilities have suffered a complete outage. Issuer expects the Joint Operating Agreement to enhance the reliability of transmission service in County through the interconnection of Issuer's and Utility's Existing Facilities (providing backup service and redundancy) and the construction of new transmission facilities (providing necessary additional transmission capacity).

Issuer and Utility anticipate constructing the ITS in four phases. In phase 1, the parties will install certain improvements on the existing interconnection between the Switchyard and one of Utility's substations and in the Switchyard to enable the Issuer's and Utility's Existing Facilities to be operated in parallel during emergency operating conditions. Operated in parallel means that the switches at the interconnections between Issuer's Existing Facilities and Utility's Existing Facilities will be connected, allowing electricity to flow from Utility or Issuer's substations over Issuer's double-circuit transmission line or Utility's single-circuit transmission line (whichever is unaffected by the emergency condition) to the Switchyard from which electricity will then flow to serve each party's respective loads. Utility will fund the costs of these improvements. In phase 2, the parties will expand the Switchyard and install additional equipment in order to operate Issuer's and Utility's transmission facilities in parallel under normal operating conditions. Generally, the Switchyard expansion and some of the additional equipment will be funded by Utility; the remainder of the equipment will be funded jointly by Utility and Issuer. In phases 3 and 4, the parties will reconstruct Utility's transmission line into a double circuit line and will install a capacitor bank at the Switchyard. These improvements will be jointly funded.

Utility will remain the owner of Utility's Existing Facilities and Issuer will remain the owner of its Existing Facilities. Issuer and Utility will each own the improvements or facilities they respectively solely fund and each will own a share in any jointly funded facilities along with a share of the transfer capability of such facilities in proportion to the amount of funding it provides. The funding for and ownership of the ITS facilities are based on the parties' respective load ratio shares of those facilities.

Each party will be responsible for the control, maintenance, repair and replacement of the transmission facilities it owns that are included within the ITS. Until completion of phase 2, Issuer and Utility will coordinate operation of their existing facilities and at that time, one party will be designated to perform the operations and maintenance of the ITS. Issuer represents that if Utility is the designated party, Issuer will enter into an agreement with Utility that will meet the exception provided in § 1.141-3(b)(4)(iii)(C) of the Income Tax Regulations. The actual maintenance costs including allocated overhead expenses incurred by such party will be shared by the parties based on their ownership interests in the ITS facilities.

Each party will use the ITS to transmit electricity by such party to serve its loads interconnected with the ITS. To the extent such service is for the purpose of serving a party's own loads, such use of ITS facilities will be without any charges. The Joint Operating Agreement provides that, as of its date and based upon their historic loads and the load forecasts contained in a joint plan prepared by the Issuer and Utility, the parties reasonably expect that any usage by Utility of the transmission capacity of the Issuer's Existing Facilities and any usage by Issuer of the transmission capacity of the Utility's Existing Facilities will be approximately equal in value determined over periods of three years or less.

Law and Analysis

Section 103(a) provides that, except as provided in § 103(b), gross income does not include interest on any state or local bond. Section 103(b) provides, in part, that § 103(a) shall not apply to any private activity bond which is not a qualified bond (within the meaning of § 141).

Section 141(a) provides that the term "private activity bond" means any bond issued as part of an issue which meets (1) the private business use test of § 141(b)(1) and the private security or payment test of § 141(b)(2), or (2) the private loan financing test of § 141(c).

Section 141(b)(1) provides that, except as otherwise provided, an issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use. Section 141(b)(6)(A) defines “private business use” as use (directly or indirectly) in a trade or business carried on by a person other than a governmental unit.

Section 141(b)(2) provides that, except as otherwise provided, an issue meets the private security or payment test if the payment of the principal of, or the interest on, more than 10 percent of the proceeds of such issue is (under the terms of such issue or any underlying arrangement) directly or indirectly (A) secured by any interest in (i) property used or to be used for the private business use or (ii) payments in respect of such property or (B) to be derived from payments (whether or not to the issuer) in respect of property, or borrowed money, used or to be used for a private business use.

Section 1.141-1(b) defines the private business tests to mean the private business use test and the private payment test of § 141(b).

Section 1.141-7 sets forth rules to determine whether arrangements for purchases of output from an output facility cause an issue of bonds to meet the private business tests. An output facility is defined by § 1.141-1(b) as electric and gas generation, transmission, distribution, and related facilities, and water collection, storage, and distribution facilities. Section 1.141-7(c)(1) provides that the purchase pursuant to a contract by a nongovernmental person of available output of an output facility (output contract) financed with the proceeds of an issue is taken into account under the private business tests if the purchase has the effect of transferring to the nongovernmental person the benefits of owning the facility and the burdens of paying the debt service on the bonds used (directly or indirectly) to finance the facility (the “benefits and burdens test”).

Section 1.141-7(b)(1) provides that the available output of a facility financed by an issue is determined by multiplying the number of units produced or to be produced by the facility in one year by the number of years in the measurement period of that facility for that issue.

Section 1.141-7(b)(1)(ii)(A) provides that for transmission, distribution, cogeneration, and other output facilities, available output must be measured in a reasonable manner to reflect capacity.

Section 1.141-7(f)(2) provides that an agreement that provides for swapping or pooling of output by one or more governmental persons and one or more nongovernmental persons does not result in private business use of the output facility owned by the government person to the extent that (1) the swapped output is reasonably expected to approximately equal in value (determined over a period of three years or less) and (2) the purpose of the agreement is to enable each of the parties to satisfy different peak load demands, to accommodate temporary outages, to diversify supply, or to enhance reliability in accordance with prudent reliability standard.

Issuer's Existing Facilities are output facilities within the meaning of § 1.141-1(b), and the Joint Operating Agreement, which provides the terms under which Utility can use transmission capacity of Issuer's Existing Facilities, is an arrangement under which Utility acquires output of output facilities. Thus, the analysis of whether Utility's use of the transmission capacity under the Joint Operating Agreement causes the Bonds to meet the private business tests is determined under the special rules for output facilities provided in § 1.141-7.

Utility's use of the transmission capacity of Issuer's Existing Facilities under the Joint Operating Agreement does not cause the Bonds to be private activity bonds within the meaning of § 141 because such use meets the exception for swapping and pooling arrangements under § 1.141-7(f)(2). The Joint Operating Agreement provides that each party will have the right to transmit electricity over the ITS facilities, which include Issuer's Existing Facilities. Issuer and Utility reasonably expect that any usage by Utility of the transmission capacity of Issuer's Existing Facilities and any usage by Issuer of the transmission capacity of the Utility's Existing Facilities will be approximately equal in value determined over periods of three years or less. Furthermore, the Joint Operating Agreement was entered into to enhance the reliability of the transmission systems of the parties in accordance with prudent reliability standards and to better accommodate emergency operating conditions, temporary outages and the parties' respective peak loads.

Conclusion:

We conclude that Utility's use of the transmission capacity of Issuer's Existing Facilities under the Joint Operating Agreement will not cause the Bonds to be private activity bonds within the meaning of § 141 because such use meets the exception for swapping arrangements under § 1.141-7(f)(2).

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting 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 with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,
Assistant Chief Counsel
(Exempt Organizations/Employment Tax/Government Entities)

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By: Johanna Som de Cerff
Senior Technician Reviewer
Tax Exempt Bond Branch

cc: