

## REG-1-109, Community-based Energy Development (C-BED) Development Projects

\* Legislation changed the requirements to qualify for the Community-Based Energy Development (C-BED) project exemption, operative July 18, 2014. This regulation is currently undergoing review for amendment to reflect these changes (Neb. Rev. Stat. §§ 70-1903, 70-1904, & 77-2704.57).

109.01 Sales of qualified materials for use in the manufacture, installation, construction, repair, or replacement of qualified community-based energy development (C-BED) projects are exempt from sales and use tax provided the purchaser files the appropriate documentation as required under this regulation.

109.02 The following definitions will be used for this regulation.

109.02A C-BED project means a new wind energy project:

109.02A(1) That meets the eligible ownership structure and other requirements as set forth in Neb. Rev. Stat. § 77-2704.57 and §§ 70-1901 to 70-1909, and in this regulation;

109.02A(2) Which is supported by a resolution adopted by the county or counties in which the C-BED project is to be located or by the tribal council for a C-BED project located within the boundaries of an Indian Reservation located in Nebraska; and

109.02A(3) Where at least 33% of the gross power purchase agreement payments over the life of the power purchase agreement must flow to the qualified owners or local community. Equity partners, if any, may receive the remaining payments.

109.02B C-BED project developer means both the person arranging and organizing the C-BED project, and any person who is operationally responsible for the C-BED project.

109.02C Debt financing payments mean principal, interest, and other typical financing costs paid by the C-BED project developer to one or more third-party financial institutions for the financing or refinancing of the construction of the C-BED project. Debt financing payments do not include the repayment of principal at the time of a refinancing.

109.02D Electric supplier means any legal entity supplying, producing, or distributing electricity within the state for sale at wholesale or retail.

109.02E Electric utility means an electric supplier that:

109.02E(1) Owns more than 100 miles of 115 kilovolt or larger transmission lines in Nebraska;

109.02E(2) Owns more than 200 megawatts of electric generating facilities; and

109.02E(3) Has the obligation to directly serve more than 200 megawatts of wholesale or retail electric load in Nebraska.

109.02F Eligible ownership structure means:

109.02F(1) For a C-BED project that consists of more than two wind turbines:

109.02F(1)(a) The C-BED project must be developed by one or more qualified owners and may also include equity partners;

109.02F(1)(b) No single individual qualified owner may own, directly or indirectly, more than 15% of the C-BED project; and

109.02F(1)(c) No single electric supplier may own, directly or indirectly, more than 15% of the C-BED project, and the combined ownership of all electric suppliers cannot exceed 25% of the C-BED project.

109.02F(2) For a C-BED project that consists of one or two wind turbines:

109.02F(2)(a) The C-BED project must be developed by one or more qualified owners and may also include equity partners; and

109.02F(2)(b) No single electric supplier may own, directly or indirectly, more than 15% of the C-BED project, and the combined ownership of all electric suppliers cannot exceed 25% of the C-BED project.

109.02G Equity partner means a person who is not a qualified owner and who has received an ownership interest in exchange for an investment in the C-BED project.

109.02H Gross power purchase agreement payments mean the total amount of payments received from the purchaser of the power during the life of the agreement. For power purchase agreements entered into after August 29, 2009 and on or before December 31, 2011, if the qualified owners have a combined total of at least 33% of the equity ownership in the C-BED project, gross power purchase agreement payments will be reduced by the debt financing payments. For the purposes of determining eligibility of the project, an estimate of the payments and their recipients will be used.

109.02I New wind energy project means the manufacture, installation, construction, repair, or replacement of a device, such as a wind charger, windmill, or wind turbine, that is used to convert wind energy to electrical energy, or for the transmission of this electricity to the purchaser.

109.02J Payments to the local community mean payments that are made to local residents, property owners, or governments.

109.02J(1) Payments to the local community include, but are not limited to, lease payments to property owners on whose property a wind turbine is located, wind energy easement payments, real and personal property tax receipts from the C-BED project, and loan payments received or processed by a local financial institution that is actually financing construction of the project.

109.02J(2) Payments to the local community do not include construction costs, purchases of qualified or nonqualified property prior to the initial delivery of power payments or deposits received or processed by local financial institutions, and loan payments received or processed by a local financial institution on behalf of a non-local financial institution that is actually financing construction of the project.

109.02K Qualified property means any property used to manufacture, install, construct, repair, or replace a device used in a C-BED project such as a wind charger, windmill, or wind turbine including the substation, power lines connecting these devices together and power lines connecting the project to the electrical grid system, and property used to construct the pads that support the wind chargers, windmills, wind turbines, windmill towers, and substations.

109.02K(1) Nonqualified property means all property other than qualified property.

109.02K(2) Nonqualified property includes, but is not limited to: motor vehicles; maintenance equipment and tools; communication systems (i.e., meteorological towers

and data recorders-computer systems that are not an integral part of the wind turbine); information centers and related security systems (i.e., cameras and recorders); erosion control systems (i.e., landscaping, grass seed, sod, and irrigation systems); office and maintenance buildings; computer equipment that is not an integral part of the wind turbine; office equipment; signage of any kind; furnishings; roads; bridges; gates; fencing; site lighting; and any materials for the electrical grid system. The purchase and use of property that is not qualified property is taxable.

109.02L Qualified owner means a person or organization with an equity ownership stake in the project who is:

109.02L(1) A Nebraska resident;

109.02L(2) A limited liability company that is organized under the Limited Liability Company Act and which has only Nebraska residents as members.

109.02L(3) A Nebraska nonprofit corporation organized under the Nebraska Nonprofit Corporation Act;

109.02L(4) An electric supplier; or

109.02L(5) A tribal council of a federally recognized American Indian Tribe with a reservation located in Nebraska.

109.03 To receive the sales and use tax exemption, the C-BED project developer must submit a Community-Based Energy Development Project Application and the following supporting documentation to the Nebraska Department of Revenue (Department):

109.03A The organization of the C-BED project;

109.03B The proposed distribution structure of the payments made under the power purchase agreement;

109.03C A copy of the power purchase agreement;

109.03D The C-BED project financial pro forma; articles of incorporation; operating agreements;

109.03E A copy of the resolution in support adopted by the county board or tribal council where the project is located; and

109.03F Written documentation demonstrating that a written offer to become a qualified owner has been made to each owner on whose property a turbine will be located to the extent feasible.

109.04 If the Department approves the C-BED Project Application, the Department will subsequently issue a Certificate of Exemption that may be used by the project developer and contractors to purchase qualified property tax-free.

109.04A To purchase qualified property tax-free, the C-BED project developer and any contractors must complete and issue to each vendor a Nebraska Resale or Exempt Sale Certificate, Form 13, and attach a copy of the Certificate of Exemption. The basis for the exemption must be entered on the Form 13.

109.04B A C-BED project developer or contractor may claim and receive a refund of any sales or use tax paid for purchases of qualified property made after the Department has received the application for the Certificate of Exemption, and before the Department has issued the Certificate of Exemption if the project met all the requirements of a C-BED project at the time of the purchase.

109.05 The Department may examine the actual payments to qualified owners and the local community and the distribution of the power purchase agreement payments to determine if the projected distributions were met. If the power purchase agreement payments to qualified owners and the local community do not meet the requirements of this regulation or Neb. Rev. Stat. § 77-2704.57, the Department may recover the amount of the sales or use tax that should have been paid on property used at the project from the C-BED project developer, at any time up to and including three years after the end of the power purchase agreement.

109.05A The amount due under this section includes the sales and use taxes that would have been paid if no Certificate of Exemption had been granted, and interest at the rate specified in Neb. Rev. Stat. § 45-104.02, from the date the tax was due until the date the sales and use tax is paid.

109.05B At any time prior to the end of the power purchase agreement, the C-BED project developer may voluntarily surrender the Certificate of Exemption granted by the Tax Commissioner and pay the Department the amount of sales and use tax that should have been paid, plus interest.

109.06 To meet the requirements of the exemption, at least 33% of the gross power purchase agreement payments must be distributed to the qualified owners or the local community. Only payments made after the receipt of the first power purchase agreement payments will be considered when determining the percentage received by the qualified owners or the local community. Distribution of a tax attribute, a noncash benefit, loan proceeds, or some other payment that does not come out of the power purchase agreement payments will not be considered.

109.06A Payments to the local community are those payments that are defined above as payments to the local community in section 109.02J of this regulation.

109.06B For power purchase agreements entered into after August 29, 2009 and on or before December 31, 2011, if the qualified owners have a combined total of at least 33% of the equity ownership in the C-BED project, the gross power purchase agreement payments will be reduced by the debt financing payments.

109.06C To prevent the same payment from being counted both as a distribution to the owner and as a local payment or debt financing payment, the distributions to the qualified owners for any purpose will be considered prior to all expenses other than expenses that are considered to be local payments, or any debt financing that reduces the gross power purchase agreement payments. Any expenses that are allocated to the owners must be allocated in the same proportion as the distributions of the power purchase agreement payments for the same year.

109.06D In determining if debt financing may be excluded under section 1-109.06B, the percentage of ownership that is considered is the percentage of ownership for the same year that the debt financing payment is to be excluded.

109.07 Changes in Ownership Structure. If there is any change in the ownership structure after the application is submitted or approved, including a change of an equity partner, a new application must be submitted to the Department. If the new ownership structure does not meet the statutory requirements and the new application is not approved by the Department, all purchases of qualifying property after the effective date of the change in ownership structure are taxable.

109.07A A C-BED project developer must notify the electric utility that has a power purchase agreement with a C-BED project if there is a change in the ownership structure which makes the project no longer eligible as a C-BED project.

109.07B The Tax Commissioner must notify an electric utility that has a power purchase agreement with a C-BED project if there is a change in the ownership structure which makes the project no longer eligible as a C-BED project.

109.07C Acquisition of a C-BED project by an electric utility prior to the end of the power purchase agreement disqualifies the C-BED project for the sales and use tax exemption for all purchases of qualifying property made after the date of the acquisition by the electric utility, and may require payment of any sales and use taxes not previously paid if the payments to the qualified owners and the local community no longer meet the required criteria for the period the agreement was in effect.

109.08 Changes in the Power Purchase Agreement. The C-BED project developer must notify the Tax Commissioner of any changes in the power purchase agreement or of the termination of the agreement. If the power purchase agreement is amended, a new application must be submitted. If the distribution of the gross power purchase agreement payments no longer meets the statutory requirements and the new application is not approved by the Department, the Department may recover the amount of the sales or use tax that should have been paid on materials used at the project from the C-BED project developer, at any time up to and including three years after the end of the power purchase agreement, and interest at the rate specified in Neb. Rev. Stat. § 45-104.02, from the date the tax was due until the date the sales or use tax is paid.

109.09 Changes in Documents Supporting the Application. The C-BED project developer must notify the Tax Commissioner of any changes in any of the other documents supporting the application during the life of the power purchase agreement. The Tax Commissioner will determine if a new application must be submitted based on the changes made.

*(Sections 70-1001.01, 70-1901 to 70-1909 and 77-2704.57, R.R.S. 2009. June 6, 2011.)*