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September 26, 2007

Commissioner of Revenue
Massachusetts Department of Revenue
100 Cambridge Street
Boston, MA 02204
Attention: John Tully, Rulings and Regulations Bureau, Room 703

Re: *Letter Ruling Request/Cape & Vineyard Electric Cooperative, Inc.*

Dear Commissioner:

Pursuant to 830 CMR 62C.3.2, Cape & Vineyard Electric Cooperative, Inc. (the "Cooperative"), requests rulings that it is exempt from the corporate excise tax, utility excise tax, other state and local taxes, and the sales and use tax.

A. COMPLETE STATEMENT OF ALL RELEVANT FACTS

1. Taxpayer Information

The Cooperative's legal name is Cape & Vineyard Electric Cooperative, Inc. The Cooperative's address is P.O. Box 427/Superior Court House, 3195 South Main Street, Barnstable, MA 02630 and its phone number is (508) 375-6648. The Cooperative's taxpayer identification number is 26-11117727. The Cooperative's state and federal tax status is not definitively established by existing law or legal precedent. Therefore, in addition to seeking this letter ruling, the Cooperative also intends to seek a private letter ruling from the Internal Revenue Service that it is exempt from federal income tax under Section 115 of the Internal Revenue Code and on the basis that it is an instrumentality of its government members.

The Cooperative's fiscal year begins on July 1st and ends on June 30th, the same fiscal year as established by the Massachusetts General Laws for cities and towns in the Commonwealth of Massachusetts. The Cooperative has designated one of its members, Barnstable County (the "County"), to act as its fiscal agent and has entered into a Member Services Agreement, which among other things, sets forth the County's authority and responsibilities in this regard (a copy of this agreement is enclosed). The contact information for the County is the same as the Cooperative's.

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The Cooperative was formed on September 12, 2007 and was organized pursuant to Massachusetts General Laws c. 164, § 136 (referred to in this request as the “Electric Cooperative Statute”) (a copy of the Electric Cooperative Statute, the Cooperative’s Bylaws and the Cooperative’s Articles of Organization is enclosed). Generally, membership in cooperatives formed under the Electric Cooperative Statute is open to a wide variety of legal persons. However, membership in the Cooperative is restricted to governmental entities. The Bylaws and Articles of Organization specifically state “[a]ny municipality or county or political subdivision thereof, or body politic that meets the requirements of Internal Revenue Code Section 115, shall be eligible to apply for membership in the Cooperative, provided that the governing board of each member has authorized its membership.” Bylaws, § 2.1; Articles, § VI (b). The Cooperative’s Bylaws and Articles of Organization state that it shall operate as an instrumentality of its government members. Bylaws, § 9; Articles, § VI (e).

Membership in the Cooperative is currently comprised of three members: the County and the Town of Barnstable, both of which are political subdivisions of the Commonwealth of Massachusetts, and the Cape Light Compact (the “Compact”). The Compact’s membership solely consists of counties and municipalities - the County, Dukes County, and all of the twenty-one municipalities located within these counties on Cape Cod and Martha’s Vineyard. The Compact was formed in 1997 through an Inter-Governmental Agreement (“IGA”) among its members. Additional background information regarding the Compact is set forth below (Statement of Business Reasons for the Transaction).

2. Statement of Business Reasons for the Transaction

The Electric Cooperative Statute allows electric cooperatives organized under the statute to transact “any lawful business associated with the purchase, acquisition, distribution, sale, resale, supply, and disposition of energy or energy-related services to wholesale or retail customers, subject to federal and state laws and regulations.” G.L. c. 164, § 136. The purposes of the Cooperative are to develop and/or own renewable and non-renewable electric generation facilities, and to procure and/or sell long term electric supply or other energy-related goods or services including renewable energy certificate (“REC”) contracts at competitive prices to its members.

The Cooperative is a newly formed entity and has engaged in limited activities to date. It plans to begin analyzing the feasibility of developing a wind-turbine project. The initial steps in this process include conducting site feasibility studies and exploring project finance options. The formation and initial operating costs of the Cooperative have been borne by the Compact pursuant to the Member Services Agreement. The Cooperative’s Bylaws and Articles of Organization provide that it “shall accept funds only from its members or other sources that will not jeopardize its tax-exempt status.” Bylaws, § 9; Articles, § VI (f). The Cooperative’s products, services and programs will be available to its government members and to consumers living in its constituent jurisdictions.

3. Detailed Description of Transaction

a. Restructuring of the electric utility industry and formation of the Compact

In November of 1997, the Massachusetts legislature passed a law intended to restructure the electric utility industry in the Commonwealth, Chapter 164 of the Acts of 1997 "An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity, and Other Services, and Promoting Enhanced Consumer Protections Therein" (the "Restructuring Act").

Among other things, the Restructuring Act provides for competition in the generation and supply of electricity to customers and authorizes any municipality or group of municipalities to enter into agreements for services to facilitate the sale and purchase of electricity, for the purpose of aggregating the electrical load of consumers within its boundaries. G.L. c. 164, § 134 (see enclosed). One of the Cooperative's members, the Compact, is a governmental aggregator under the Restructuring Act. The Compact is governed by a governing board which consists of one representative selected by the Board of Selectmen or Town Council of each member municipality, plus one County Commissioner appointed by the Barnstable County Board of Commissioners, and one representative appointed by the Dukes County Board of Commissioners. The Compact does not have a separate taxpayer identification number; under some circumstances, the Compact is deemed to have a separate legal existence. As set forth in the current IGA, the goals of the Compact include, among other things, aggregating consumers as part of the competitive market for electricity, acquiring the best market rate for electricity supply, ensuring transparent pricing, providing equal sharing of economic savings based on current electric rates, providing and enhancing consumer protection, allowing those consumers who choose not to participate to opt-out, as well as supporting environmental protection, energy efficiency, and renewable energy development.

While the Compact has been able to achieve many of its goals, there are limits to its ability to fulfill some of its public purposes due to the constraints of its organizational form. The Compact's authority is subject to the limits on municipal power that apply to its government members and the authority granted to aggregators under G.L. c. 164, §134. The Cooperative can do things that the Compact cannot do. For example, the Cooperative may directly own or develop (by itself or with other parties) renewable energy or distributed generation projects. Municipalities may not be empowered to do this without special legislation and the Compact does not have the authority to directly own renewable energy or distributed generation projects. The Cooperative is authorized to borrow funds for its activities. Without special legislation, cities and towns may not be authorized to borrow to finance renewable energy projects. The Cooperative has authority to issue bonds. The Cooperative may purchase electric power at wholesale (the Compact does not currently directly engage in wholesale power transactions). The Cooperative, unlike the Compact and Commonwealth municipalities, would have clear authority to enter into long-term contracts for wholesale power and/or RECs. The Cooperative, through its ability to enter into long-term power supply contracts, can better manage and control energy costs for its government members and the consumers of those communities. In sum, the

Cooperative can more effectively achieve the goals of aggregating consumers as part of the competitive market for electricity, acquiring the best market rate for electricity supply, ensuring transparent pricing, providing equal sharing of economic savings based on current electric rates, providing and enhancing consumer protection, supporting environmental protection, energy efficiency, and renewable energy development.

- b. Development of renewable energy projects, promotion of a clean environment, and purchase of energy and RECs

The Cooperative plans to develop energy projects from renewable energy generating sources. The Commonwealth has made a determination that diversification of the sources of energy is in the public interest. Restructuring Act, § 50 (see enclosed). Renewable energy resources are clean, green sources of energy which have been traditionally underdeveloped. Because the private sector has not significantly developed renewable energy resources, the Commonwealth stepped in and enacted a law intended to change this. More specifically, the Commonwealth enacted a law that requires all retail electricity suppliers selling electricity to consumers to increase the percentage of renewable energy generating sources¹ of energy in their portfolios. G.L. c. 25A, § 11F. This year the minimum percentage requirement is three percent. *Id.* This percentage increases annually – by one-half percent each year through the year 2009 and one percent annually thereafter. *Id.* Because the Restructuring Act requires electricity suppliers to get a gradually increasing supply of their electricity from new renewable generating sources, the result should be new construction of renewable energy facilities. The Cooperative's objective is to add to the amount of renewable energy produced in New England by developing new facilities and by selling RECs, particularly on Cape Cod and Martha's Vineyard, and to stabilize electricity rates for consumers.

The Cooperative may also enter into long-term power supply and REC contracts to serve its members. The energy associated with power supply contracts may be from renewable or non-renewable facilities. Once again, the Cooperative's objective is to stabilize rates for consumers through long-term power supply and REC contracts.

A REC is a certificate that represents all of the environmental attributes (such as avoided CO₂ emissions) that are created when electricity is generated from a renewable energy source such as wind, solar and landfill biomass instead of using fossil fuels such as coal or oil. A REC can be sold separately from the actual physical electricity generated from the energy source. The purchase of RECs should provide funding which will increase the supply of new, clean

¹ A renewable energy generating source under Massachusetts law is an energy source which "generates electricity using any of the following: (i) solar photovoltaic or solar thermal electric energy; (ii) wind energy; (iii) ocean thermal, wave, or tidal energy; (iv) fuel cells utilizing renewable fuels; (v) landfill gas; (vi) waste-to-energy which is a component of conventional municipal solid waste plant technology in commercial use; (vii) naturally flowing water and hydroelectric; and (viii) low-emission, advanced biomass power conversion technologies, such as gasification using such biomass fuels as wood, agricultural, or food wastes, energy crops, biogas, biodiesel, or organic refuse-derived fuel; provided, however, that after December 31, 1998, the calculation of a percentage of kilowatt-hours sales to end-use customers in the commonwealth from new renewable generating sources shall exclude clauses (vi) and (vii) herein." G.L. c. 25A, §11F.

renewable energy. The creation of RECs is a way to monetize the value of renewable energy. The amount that a person pays for a REC makes the development of renewable energy more economical. Without RECs, renewable energy developers cannot compete with fossil fuel developers. Traditionally, the marketplace has not recognized the value of the environmental attributes that renewable energy provides. The Cooperative's power purchases and REC sales will therefore increase the rate of development of renewable energy. Its ability to enter into long term, stable power contracts will provide cost-savings to its government members and will enhance consumer protections.

Development of renewable energy resources continues to be a legislative priority in the Commonwealth of Massachusetts. Many within the Commonwealth are working with the General Court and the Governor's Administration to develop a comprehensive energy plan for Massachusetts, including ways in which to promote renewable energy development and clean energy communities; in fact the Speaker has filed his own comprehensive energy proposal addressing these issues which is presently in committee.

c. Cape Light Compact Green

In order to promote the development of renewable energy resources, the Compact operates the voluntary Cape Light Green program. Consumers living in the Compact's member municipalities who receive their electricity service from its competitive supplier pursuant to a competitive electric supply agreement with the Compact receive offers to purchase RECs from the Compact. Consumers who purchase the RECs are eligible for a federal tax-deduction for their purchases. The purchased RECs are retired; donors are not permitted to re-sell the RECs. The Cooperative may operate its own version of the Compact's program (the "Cooperative REC Program"). The Cooperative would like a ruling that REC sales through the Cooperative REC Program will be exempt from sales and use tax. Additional information about the Compact program can be found at <http://www.capelightcompact.org>.

B. RULINGS REQUESTED

1. The Cooperative is exempt from the corporate excise tax.
2. The Cooperative is exempt from the utility excise tax.
3. The Cooperative is exempt from other state and local taxes.
4. The Cooperative's REC sales will be exempt from sales and use taxes.

The Cooperative is a newly formed entity and has not filed any tax returns. Therefore none of these issues are being considered by the Department in connection with an active examination or audit of a tax return already filed.

C. LEGAL ANALYSIS

1. Corporate Excise Tax

In general, the Commonwealth imposes a corporate excise on domestic corporations. G.L. c. 63, § 32. While the Cooperative was organized as a domestic corporation, it should be exempt from the corporate excise tax because its membership is limited to governmental units. Its Articles of Organization and Bylaws state “[a]ny municipality, county or political subdivision thereof, or body politic that meets the requirements of Internal Revenue Code Section 115 shall be eligible to become a member of the Cooperative, provided that the governing board of each member has authorized its membership.” Bylaws, § 2.1; Articles, § VI(b). The Cooperative should therefore be exempt from the corporate excise tax because it is an extension of local governments.

2. Utility Excise Tax

Utility corporations doing business within the Commonwealth are subject to a utility excise tax. G.L. c. 63, § 52A. The applicable statute defines a utility corporation as follows:

"Utility corporation" means (i) every incorporated electric company and gas company subject to chapter one hundred and sixty-four; (ii) every incorporated water company and aqueduct company subject to chapter one hundred and sixty-five; (iii) every incorporated telephone and telegraph company subject to chapter one hundred and sixty-six; (iv) every incorporated railroad and railway company subject to chapter one hundred and sixty; and every corporation qualified under section one hundred and thirty-one A of said chapter one hundred and sixty to acquire, own and operate terminal facilities for steam, electric or other types of railroad; (v) every incorporated street railway subject to chapter one hundred and sixty-one; (vi) every incorporated electric railroad subject to chapter one hundred and sixty-two; (vii) every incorporated trackless trolley company subject to chapter one hundred and sixty-three; (viii) every domestic or foreign pipe line corporation engaged in the transportation or sale of natural gas within the commonwealth; and (ix) every foreign corporation which is not subject to the above chapters but which does an electric, gas, water, aqueduct, telephone, telegraph, railroad, railway, street railway, electric railroad, trackless trolley or bus business within the commonwealth and has, prior to January first, nineteen hundred and fifty-two been subject to taxation under sections fifty-three to sixty, inclusive.

G.L. c. 63, § 52A(1)(a).

While the Cooperative may at some point in the future conceivably be considered an “incorporated electric company² and gas company subject to chapter one hundred and sixty-four,” it should be exempt from this tax for the same reasons that it is exempt from the corporate excise tax. It is not a profit-making business enterprise; the Cooperative is an extension of local governments. In addition, the Cooperative should not be subject to the utility excise tax because it lacks a significant physical distribution infrastructure. See *Bell Atlantic Mobile Corporation, LTD. v. Commissioner of Revenue and Boards of Assessors of 220 Cities and Towns*, A.T.B. Nos. C267959 through C268176, C269027 and C269028 (2007).

3. Other State and Local Taxes

The Cooperative is also seeking a ruling that to the extent its members themselves are exempt from state and local taxes, the Cooperative itself should be exempt. For example, sales of electricity to political subdivisions of the Commonwealth are exempt from sales tax under G.L. c. 64H, § 6(d). This exemption should extend to the Cooperative. The Cooperative should be treated as a pass-through government entity and an extension of its government members. The Department already treats agents who purchase tangible personal property on behalf of tax-exempt entities as tax-exempt. TIR 99-21; TIR 99-4.

4. REC Sales

The Commonwealth imposes a sales and use tax of five percent on the sales of tangible personal property. G.L. c. 64H, § 2. A complementary use tax is imposed on the storage, use or other consumption in the state of tangible personal property purchased from any vendor. G.L. c. 64I, § 2. Sales exempt from the sales tax are also exempt from the use tax. G.L. c. 64I, § 7(b).

As described above, the Cooperative will be selling RECs. These sales should not be subject to the sales tax because a REC does not constitute tangible personal property. “Tangible personal property” is defined in pertinent part as:

personal property of any nature consisting of any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the commonwealth, but shall not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership. For purposes of this chapter, “tangible personal property” shall include gas, electricity and steam.

² “Electric company” is defined in pertinent part as “a corporation organized under the laws of the commonwealth for the purpose of making by means of water power, steam power or otherwise and selling or transmitting and selling, or transmitting only, or distributing and selling, or only distributing, electricity within the commonwealth, or authorized by special act so to do, even though subsequently authorized to make or sell gas; provided, however, that electric company shall not mean an alternative energy producer . . . and provided, further, that electric company shall not mean a corporation only transmitting and selling, or only transmitting, electricity unless such corporation is affiliated with an electric company organized under the laws of the commonwealth for the purpose of distributing and selling or distributing only, electricity within the commonwealth.” G.L. c. 164, § 1.

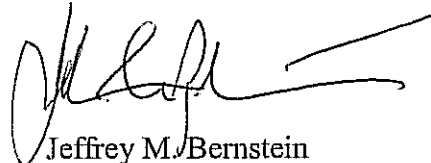
G.L. c. 64H, § 1. RECs are not used or consumed. A REC is not a good, ware or merchandise. It is not a commodity, at least in the Cooperative's REC Program, because consumers cannot resell them. Consumers purchasing RECs do not get any product or service in exchange for their contribution. In addition, the Department has ruled that the renewable resources charge collected to support the Massachusetts Renewable Energy Trust is not subject to the sales tax. TIR 98-16. The Cooperative's REC sales should receive the same treatment.

D. CONCLUSION

The Cooperative is exempt from the corporate excise tax, utility excise tax, and other state and local taxes because it is an extension of its member local governmental units. The Cooperative's REC sales will be exempt from the sales and use taxes.

If you would like to discuss the requested rulings, please do not hesitate to contact me. As required by Department regulations, a Power of Attorney (Form M-2848) authorizing certain attorneys in this firm to submit this request on the Cooperative's behalf is enclosed. Thank you.

Sincerely yours,



Jeffrey M. Bernstein
Erin M. O'Toole
for BCK Law, P.C.

JMB:EMO/drb
Enclosures

cc: Margaret T. Downey, Clerk

LIST OF ENCLOSURES

Articles of Organization
Bylaws
Electric Cooperative Statute
Member Services Agreement
Restructuring Act (excerpt)
Form M-2848