



Department of Energy

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DECISION AND ORDER OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Broward County, Florida

Date of Filing: July 14, 2009

Case Number: TGA-0002

This decision considers an Appeal filed by Broward County, Florida (Broward County) relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) being administered by the U.S. Department of Energy (DOE). In its Appeal, Broward County seeks a determination by the DOE Office of Hearings and Appeals (OHA) that it is an "eligible unit of local government" to receive block grant funding under the EECBG Program. If the present Appeal were granted, Broward County would have thirty (30) days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. Energy Efficiency and Conservation Block Grant Program

The Energy Independence and Security Act of 2007 (EISA) established the Energy Efficiency and Conservation Block Grant (EECBG) Program, which provides, in part, for a direct formula grant program for States, eligible units of local government, and Indian Tribes, to implement a broad range of programs designed to reduce fossil fuel emissions, reduce total energy use and improve energy efficiency. 42 U.S.C. 17151-17158.¹ For the purpose of the EECBG program, an "eligible unit of local government" was defined by the EISA to be a city or county that met population thresholds specified in statute. 42 U.S.C. 17151. In summary, the EISA defines an "eligible unit of local government" to be: (1) a city with a population of at least 35,000 or which causes the city to be one of the ten highest populated cities of the State, or (2) a county with a population of at least 200,000 or which causes the county to be one of the ten highest populated counties of the State.

On April 15, 2009, DOE published in the Federal Register formulas for allocation of direct grants under the EECBG Program. 74 FR 17461. DOE also published a funding opportunity announcement that identified the "eligible units of local government," Funding Opportunity Number: DE-FOA-0000013, Amendment 00003 (available at: <http://www.eecbg.energy.gov/>). To determine eligibility, DOE applied four factors to the evaluation of whether a city or county qualifies

¹ The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Public Law 111-5.



as “eligible unit of local government” for the purpose of the EECBG Program. A city or county is an “eligible unit of local government” under the EECBG Program if it:

1. Is listed in the 2007 Governments Integrated Directory (GID) as an incorporated entity;
2. Meets the required population threshold according to the 2007 Population Estimates (including successful challenges to these estimates) published by the U.S. Census Bureau;
3. Is identified by the 2007 Census of Governments as having a governance structure consisting of an elected official and governing body; and
4. Has a governing structure, as indicated by the 2007 Census of Governments publication, with the capabilities and jurisdiction necessary to carry out the broad range of EECBG programs.

As noted above, an “eligible unit of local government” was defined by the EISA to be a city or county that met population thresholds specified in statute. In determining population, DOE used the population estimates of the 2007 Census Population Estimates Program with updates to reflect successful challenges to the 2007 population estimates submitted to and accepted by the U.S. Census Bureau. DOE relied on the 2007 Census data and information in evaluating each factor, as it is the official government source for this type of data and information.

Additionally, the EISA distinguishes between cities that are eligible units of local government and counties that are eligible units of local government. Consistent with the EISA distinction, DOE distinguished the population of a city that met the requisite population threshold for an eligible unit of local government from the population of the county in which that city is situated. For the purpose of the EECBG Program, DOE removes the population of an eligible city in determining the population of a county. By removing the population of an eligible city in determining the population of a county, DOE reduced the instances in which a person would be double-counted, i.e., counted once for determination of a city’s eligibility and again in determining a county’s eligibility. This distinction between city and county populations yields a determination of eligibility that results in funds being distributed more on a per capita basis, which more equitably advances the objectives of the EISA and DOE believes is one way to provide greater equity in the allocation of funds between cities and counties under the direct formula grants.

Further, to be defined as an “eligible unit of local government,” DOE determined that a geographical subdivision also must have a “functional government” with responsibilities and jurisdiction capable of implementing the broad range of programs identified by the EISA. In determining whether particular county governments have the types of functions and authority necessary to support the programs the EISA directs DOE to fund, DOE relied on the 2007 Census of Governments, published by the U.S. Census Bureau. A county that has the requisite population, but has an associated government that, as described by the 2007 Census of Governments, has “relatively few [governmental] responsibilities,” or an equivalent evaluation, was understood to lack the government functions and authority necessary to discharge the energy efficiency and conservation programs and projects identified by the EISA. In effect, jurisdictions with limited responsibilities were not considered units of local “government” for the purpose of defining eligibility under the EECBG Program. A complete discussion of how DOE determined whether a city or county is an “eligible

unit of local government” is provided in the April 15, 2009, Federal Register notice. 74 FR 17461.

B. Appeal Procedures

As explained above, DOE relied on the characterization of city and county governing structures stated in the 2007 Census of Governments to determine whether cities and counties had sufficient administrative capability to carry out the activities set forth in the EISA. For instance, the Department deemed ineligible those counties characterized as having limited governmental function. However, DOE recognizes that the characterization of city and county governments in the 2007 Census of Governments was not in the context of functionality to administer activities sanctioned by the EISA, and therefore may not have been sufficiently informative or determinative for the purpose of eligibility under the EECBG Program.

Therefore, on June 24, 2009, DOE issued a Federal Register notice establishing an appeals process for eligibility determinations published in the funding opportunity announcement issued under the EECBG Program. 74 Fed. Reg. 30061. The issues that can be appealed, the process for filing an appeal, and the procedure applicable to review an application for appeal are set forth in the Federal Register notice. Those procedures state, in part, that:

A unit of local government may file an appeal under these procedures where it has been denied eligibility for the EECBG Program based: (1) upon a determination that it is incapable of carrying out activities set forth in Title V, Subtitle E of the Energy Independence and Security Act of 2007, Pub. L. 110-140 (EISA); (2) upon an adjustment to its population as the result of a determination that another entity that is located within its borders is capable of carrying out activities set forth in Title V, Subtitle E of EISA; or (3) upon 2007 Census data that was corrected by the U.S. Census Bureau, but the correction was not reflected in the Department’s determination of eligibility.

Any such appeal must be filed with OHA within thirty (30) days of the Federal Register notice, by the close of business July 24, 2009.

C. The Present Appeal

In its Appeal, Broward County contends that DOE inappropriately failed to identify the county as eligible to apply for funding under the EECBG Program. According to Broward County, it was denied eligibility because 18 cities² out of 31 incorporated cities situated within the county were

² In its initial filing, Broward County inadvertently failed to list the city of Hallandale Beach, and stated that there were only 17 cities within the county that had qualified to receive EECBG Program funding. However, in an Addendum filed on July 23, 2009, Broward County corrected its appeal and revised its figures to indicate that there are indeed 18 cities within the county that have been designated by DOE to receive funding under the EECBG Program.

determined eligible to receive EISA funding. Appeal at 1; *see* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. Notwithstanding, Broward County argues that it should be allowed to apply for funding under the EECBG Program. Broward County points out that it is the 17th most populous county in the nation. Appeal at 2. In addition, Broward County asserts that as the regional government, it is the governmental entity charged with developing and implementing environmental programs on a countywide basis. *Id.* Broward County further states that as a county government with 31 incorporated cities, it has responsibility for managing for an international seaport, airport, an extensive library system, parks, transit, street lights, infrastructure and various public works projects. According to Broward County, “[a]ll of these areas of responsibility include initiatives designed to improve energy efficiency, reduce greenhouse gases, and improve sustainability.” *Id.*

II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Broward County and have determined that its Appeal must be denied. Broward County is a unit of local government identified in 2007 GID, and clearly has the governance structure and functional capability to carry out the broad range of activities specified in the EISA. However, as explained below, Broward County fails to meet the EISA population requirement based upon 2007 U.S. Census estimates, as implemented by DOE.

As explained in the April 15, 2009, Federal Register notice, DOE used the “county balance population” to determine eligibility for the EECBG Program:

In evaluating county populations for eligibility for direct formula grants, DOE will not include the populations of cities located within county boundaries that are eligible for direct formula grants from DOE. For the purpose of this program, this population is referred to as the “county balance population.” In determining the formulas for funding distribution, DOE has determined that the EECBG Program achieves the most equitable funding allocations if done on a per capita basis. By removing the population of an eligible city from a county population, DOE has reduced the instances of double-counting persons who live in both an eligible city, which is located in an eligible county. DOE’s implementation approach is consistent with the approach developed by the Community Development Block Grant Program (CDBG) administered by the Department of Housing and Urban Development (HUD).

74 Fed. Reg. at 17462.

According to the 2007 Census estimates data utilized by DOE, Broward County had a 2007 population of 1,759,591, while the respective 2007 populations of the 18 cities within the county that have been determined to be eligible for EECBG Program funding are as follows:

<u>City</u>	<u>Population</u>
Coconut Creek	50,321
Coral Springs	126,875
Davie, Town of	90,329
Deerfield Beach	74,573
Fort Lauderdale	183,606
Hallandale Beach	38,634
Hollywood	142,473
Lauderhill	67,565
Margate	54,602
Miramar	108,240
North Lauderdale	41,832
Oakland Park	42,151
Pembroke Pines	146,828
Plantation	84,370
Pompano Beach	102,745
Sunrise	89,787
Tamarac	59,668
Weston	<u>64,157</u>
Total	1,568,756

Deducting this amount from Broward County's 2007 population leaves a county balance population of 190,835 (1,759,591 - 1,568,756 = 190,835).³ Thus, Broward County is below the 200,000 population threshold for county eligibility specified in the EISA. *See* 42 U.S.C. 17151. In addition, Broward County fails to satisfy the alternative means for meeting county eligibility under the EISA, i.e. one of the ten highest populated counties in the State, since its county balance population drops the county from being the second most populous county (behind Miami-Dade County), to the 19th most populous county in Florida.⁴

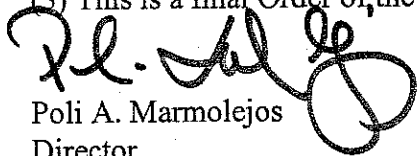
³ In its appeal, Broward County calculates a county balance of 189,379. *See* Appeal Addendum. Apparently, Broward County incorrectly utilized 2007 population estimates as adjusted by the U.S. Census Bureau in 2008. However, this discrepancy does not affect the outcome of this decision. Using either county balance figure, Broward County is below the 200,000 threshold and not within the top ten county balance populations in the State, as required and specified in the EISA.

⁴ Broward County becomes the 19th most populous county based upon county balance populations after deducting the 2007 populations of 69 Florida cities determined to be eligible to apply of EECBG Program funding, from the populations of the respective counties in which they are situated.

The June 24, 2009, Federal Register notice that established the present appeal process provides specifically that issues regarding DOE's methodology for determining city or county population are not appealable, noting "[f]or example, the decision by DOE to exclude the population of an eligible city from the population of the county in which the city is located is not reviewable on appeal." 74 Fed. Reg. at 30063-64. We do not question Broward County's claims that it carries a high level of responsibility in managing and overseeing various programs and facilities on behalf of its citizenry. However, these equitable arguments are insufficient to overcome the population requirements clearly established by the EISA. Accordingly, Broward County's appeal must be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Broward County, Florida, on July 14, 2009, is hereby denied.
- (2) This Decision and Order is being served upon the Appellant and the DOE Office of Energy Efficiency and Renewable Energy by electronic mail on the date of issuance noted below.
- (3) This is a final Order of the U.S. Department of Energy.


Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: **AUG 19 2009**