Department of Energy
Washington, DC 20585

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DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Town of Groton, Connecticut

Filing Date: July 23, 2009

Case Number: TGA-0017

This decision considers an Appeal filed by the Town of Groton, Connecticut, relating to the Energy Efficiency and Conservation Block Grant Program (EECBG Program) administered by the U.S. Department of Energy (DOE). The Town of Groton 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, the Town of Groton would have 30 days from the date of this decision to submit an application for the appropriate EECBG Program allocation funding.

I. Background

A. The Energy Efficiency and Conservation Block Grant Program

The EECBG Program was established by the Energy Independence and Security Act of 2007 (EISA).[1] The EECBG Program provides grants to implement EISA activities, which are designed to reduce fossil fuel emissions and total energy use and improve energy efficiency. 42 U.S.C. §§ 17152(b)(1)-(3). EISA activities include energy conservation planning; energy audits of buildings; code development; installation of energy efficient technologies; financial incentive and public education programs; transportation programs to conserve energy; recycling programs; management of greenhouse gases from waste-related sources; and production of energy from renewable sources. *Id.* at §§ 17154(1)-(14).

EECBG recipients include States, Indian Tribes, and eligible units of local government. *Id.* at 17152(1)(A)-(C). The EISA defines an "eligible unit of local government" as: (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

[1] The EECBG Program was funded in 2009 with appropriations from the American Recovery and Reinvestment Act of 2009, Pub. Law No. 111-5 (2009).

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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. *Id.* at §§ 17151(3)(A)(i)-(ii).

In April 2009, DOE published formulas for the allocation of direct grants under the EECBG Program. 74 Fed. Reg. 17,461 (Apr. 15, 2009). DOE stated that for a city or county to be an eligible unit of local government, in addition to meeting the EISA's population thresholds, it must:

(1) Be listed in the U.S. Census Bureau's 2007 Governments Integrated Directory (GID) as an incorporated entity;

(2) Be listed in the U.S. Census of Governments as having a governance structure consisting of an elected official and governing body; and

(3) Be listed in the 2007 Census data as capable of carrying out activities that the EISA sets forth.

Id.; *see also* 74 Fed. Reg. 30,062 (June 24, 2009).

In May 2009, DOE published a list of entities eligible to apply for direct grants under the EECBG Program. *See* Attachment A, U.S. Department of Energy, National Energy Technology Laboratory, Recovery Act – Energy Efficiency and Conservation Block Grants – Formula Grants, Funding Opportunity Number: DE-FOA-0000013, Amendment 000003, *available at* http://www.eecbg.energy.gov/downloads/DE_FOA_0000013_Amendment_000003.pdf (last visited Aug. 20, 2009).

DOE treated towns, townships, and boroughs as cities if the U.S. Census Bureau listed them as "incorporated places" for purposes of the Department of Housing and Urban Development's Community Development Block Grant Program. 74 Fed. Reg. 30,062, 30,063 (June 24, 2009). (Because cities are potentially eligible units of local government, incorporated places are also potentially eligible units of local government.) If one incorporated place is "nested" within the boundaries of another incorporated place, DOE counted the two populations separately. By subtracting the population of a nested city from the town in which it lies, DOE wished to avoid "double-counting" populations in order to distribute the funds equitably, on a per-capita basis. Further, "DOE assumed" that if the 2007 GID listed an entity as incorporated, that entity "has a functional government with responsibilities and jurisdiction capable of implementing the broad range of programs identified by EISA." *Id.* at 30,062.

B. Appeal Procedures

On June 24, 2009, DOE published a notice establishing a process for units of local government to appeal DOE's EECBG eligibility determinations. *See id.* at 30,061. A unit of local government may appeal when it has been denied eligibility based:[2]

(1) Upon a determination that it is incapable of carrying out activities set forth in [the 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 [the] 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.

Id. at 30,064. The notice set an appeal deadline of July 24, 2009.

DOE specified a test that a unit of local government must meet when it appeals its EECBG eligibility denial based "[u]pon 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 [the] EISA." The June 24, 2009, Federal Register notice states that the appellant "would need to demonstrate that the 'nested city' lacks sufficient jurisdiction and government function to carry out the types of projects listed in EISA, and the 'nested city' relies on the appellant city for such services." *Id.* at 30,063. Noting that the information provided in the appeal "should be authoritative but need not be exhaustive," the notice states that in order to make the required demonstration, the appealing unit of government should show "that the larger city provides services to the 'nested city' of the type necessary to implement programs or projects that are consistent with those listed by EISA. A city (or city equivalent) may include previous examples where the applicant has carried out such activities." *Id.*

C. The Town of Groton's Appeal

The Town of Groton has 42,324 residents, including 9,338 residents in the "nested" City of Groton, which is located within the Town of Groton's "corporate boundaries." Appeal at 3.[3] DOE "adjusted" the population of the Town by subtracting the population of the City, based on the assumption that the City is capable of implementing activities set forth in the EISA. *See id.*

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[2] Certain eligibility determinations are not appealable, including denials based on the entity's "failure to meet required population thresholds." 74 Fed. Reg. 30,064 (June 24, 2009). Nor can an entity appeal a denial because the GID does not list it as an incorporated entity, or because the U.S. Census of Governments does not list it as having an elected official and governing body. *See id.*

[3] These population numbers are taken from the U.S. Census Bureau's Population Estimates data for the period April 1, 2000 to July 1, 2007 (released on July 10, 2008).

at 2. Because the Town of Groton's "adjusted" population fell below the EECBG population eligibility threshold of 35,000, DOE denied it eligibility to apply for EECBG funds. *Id.* at 4-5.

The Town of Groton argues that DOE improperly adjusted its population because (i) the City of Groton is not capable of implementing activities set forth in the EISA; and (ii) the City relies on the Town for such services. Therefore, the Town of Groton argues that the DOE improperly denied it eligibility to apply for EECBG funds. *Id.* at 12.

II. Analysis

We have reviewed the Town of Groton's Appeal and determined that it should be granted. The Town of Groton shows that the City of Groton lacks the jurisdiction and government function to implement EISA activities. It makes its showing by demonstrating that it provides many services to the City, and that the City relies on it to provide EISA-type activities in many of those services.

The services that the Town provides to the City include the public school system; a recycling program; a public works program; three municipal libraries; the public health services; the probate court; social services and assistance; animal control; the school nurses; the multi-purpose refuse transfer station; Meals on Wheels; grants to approximately 18 social service and cultural agencies; the Senior Center; the K-9 police; the ambulance services; and community redevelopment housing rehabilitation. *Id.* at 8, 9, 14.

In providing these services to the City, the Town has undertaken activities consistent with programs and projects that the EISA authorizes. For example, in January 2008, the Town opened a new high school that serves the City. Memorandum of Telephone Conversation Between Mark R. Oefinger, Town Manager, Town of Groton, and David M. Petrush, Attorney-Examiner, OHA, Sept. 1, 2009. Through a grant, the State Department of Education provided more than half of the building costs of $42 million. The school's energy efficient lights and HVAC system caused the electricity provider to award the school a $100,000 rebate. Additionally, the new high school is much larger than the old high school, but saves $100,000 a year in fuel oil. Second, the Town's recycling program provides the City bins, educational materials, and a processing facility. Third, the Town operates 20 passenger vehicles (excluding police cars) that also serve the City. The Town recently replaced 8 of the vehicles with energy-efficient hybrids, and has ordered 4 more. For three years, the Town has paid for part of the vehicles with grant money from the State Department of Transportation. *Id.* Lastly, the area's largest employers are located in the City, providing jobs for more than 13,000 commuters that congest the area. The Town sanctioned and financed a study to improve traffic flows and reduce carbon emissions within the City. *Id.*, *see also* Appeal at 16.

The Town of Groton has presented sufficient evidence that the City of Groton lacks the government function to implement EISA activities, and that by necessity the City relies on the

Town to implement those activities.[4] Therefore, the Town of Groton has established that the population of the City of Groton should be included with the Town of Groton's population for purposes of determining eligibility for apply for EECBG program funding. As indicated above, with this adjustment, the Town of Groton's 2007 Census population exceeds the 35,000 population threshold established by the EISA.

It Is Therefore Ordered That:

(1) The Appeal filed by the Town of Groton, Connecticut, on July 23, 2009, is hereby granted.

(2) The Town of Groton will have thirty (30) days from the date of issuance of this Decision and Order in which to file an application for funding under the direct formula grant provision of Energy Efficiency and Conservation Block Program. The application must be consistent with the application requirements provided in Funding Opportunity Number: DE-FOA-0000013, Amendment 000003. 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: SEP - 4 2009

[4] The Town of Groton also argues that DOE adjusted its population based on a misapplied application of the "double-counting" rule. Appeal at 9, 10. We agree. Since the City of Groton's low population made it ineligible to apply for EECBG funds (nor is the City one of the ten largest in the state), the City's population could not have been "double-counted."