



## Department of Energy

Washington, DC 20585

AUG 19 2009

### DECISION AND ORDER OFFICE OF HEARINGS AND APPEALS

#### EECBG Appeal

Case Name: City of Bremerton, Washington

Date of Filing: July 23, 2009

Case Number: TGA-0020

This decision considers an Appeal filed by the City of Bremerton, Washington (City of Bremerton) 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, the City of Bremerton 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 City of Bremerton 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.<sup>1</sup> 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

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<sup>1</sup> 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, the City of Bremerton contends that DOE inappropriately failed to identify the town as a unit of local government eligible to apply for direct funding under the EECBG Program. According to the City of Bremerton, it was denied eligibility based upon the 2007 Census population data relied upon by DOE, which indicates that the City of Bremerton has less than the 35,000 population eligibility threshold established by the EISA, more specifically that the city had a 2007 population of 34,075. However, the City of Bremerton contests the use of this data by DOE. According to the City of Bremerton, the U.S. Census Bureau subsequently released revised 2007 Census population estimates which show that the City of Bremerton had a 2007 population of 35,826. Appeal at 2. In addition, the City of Bremerton asserts that it has a daytime population of

52,725, and “hence represents a community with substantial daytime energy demands and infrastructure.” *Id.* The City of Bremerton therefore claims that it should be determined eligible to apply for direct funding under the EECBG Program.

## II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by the City of Bremerton and have determined that its Appeal must be denied. The City of Bremerton 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, the City of Bremerton fails to meet the EISA population requirement based upon 2007 U.S. Census estimates data utilized by DOE for purposes of the EECBG Program.

The U.S. Census Bureau is the official government source for population data and related information. In determining the EECBG Program eligibility of cities and counties, DOE relied on the Census 2007 Population Estimates data (April 1, 2000 to July 1, 2007) released by the U.S. Census Bureau on July 10, 2008. As stated by DOE in the April 15, 2009, Federal Register notice, this was “the most recent and accurate population data from the U.S. Census” at the time the EECBG Program was implemented. 74 Fed. Reg. 17462. The 2007 Census data relied upon by DOE shows the City of Bremerton as having a 2007 population of 34,075,<sup>2</sup> below the 35,000 population threshold established by the EISA and does not qualify the City of Bremerton as one of the ten most populous cities in the State of Washington. Thus, we find that the City of Bremerton was properly omitted by DOE from the listing of cities determined by DOE to be eligible to apply for direct funding under the EECBG Program.

We are unable to accept the more recently released 2007 population estimates presented by the City of Bremerton. The revised 2007 Census population estimates (April 1, 2000 to July 1, 2008), showing the City of Bremerton with a 2007 population of 35,826, were released by the U.S. Census Bureau on July 1, 2009. This was nearly three months after DOE’s issuance of the April 15, 2009, Federal Register notice implementing the EECBG Program, when DOE published the funding opportunity announcement that identified “eligible units of local government” based on the initial 2007 population data published on July 10, 2008. *See* Funding Opportunity Number: DE-FOA-0000013, Amendment 00003, Attachment A. We find DOE’s decision to use uniformly the best

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<sup>2</sup> The U.S. Census Bureau provided an opportunity for local governments to request corrections to the initially released 2007 population data. The time in which file a population challenge closed on January 5, 2009. DOE indicated in the April 15, 2009, Federal Register notice that it would update the 2007 population data it utilized to reflect challenges that were submitted and accepted by the U.S. Census Bureau. A listing of the successful challenges can be found at: [http://www.census.gov/popest/archives/2000s/vintage\\_2007/07s\\_challenges.html](http://www.census.gov/popest/archives/2000s/vintage_2007/07s_challenges.html). In its appeal, the City of Bremerton concedes that it did not file challenge to the initial 2007 population estimates released by the U.S. Census Bureau asserting, however, that it would have done so if it had known of the impact upon its EECBG Program eligibility. Appeal at 2.

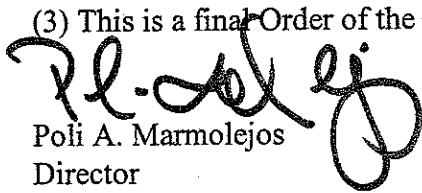
available Census data at the time the EECBG Program was established to be a prudent exercise of agency discretion. It would be impracticable to implement the EECBG Program in a cohesive and timely manner if individual units of local government were permitted to present alternative or subsequently released population data to determine EECBG Program eligibility. For that reason, the June 24, 2009, Federal Register notice that established the present appeal process provides that issues regarding DOE's methodology for determining the population of a city or county are not appealable, specifically stating:

[T]he determination of DOE to rely on the 2007 Census data is not reviewable on appeal. DOE recognizes that more recent data have been made available by the U.S. Census Bureau. However, in order to provide certainty as to the funding levels of entities determined to be "eligible units of local government," DOE relied on the most recent data available at the time the formula allocations were announced. The availability of updated (as opposed to corrected 2007 data) is not reviewable on appeal.

74 Fed. Reg. at 30064 (emphasis supplied). Accordingly, the City of Bremerton's appeal must be denied.<sup>3</sup>

It Is Therefore Ordered That:

- (1) The Appeal filed by the City of Bremerton, Washington, on July 23, 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**

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<sup>3</sup> The City of Bremerton urges that we take into consideration its daytime population, which it estimates to be 52,725. However, daytime population is relevant only for purposes of calculating the allocation amount of a city or county, after EECBG Program eligibility has been established. See 74 Fed. Reg. at 17463.