



Department of Energy  
Washington, DC 20585

AUG 27 2009

DECISION AND ORDER  
OFFICE OF HEARINGS AND APPEALS

EECBG Appeal

Case Name: Barnstable County, Massachusetts  
Date of Filing: July 24, 2009  
Case Number: TGA-0025

This decision considers an Appeal filed by Barnstable County, Massachusetts (Barnstable 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, Barnstable 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, Barnstable 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.<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, Barnstable County states that it believes it was denied eligibility to apply for EECBG Program funding based on a determination that it is incapable of carrying out activities prescribed by the EISA. Appeal at 4. Barnstable County asserts in its Appeal, however, that “the denial of eligibility is erroneous.” *Id.* According to Barnstable County, it meets all of the requirements to be found eligible to receive direct funding under the EECBG Program, including having the jurisdiction, authority and functional capability to administer the types of programs and activities identified in the EISA.

## II. Analysis

We have thoroughly evaluated the arguments and supporting documentation submitted by Barnstable County and have determined that its Appeal should be granted. For the reasons discussed below, we find that Barnstable County meets all of the criteria for eligibility to receive EISA funding under the EECBG Program.

### (1) Incorporated Unit of Local Government

Barnstable County is one of five county governments in the State of Massachusetts listed in the 2007 Governments Integrated Directory. *See* [http://harvester.census.gov/gid/gid\\_07/options.html](http://harvester.census.gov/gid/gid_07/options.html). Barnstable County therefore meets this criterion.

### (2) Population

As noted above, the EISA definition of “eligible unit of local government” includes a county with a population which causes the county to be one of the ten highest populated counties of the State. Because there are only five county governments in the State of Massachusetts, Barnstable County is one of the ten highest populated counties of the State. We, therefore, find that Barnstable County satisfies the population requirement of the EISA.

### (3) Governance Structure

Barnstable County states in its Appeal that in accordance with its County Home Rule Charter, the executive powers of the county are exercised by a Board of Regional Commissioners consisting of three members. Appeal at 3; *see* Exhibit B at Article 3. These Regional Commissioners are elected by Barnstable County voters to four-year terms. *Id.* The Home Rule Charter vests the County’s executive branch with powers to direct and supervise all county agencies. In addition, legislative powers of Barnstable County are exercised by an Assembly of Delegates consisting of fifteen members who are elected to two-year terms by the respective towns they represent within Barnstable County. *Id.*, at Article 2. Based upon this information, we find that Barnstable County has the requisite governance structure to receive EECBG funds.

### (4) Functional Capability

In its Appeal, Barnstable County argues that the county was initially denied EECBG eligibility based upon DOE’s supposition that it does not have the functional capability to administer one or more of the broad range of activities specified in the EISA. As stated in the implementing DOE Federal Register Notice: “As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these States were determined to be ineligible for Program funds.” 74 Fed. Reg. at 17462. However, we find that Barnstable County has presented sufficient supporting information and evidence in its Appeal to rebut that presumption.

Barnstable County states in its Appeal that, during fiscal year 2009, the county has been awarded more than \$3.5 million in federal grant money and approximately \$5 million in state grant funds that the county administers to conduct various programs on behalf of its citizens. Appeal at 5. Barnstable County notes, for example, that during the current year the county has expended approximately \$875,000 of federal grant money received from the U.S. Department of Housing and Urban Development through its HOME Investment Partnerships Program. *Id.*; see Exhibit E. The county was recently awarded \$750,000 by the state as part of a regional network program to end homelessness. *Id.* According to Barnstable County, it administers federal and state grant monies it receives through several county agencies directed by the county's executive branch: 1) Barnstable County Department of Health and Environment, 2) Barnstable County Department of Human Services, 3) Cape Cod and Islands Child Advocacy Center, 4) Barnstable County Resource Development Office, 5) Cape Cod Cooperative Extension, 6) Barnstable County Sheriff's Office, and 7) the Cape Light Compact. See Appeal at 5-7.

The Cape Light Compact (Compact), managed by Barnstable County, serves as a regional municipal power load aggregator as well as a energy efficiency program administrator that offers a variety of programs to help consumers with their energy needs.<sup>2</sup> According to Barnstable County, the Compact offers a competitive electric power supply option on an opt-out basis to over 200,000 customers, across all customer classes, located with the Compact's service territory. Appeal at 8. In addition, the Compact administers an Energy Efficiency Plan, with a 2009 annual budget of \$10 million. Some of the many energy efficiency and conservation initiatives being conducted under the 2009 Energy Efficiency Program include the: 1) Massachusetts New Homes with *ENERGY STAR* Program, 2) Residential Massachusetts Home Energy Services Program, 3) Residential High Efficiency Air Conditioning Program ("*COOL SMART*" with *ENERGY STAR*), 4) Low-Income Single Family Program, 5) Low-Income New Construction Program, and 6) Small Commercial and Industrial Retrofit Program. *Id.* at 8-9.

Based upon the foregoing, we are satisfied that Barnstable County has the functional capability to carry out one or more of the broad activities outlined in the EISA.<sup>3</sup>

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<sup>2</sup> Barnstable County states that the Cape Light Compact was organized under a formal Intergovernmental Agreement and represents a unique partnering between Barnstable County and the Cape Cod municipalities, including the 21 towns located in Barnstable County and neighboring Dukes County. Appeal at 7. Barnstable County states that under the Intergovernmental Agreement and ancillary services agreement, Barnstable County "provides fiscal management and administrative support to the Compact, overseeing all fiscal and contracting concerns for the Compact." *Id.* citing Exhibits F and G.

<sup>3</sup> The EISA authorizes a broad range of activities including, *inter alia*:

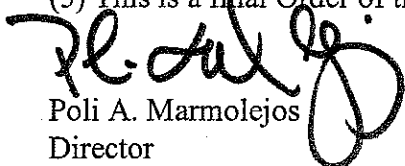
- 1) Development of an energy efficiency and conservation strategy;
- 2) Building energy audits and retrofits, including weatherization;
- 3) Financial incentive programs for energy efficiency, such as energy savings

It Is Therefore Ordered That:

(1) The Appeal filed by Barnstable County, Massachusetts, on July 24, 2009, is hereby granted.

(2) Barnstable County 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 00003. 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:

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- performance contracting, on-bill financing, and revolving loan funds;
- 4) Transportation programs to conserve energy;
  - 5) Building code development, implementation, and inspections;
  - 6) Installation of distributed energy technologies, including combined heat and power and district heating and cooling systems;
  - 7) Material conservation programs, including source reduction, recycling, and recycled content procurement programs;
  - 8) Reduction and capture of greenhouse gas emissions generated by landfills or similar waste-related sources;
  - 9) Installation of energy efficient traffic signals and street lighting;
  - 10) Installation of renewable energy technologies in or on government buildings;
  - 11) Any other appropriate activity that meets the purposes of the program and is approved by DOE.

*See generally* 42 U.S.C. 17154.