**Business Entities for Group Net Metering**

There are multiple business entities suitable for group net metering projects. Below are descriptions of primary business entities, including brief discussions of the advantages and disadvantages associated with each. There are additional feasible business entities available for group net metering; however, we selected these based on the existing state and federal regulatory and policy framework around group net metering.

**Limited Liability Company**

When a group forms a limited liability company (LLC), such members, own the company, and form a separate and distinct legal entity from the project itself. The LLC structure provides limited liability protection for its members and two primary benefits: pass-through taxation, and flexibility in governance.

First, the LLC structure allows for the profits of the company to “pass through” to its members.[[1]](#footnote-1) Regular corporations are taxed twice, once at the corporate level and again when the profits are distributed to the members, conversely, the profits of an LLC are taxed only once at the individual tax rates. An added benefit here is each member of the LLC can claim the *commercial* ITC, while a residential customer may claim the *residential* ITC. An LLC limits the liability of individual participants to the value of their initial investment, even if they actively participate in or control the firm’s management.[[2]](#footnote-2) But, a member may become liable for LLC debts if: the member personally guarantees the debts, personal funds are intermingled with LLC funds, the LLC has minimal insurance, or the members did not contribute enough funds to the LLC upon its formation.

 The second benefit is the flexibility offered in an LLC governance. An LLC can be either member-managed or manager-managed. Under the member-managed model, the company’s operations are managed directly by the members, in a manner established by the group. Here, the members are directly responsible for the running of the company. In contrast, in a manager-managed LLC, the company members elect or hire a manager to manage the operations of the LLC – similar to a director of a corporation. This manager can be a group member or an outside hire. Designating an outside manager may be useful if members do not have the skills, experience, or time to participate effectively in the management of an LLC. But compensating a manager may be an additional expense to the group. In addition, when members do not manage the LLC, their passive involvement carries the risk that the membership interest will classify as a security.

Groups can form an LLC through the Vermont Secretary of State’s website.[[3]](#footnote-3) Also, an LLC or Operating Agreement is necessary to govern the relationship of the members, the management structure, the financial regulations, and the regulation of transfer of membership interests or admission of new members. Without an LLC agreement, the state LLC laws will apply to the LLC the group members’ form. Groups interested in establishing an LLC should consult a legal professional to create an LLC that addresses the needs of their group.

**Low-Profit Limited Liability Company (L3C)**

Additionally, a group can choose to organize as a low-profit LLC, called an L3C. An existing LLC can convert to an L3C with a members’ vote and an amendment to the entity’s contract. Similarly, groups can form an L3Cs on the Vermont Secretary of State’s website. An L3C is a hybrid nonprofit and LLC model with a charitable mission. However, the L3C can distribute profits, after expenses, to owners or investors. A company shall create an L3C because of the entity’s “relationship to the accomplishment of a charitable or educational purpose”.[[4]](#footnote-4) Unlike, an LLC, an L3C is not obligated to construct an operating agreement. The Vermont L3C statute[[5]](#footnote-5) requires the group be organized for a “business purpose” and continuously operates satisfying the three requirements of a Program-Related Investment (PRI).[[6]](#footnote-6) First, the L3C investment must “further the accomplishment of one or more charitable or educational purpose”, adhering to definition of 26 U.S.C. Section 170 (c)(2)(B), of the IRS Code of 1986.[[7]](#footnote-7) Secondly, the “appreciation of property or production of income is not the” main purpose for the investment.[[8]](#footnote-8) Third, the L3C must abide 26 U.S.C. Section 170(c)(2)(D) of the IRS code of 1986 and “not make influencing legislation the company’s purpose, or take part in political campaigns on behalf of candidates”. [[9]](#footnote-9)An L3C will cease to exist if any one of the requirements at any time is unsatisfied. Subsequently, the company will continue to exist as a limited liability company. Nevertheless, the name of the company has to change to conform to subsection 3005(a) of 11 V.S.A. § 3001(23).[[10]](#footnote-10)

In order for community- owned solar groups to secure a tax-exempt investment, they should consult with a certified public accountant and/or tax attorney to verify whether their interest of furthering a charitable or educational purpose, aligns with section 501(c)(3) of the Internal Revenue Code and the state equivalent. In the end, L3Cs help a for-profit business express a strong commitment to educational and/or charitable purpose and through its potential PRI status attract foundation and donor funding. An L3C is unlikely to hold greater benefits than an ordinary LLC, for the purposes of a community-owned group net metering project.

**A Consumers’ Cooperative**

A consumers’ cooperative corporation (co-op) is an entity that prioritizes the common goals of its members. A co-op is a legal entity owned and democratically controlled by its members. Here, the members use the service the cooperative offers and are referred to as “patrons”. In a consumer cooperative the patronage is the purchase of goods from such cooperative.[[11]](#footnote-11) In a community solar consumer cooperative, the members or patrons would form a cooperative to construct a solar array and purchase its solar energy. A members’ patronage is measured by the amount of energy he/she buys from the cooperative.[[12]](#footnote-12) Community solar groups can form a cooperative by filing articles of incorporation with the Secretary of State’s office. In addition, groups should create bylaws governing members’ relationships, and their respective duties, and clearly define the managing obligations of the board of directors.

A consumers’ co-op structure appeals to groups seeking to organize a group net metering project, because of the democratic nature of its governance and management. In addition, co-ops are lucrative because its members can pool their financial resources together to leverage debt financing[[13]](#footnote-13). However, there are some significant drawbacks to using this model for a community solar project. Members traditionally have little input into day-to-day and big business operations decisions.[[14]](#footnote-14) However, significant decisions like an amendment to a bylaw will require an all member vote.[[15]](#footnote-15) Moreover, each fiscal year the cooperative’s board decides how to distribute the co-op’s net earnings after expenses.[[16]](#footnote-16) The co-op could save its revenue for emergency expenses or allocate the surplus to members based on their patronage.[[17]](#footnote-17) To qualify for a tax benefit, co-ops adhere to Subchapter T of the Internal Revenue Code when allocating patronage dividend distributions to its members.[[18]](#footnote-18) However, regardless the value of a member’s dividend, each co-op member receives one vote. Voting rights are unbundled from financial investment.

Further, members have limited equity in a cooperative.[[19]](#footnote-19) When a member leaves a cooperative, he/she collects only what is available in their capital account; usually it is their initial capital contribution, rather than the market value of their share of the business.[[20]](#footnote-20) Additionally, such collection of capital contribution becomes a loan from the member leaving the co-op. Then the co-op will pay back such amount over a period identified in the initial member’s contract.[[21]](#footnote-21) Funding a co-op can be a struggle because the corporation may not give non-member investors, power to make significant decisions. [[22]](#footnote-22)The Internal Revenue Service agency views such allocation of rights to non-members as deviation from “operating as a cooperative.”[[23]](#footnote-23)

Analyzing a cooperatives tax benefits, a co-op is not eligible to apply for a 501(c)(3)-tax exemption.[[24]](#footnote-24) Nonetheless, a co-op satisfying the requirements in Sub-chapter T of the Internal Revenue Code can “avoid traditional corporate double-tax and the corporation won’t have to pay income tax on its net earnings.” [[25]](#footnote-25) Such requirement is met if “20 percent of every patronage dividend is paid in cash.” [[26]](#footnote-26)If the co-op meets Sub-chapter T, its members will only pay income tax based on their share of the overall cooperative’s net earning.[[27]](#footnote-27) However, each member will pay income tax on their total patronage dividend regardless of whether it is a cash payment or a credit to a “member’s capital account.”[[28]](#footnote-28)

Lastly, a consumer cooperative is not as suitable a business entity as an LLC for the VLS community net-metered solar model. The VLS model is not organized to distribute net-earnings to its members, other than in the form of net-metering credits. The main purpose of a consumers’ co-op is delivering goods or services instead of producing a high profit from selling such good or service. Federal securities regulations make it difficult for members to capitalize on financial returns to the company and earn a profit on their initial investment. Nevertheless, a consumer co-op model is an option to community solar groups.

**Mutual Benefit Enterprise**

The Mutual Benefit Enterprise (MBE), also known as a limited cooperative association, is another hybrid LLC structure that combines the LLC’s financial and governance flexibility with the missions and goals of a traditional cooperative.[[29]](#footnote-29) 11C V.S.A. § 104 defines a mutual benefit enterprise as “an autonomous, unincorporated association of persons united to meet their mutual interests through a jointly owned enterprise primarily controlled by those persons.”[[30]](#footnote-30) The statute permits combining (1) ownership, financing, and receipt of benefits by the members for whose interests forms the enterprise; and (2) separate investments in the enterprise by members who may receive returns on their investments and a share of control. [[31]](#footnote-31)Vermont has no restriction on a mutual benefit enterprise organizational purpose. The state allows individuals or businesses to “unite to meet their mutual business interests by creating and using a jointly owned enterprise.”[[32]](#footnote-32) The MBE improves the “equity investment opportunities for capital-intensive and startup cooperative enterprises by allowing, but not requiring, the MBE to have voting investor members in addition to patron members.”[[33]](#footnote-33) An MBE does not require all members to participate in-group governance, as in a cooperative. “The relations between a mutual benefit enterprise and its members are consensual and are organic.”[[34]](#footnote-34) This model holds great promise for community-owned solar because it is more flexible than an LLC, and less cumbersome than a cooperative.

**Multilateral Licensing Agreement**

The multilateral licensing agreement (MLA) is a legal agreement between all stakeholders articulating government of the group. If a group chooses to organize through a MLA, the agreement should contain all of the provisions required to obtain a Certificate of Public Good, addressed in Appendix C.

The multilateral licensing agreement preserves tax benefits for multiple parties, allows participants discretion to tailor the structure of their association, and minimizes the cost of execution. Participants may select a single administrator to oversee communications and operations for the net metering group.

Unfortunately, an MLA lacks liability shielding. Under the LLC model, each member enjoys liability that does not exceed his or her investment in the project. The MLA offers no such protection. To mitigate liability for any direct or indirect harm upon third parties by the solar facility, participants may purchase liability insurance on the project.

1. Pahl Greg, Power From The People: How To Organize, Finance, and Launch Local Energy Projects82 (Chelsea Green., 2012). [↑](#footnote-ref-1)
2. James D. Cox, Thomas L. Hazen, Business Organizations Law 28 (Thomson Reuters., 3d ed. 2011). [↑](#footnote-ref-2)
3. Vermont Secretary Of State, Limited Liability Company, <https://www.sec.state.vt.us/corporations/start-or-register-a-business/limited-liability-company.aspx#reg> (last visited July 20, 2015). [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. Vt. Stat. Ann. tit. 11, § 4001 (West 2015). [↑](#footnote-ref-5)
6. Janelle Orsi, Practicing Law In The Sharing Economy: Helping People Build Cooperatives, Social Enterprise, And Local Sustainable Economies 175 (2012). [↑](#footnote-ref-6)
7. Vt. Stat. Ann. tit. 11, § 4001 (West 2015). [↑](#footnote-ref-7)
8. Orsi, *supra* note 6, at 176. [↑](#footnote-ref-8)
9. *Id.* [↑](#footnote-ref-9)
10. Vt. Stat. Ann. tit. 11 § 4001 (West 2015). [↑](#footnote-ref-10)
11. Orsi, *supra* note 6, at 186. [↑](#footnote-ref-11)
12. *See* Orsi, *supra* note 6, at 192. [↑](#footnote-ref-12)
13. Cox*, supra* note 2,at 83. [↑](#footnote-ref-13)
14. Orsi, *supra* note 6, at 194. [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. *Id.* [↑](#footnote-ref-17)
18. Orsi, *supra* note 6, at 195. [↑](#footnote-ref-18)
19. *Id.* [↑](#footnote-ref-19)
20. Orsi, *supra* note 6, at 194. [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *See* Orsi, *supra* note 6, at 198. [↑](#footnote-ref-22)
23. *Id*. [↑](#footnote-ref-23)
24. *See* Orsi, *supra* note 6, at 197. [↑](#footnote-ref-24)
25. *See* Orsi, *supra* note 6, at 195; 26 U.S.C.A. § 1381; 26 U.S.C.A. § 1382; 26 U.S.C.A. § 1383. [↑](#footnote-ref-25)
26. *Id.* [↑](#footnote-ref-26)
27. *Id.* [↑](#footnote-ref-27)
28. *Id.* [↑](#footnote-ref-28)
29. Vt. Stat. Ann. tit. 11. § 4162 (West 2015); Vt. Stat. Ann. tit. 11C. § 105 (West 2012). [↑](#footnote-ref-29)
30. *Id.* [↑](#footnote-ref-30)
31. *Id.* [↑](#footnote-ref-31)
32. Vermont Secretary Of State’s, <https://www.sec.state.vt.us/corporations/start-or-register-a-business/mutual-benefit-enterprise.aspx> (last visited July 25, 2015). [↑](#footnote-ref-32)
33. *See* i*d.* [↑](#footnote-ref-33)
34. Vt. Stat. Ann. tit. 11C § 113 (West 2012). [↑](#footnote-ref-34)