

Memorandum

To: Lou Feletto
Administrator
Program Policy and Administration Branch (MIC:31)

Date: June 7, 2011

From: Carolee D. Johnstone 
Tax Counsel III (Specialist)
Tax and Fee Programs Division (MIC:82)

Subject: *Request for Legal Opinion – Energy Resources Surcharge and
Net Energy Metering
Assignment No. 11-060*

This is in response to your February 8, 2011, request to Acting Chief Counsel Christine Bisauta for a legal opinion regarding application of the Energy Resources Surcharge (Surcharge) to net energy metering customers of electric utilities. The Board of Equalization (BOE) Special Taxes and Fees Division (STFD) has received an inquiry from the _____ asking for clarification of the proper application of the Surcharge to eligible customer-generators participating in a net energy metering program.

Specifically, _____ asks how the BOE requires electric utilities to calculate the amount of surcharge due from an eligible customer-generator (customer). The question is whether the Surcharge is based on the amount of electricity supplied by the utility to the customer or on the net difference between the amount of electricity supplied by the utility and the amount of electricity generated by the customer and fed back to the electric grid.

As discussed below, the Surcharge should be applied to the total amount of electricity supplied by the utility and consumed by the customer. Whether the customer is a “net consumer” or a “net generator” of electricity does not affect how the surcharge is applied.

BACKGROUND FACTS AND LAW

Under the Public Utilities Code (PUC), “net energy metering” involves “measuring the difference between the electricity supplied through the electric grid and the electricity generated by an eligible customer-generator and fed back to the electric grid over a 12-month period” (PUC, § 2827, subd. (b)(5).) Net energy metering is accomplished by using a single meter capable of registering the flow of electricity in two directions, so that the customer is accurately billed or credited. (PUC, § 2827, subd. (c)(1).)

An "eligible customer-generator" is, in relevant part:

[A] residential [customer], small commercial customer . . . , commercial, industrial, or agricultural customer of an electric utility, who uses a solar or a wind turbine electrical generating facility . . . with a capacity of not more than one megawatt that is located on the customer's . . . premises, and is interconnected and operates in parallel with the electric grid, and is intended primarily to offset part or all of the customer's own electrical requirements. (PUC, § 2827, subd. (b)(4).)

These customers may be net surplus generators or net consumers, and the electric utility is required to bill the customer for the electricity used during a certain period (e.g., one month or 12 months), depending on whether the customer was a net consumer or a net surplus generator during that period. (PUC, § 2827, subds. (h)(1) & (i)(3).) Where the electricity supplied by the utility exceeds the electricity generated by the customer during the same period, the customer is a net electricity consumer. (PUC, § 2827, subds. (h)(2) & (i) (3).)

The Surcharge is imposed pursuant to the Energy Resources Surcharge Law (part 19 (commencing with section 40001) of division 2 of the Revenue and Taxation Code (RTC)). "A surcharge is imposed on the consumption . . . of electrical energy purchased from an electric utility," at a rate that is fixed by November of each year, to be effective the next January, by the California Energy Resources Conservation and Development Commission (Energy Commission), not to exceed three-tenths mill (\$0.0003) per kilowatthour. (RTC, § 40016 [emphasis added].) "Consumption" is "the utilization or employment of electrical energy," but does not include receipt by an electric utility of electrical energy for resale, and a "consumer" is "any person receiving for consumption electrical energy furnished by an electric utility . . ." (RTC, §§ 40008 & 40009.) Further, "[e]very person consuming electrical energy in this state purchased from an electric utility . . . is liable for the surcharge." (RTC, § 40018 [emphasis added].)

DISCUSSION

As indicated above, the Surcharge is imposed on the consumption of electricity, and every person who consumes electricity purchased from, i.e., supplied by, an electric utility is liable for the surcharge. PUC section 2827 provides that the amount of electricity consumed by customer-generators may be offset by the amount of electricity generated by these customers; the utility will bill the customer if the amount consumed exceeds the amount generated for the period and will credit or compensate the customer if the amount generated exceeds the amount consumed for the period. (See PUC, § 2827, subds. (h) & (i).) However, with the exception of certain exemptions not relevant here, no provision in the Energy Resources Surcharge Law provides for offset of the amount of electricity consumed on any basis. In other words, the fact that the customer also generates electricity does not alter the fact that the customer has consumed electricity purchased from (i.e., supplied by) an electric utility.

Furthermore, when the electric utility bills the customer at the end of each period, the amount of electricity consumed by the customer is offset by the amount of by the electricity generated by the customer and fed back to the electric grid. (PUC, § 2827, subds. (b)(5), (h), (i).) Hence, the electricity generated by the customer is a form of consideration "paid" by the customer to the

electric utility in exchange for the electricity the customer consumed, reducing the amount of money the customer would otherwise owe to the utility for the electricity it consumed. Again, the electricity generated by the customer and fed back to the grid does not reduce the amount of electricity the customer consumed.

Accordingly, the Surcharge must be applied to the total amount of electricity supplied by the utility and consumed by the customer, and whether the customer is a "net consumer" or a "net generator" does not affect how the surcharge is applied.

Please let me know if you have any questions regarding the information provided here.

CDJ/mcb

cc: Lynn Bartolo (MIC:31)
Christine Bisauta (MIC:82)
Stephen Smith (MIC:82)