



STATE BOARD OF EQUALIZATION

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Executive Director

December 24, 1997

Ms. \_\_\_\_\_

Re: Electrical Energy Surcharge Law

Dear Ms. \_\_\_\_\_

Your October 10 and \_\_\_\_\_ letters were recently referred to the Legal Division for reply. I understand from your letters and my discussion with Board staff that you are inquiring regarding how the Energy Resources Surcharge Law will apply once the deregulation of the electrical energy industry is implemented and are requesting that the energy surcharge be applied to the distribution volumes of electrical energy.

As you are aware, the Energy Resources Surcharge Law (Rev. & Tax. Code § 40001 et seq.)<sup>1</sup> imposes a surcharge on the consumption in this state of electrical energy purchased from an electric utility on or after January 1, 1975 (Rev. & Tax. Code § 40016). While the ultimate liability for the surcharge is on the person consuming electrical energy in this state purchased from an electric utility (Rev. & Tax. Code § 40018), every electric utility making sales of electrical energy to consumers in this state is required to collect the surcharge from each consumer (other than a consumer that is an electric utility) at the time it collects its billing from the consumer (Rev. & Tax. Code § 40019) and report and remit the surcharge to the Board of Equalization (Rev. & Tax. Code §§ 40061 et seq.). Therefore, notwithstanding deregulation, only the electric utility actually selling the electrical energy to a consumer is required to collect, report and remit the surcharge to the Board of Equalization.

For example, using the scenario in your October 10 letter, if a customer chooses an alternative energy supplier (referred to as an Electric Service Provider or "ESP") on or after January 1, 1998, PG&E, will deliver the energy and bill the customer/consumer in accordance with CPUC approved tariffs for distribution services. However, the ESP will be the electric utility selling the electrical energy to the customer/consumer, and the ESP, not PG&E, will be required under Rev. & Tax. Code § 40019 to collect, report and remit the surcharge. PG&E will be

<sup>1</sup> A copy of the Board's pamphlets setting forth the Energy Resources Surcharge Law and Regulations are enclosed for your convenience.

*File*

Ms

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responsible under Rev. & Tax. Code § 40019 to collect, remit and report the surcharge for those customers to whom PG&E is selling the electrical energy, i.e., those customers who do not chose an ESP. However, PG&E will not be required to report concerning customers to whom it only provides delivery of electrical energy.

Only one entity is required to collect and remit the surcharge, and that is the electric utility that sells energy to a consumer. The law does not provide for the surcharge to be applied to the distribution volumes of electrical energy. Thus, when the law is applied correctly, the surcharge is collected only once, regardless of an electric utility's billing practices.

While the current Electrical Energy Surcharge Return does not specifically refer to the sale of electrical energy to an ESP, energy sales by PG&E to ESP's should be reported on line 4 of the return as a deduction. The Board's staff is in the process of revising the instructions to the return to make this clear.

I hope that this letter answers your questions and concerns. Please contact me at the above address if you have any further questions.

Sincerely,

  
Monica Gonzalez Brisbane  
Tax Counsel

cc: Mr. Monte Williams, Chief  
Excise Taxes Division (MIC:56)

**M e m o r a n d u m**

To : Monte Williams, Chief  
Excise Taxes Division MIC: 56

Date: February 18, 1998

From : Monica Gonzalez Brisbane *MGB*  
Tax Counsel

Subject: **Energy Deregulation**

I am writing in response to your January 5, 1998 memorandum requesting a legal opinion regarding the Energy Resources Surcharge Law (Part 19, Division 2, Revenue and Taxation Code). Your specific questions are set forth below with the opinion following:

**(1) Does Section 40019.1 allow a utility to collect the surcharge from another utility that will resell the energy to consumers if a written agreement is in place and approved by the Board?**

Section 40019.1 allows a utility to collect the surcharge from another utility that will resell the energy to consumers if a written agreement is in place and approved by the Board. Regulation 2300 currently sets forth terms that the Board has determined are acceptable in an agreement. If it is determined that other types of agreements are contemplated, then the Board should adopt regulations setting forth what should be included to have such an agreement approved.

This response should not, however, be confused with my understanding of changes in the energy industry caused by deregulation; and the roles of the Electric Service Providers (ESPs), the Electrical Corporations (ECs), and the Utility Distribution Companies (UDCs). My understanding is that the Public Utilities Commission has issued an opinion requiring the UDCs and the ECs to make available three types of billing arrangements: (1) the UDC or ECs bill all charges (including the ESPs charges), (2) the ESPs bill all charges (including the UDC or ECs charges), and (3) the ESPs and the UDC or EC would each send their own billing. We view these as billing arrangements that do not come within the scope of section 40019.1, which shifts the collection responsibility one level up the chain of distribution. In other words, the UDC or EC is not collecting the surcharge from the ESP, or vice versa. The parties are merely making a billing arrangement to determine which entity - the one that sells the energy or the one that transports it - will send the bill to the customer. It would still remain the legal responsibility of the electric utility selling electrical energy to the consumer to register, collect, report and remit any surcharge owed to the Board. It is this last point that I believe will need to be made clear to the ESPs, the ECs and the UDCs -- no matter what billing arrangements are agreed

Monte Williams  
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upon, it is only the electric utility selling the electrical energy to the consumer who must register, collect, report and remit any surcharge owed to the Board.

**(2) If the answer to the previous question is yes, which party has the record keeping requirements and is the Board transferring the liability for the collection of the surcharge from one party to another?**

As discussed above, section 40019.1 does not apply to the billing arrangements set forth by the Public Utilities Commission. Notwithstanding any billing arrangements the UDCs, ECs or ESPs may have, the liability for the collection remains as set forth in the law -- the electric utility making the sales to the consumer is required to register, collect, report and remit any surcharge owed.

**(3) Does Section 40175 give the Board the authority to require the ISO and the scheduling coordinators to give it information to assist in determining the taxpayer base under deregulation?**

Section 40175 gives the Board the authority to require an electric utility, consumer, and any other person generating, purchasing, transmitting, distributing or consuming electrical energy to give it "additional, supplemental or other reports." This would include the ISO, which is either an electrical utility<sup>1</sup> or "other person generating, purchasing, transmitting, distributing or consuming electrical energy", but would not include the scheduling coordinators. As I understand the role of the scheduling coordinators, they merely schedule the transmission of the electrical energy through the ISO, i.e., they do not generate, purchase, transmit, distribute or consume electrical energy.

If you have any questions, please contact me at 322-0438.

MGB:es  
Energy.mem

cc: Ms. Mary C. Armstrong  
Mr. Allan K. Stuckey (MIC:33)  
Ms. Janet Vining  
Ms. Judy Nelson  
Ms. Susan Bennett  
Mr. Vic Day (MIC:56)  
Mr. Bill Kimsey (MIC:56)

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<sup>1</sup> I am still researching whether the ISO falls under the definition of electric utility (§ 40010). My initial interpretation is that it does. However, I do not think that anyone contemplated that the ISO would have to register and file a return. I will advise you as soon as we make that determination.

**M e m o r a n d u m**

To : Monte Williams, Chief  
Excise Taxes Division MIC: 56

Date: March 4, 1998

From : Monica Gonzalez Brisbane *MG*  
Tax Counsel

Subject: **Energy Deregulation: follow-up memorandum**

I am writing in response to your February 19, 1998 e-mail setting forth two follow-up questions to my February 18th memorandum to you. Your specific questions are set forth below with the opinion following:

**(1) If we did a regulation under Section 40019.1, allowing the Utility Distribution Companies (UDC) or Electrical Corporations (EC) to collect from the Energy Service Provider (ESP), would that transfer liability to the UDC or EC or would the liability still rest with the ESP?**

Notwithstanding Section 40019 which does not allow one electric utility to collect the surcharge from another electric utility (who is a consumer), Section 40019.1 does allow the electric utility making the sale to another electric utility to take on the responsibility to collect, report and remit the surcharge pursuant to an agreement with the purchasing electric utility which is approved by the Board. Regulation 2300 currently sets forth terms that the Board has determined are acceptable in such an agreement. However, notwithstanding any agreements, the consumer (in this case an electric utility purchasing from another electric utility for self-consumption) always remains ultimately liable for the surcharge, unless the consumer can show payment of the surcharge to an electric utility registered with the Board (Section 40018). If such payment cannot be shown, the consumer remains liable until the surcharge has been paid to the state (Section 40018).

Viewing § 4009.1 in light of the changes in the energy industry caused by deregulation, and the roles of the new ESPs, the ECs, and the UDCs, that section does not authorize a regulation which would allow the UDC or EC to collect from the ESP. The ESP would not owe the surcharge as a consumer, because it is not purchasing the electrical energy for its own consumption, like the electric utilities who lobbied for and utilize Section 40019.1 and Regulation 2300. Any arrangement between a UDC or EC and an ESP for collection would be just that, a collection/billing arrangement for convenience, not to collect a surcharge actually due from the ESP. To attempt to implement a regulation as you propose would be in excess of the Board's statutory authority under Sections 40019 and 40019.1.

*MG*

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**(2) Since "distribution" is not defined, can we make a case that the scheduling coordinator is part of the distribution process and therefore subject to Section 40175?**

In my opinion, such an argument would not be successful. While the term "distribution" is not defined by statute, Webster's Collegiate Dictionary defines the word "distributing" to mean "to give out or deliver". The role of the scheduling coordinators is to merely schedule the transmission of the electrical energy through the Independent System Operator (ISO), not to actually transmit or deliver the electrical energy. Therefore, it remains my opinion that the Board cannot utilize Section 40175 to obtain information from scheduling coordinators.

If you have any questions, please contact me at 322-0438.

MGB:es  
Energy2.mem

cc: Ms. Mary C. Armstrong  
Mr. Allan K. Stuckey (MIC:33)  
Ms. Janet Vining  
Ms. Judy Nelson  
Ms. Susan Bennett  
Mr. Vic Day (MIC:56)  
Mr. Bill Kimsey (MIC:56)