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June 19, 2000

Rex Carpenter
General Manager
Nebraska Rural Electric Association
800 South 13th Street
Box 8204
Lincoln, NE 68501

Re: Power Bills

Dear Rex:

You have asked me to comment on whether certain components of an electric power bill are subject to the gross revenue tax, state sales tax and lease fees. I understand that a number of rural districts are considering modifying their power bills in order to provide customers with more detailed information concerning the components of their bill.

In responding to the question, it may be helpful to review and examine the statutes and regulations governing a public power district's (PPD) (i) authority to charge for electric service; (ii) obligation to pay gross revenue tax; and (iii) obligation to pay sales and use tax.

A. Rates and charges.

The authority for PPDs to charge for electric service is found in *Neb. Rev. Stat.* § 70-655(1) which provides in part:

“ . . . the board of directors of any [public power] district . . . shall have the power and be required to fix, establish, and collect adequate rates, tolls, rents, and other charges for electrical energy . . . and for any and all other commodities, including ethanol, services, or facilities sold, furnished, or supplied by the district, which rates, tolls, rents, and charges shall be fair, reasonable, nondiscriminatory, and so adjusted as in a fair and equitable manner to confer upon and distribute among the users and consumers of commodities and services furnished or sold by the district the benefits of a successful and profitable operation and conduct of the business of the district. . . .” (Emphasis added.)

A PPD not only has authority to charge a customer for the electricity furnished to the customer, but also for tolls, rents and other charges including services or facilities.

B. Gross Revenues Tax.

The origin of the gross revenue tax is found in the Nebraska Constitution. Article VIII, Section 11 provides in part:

“... The Legislature may require each ...public corporation [and political subdivision organized primarily to provide electricity] to pay to the treasurer of any county in which may be located any incorporated city or village, within the limits of which such public corporation sells electricity at retail, a sum equivalent to five (5) percent of the annual gross revenue of such public corporation derived from retail sales of electricity within such city of village....”

The Legislature has implemented the authority given to it by the Constitution and requires that a PPD pay a gross revenue tax. *Neb. Rev. Stat.* § 70-651.03 provides in part:

“... every public corporation and political subdivision of the state, which is organized primarily to provide electricity or irrigation and electricity, and which sells electricity at retail within incorporated cities or villages, shall . . .pay to the county treasurer of the county in which any such incorporated city or village may be located, a sum equivalent to five percent of gross revenue derived by it . . . from retail sales of electricity within such incorporated city or village”
(Emphasis added.)

Accordingly, a PPD is required to pay 5% of the gross revenue it receives from the retail sales of electricity within cities and villages to the county in which such city or village is located.

C. Sales and Use Tax.

The Legislature, in *Neb. Rev. Stat.* § 77-2701.02, imposed a 5% sales tax.

Neb. Rev. Stat. § 77-2703(1) provides that the tax is imposed upon the gross receipts of every person engaged as a public utility.

Neb. Rev. Stat. § 77-2702.07(2)(c) defines gross receipts of every person engaged as a public utility in the furnishing of electricity as “gross income received from the furnishing of such services upon billings or statements rendered to consumers for such utility services.”

Neb. Rev. Stat. § 77-2703(2) imposes a use tax on rentals of property at the rate of 5%. The tax is imposed on the person using the property, however, the retailer engaged in business of leasing or renting property is required to collect the tax. A PPD is considered a retailer for the purposes of this statute and is required to collect the tax.

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Accordingly, a public power district, unless the sales is exempt for irrigation or farming, is required to pay 5% of the gross income received from furnishing electricity and the rental of property.

Neb. Rev. Stat. § 77-2704.13 exempts from sales and use taxes “(2) [s]ales and purchases of electricity . . . when more than fifty per cent of the amount is for use directly in irrigation or farming.”

The State of Nebraska Department of Revenue has adopted rules and regulations pertaining to sales and use tax (Title 316, Chapter 1). The regulations relevant to the discussion here are as follows:

(1) Regulation 1- 007.01C defines gross receipts as the gross revenue received from furnishing electricity.

(2) Regulation 1-007.02A states that charges for installing or servicing property as a requirement in the furnishing of electricity is not included in the definition of gross receipts.

(3) Regulation 1- 089.01 states that the sale, purchase, use, or other consumption of electricity may be exempt from sales and use tax if more than 50% of the amount purchased is used or directly consumed in irrigation or farming.

(4) Regulation 1- 089.03 deals with determining the percent of exemption. It states “[I]f the purchaser properly determines that more than 50% of the energy charge through a single meter is consumed for a qualified use, the entire billing for that meter is exempt from the sales and use tax. However, if the purchaser determines that 50 percent or less of the energy charge through a single meter is consumed for a qualified use, he or she cannot issue an exempt certificate on that meter billing. The entire charge (qualified and nonqualified use) is taxable.”

(5) Regulation 1-089.05E states that “[p]ersons furnishing electricity and gas services as public utilities may elect to assume or absorb the applicable sales tax or may elect to pass the tax to the final consumer in the same manner as all other retailers. . .”

(5) Regulation 1-074 governs warranties and guarantee and states that “[a] charge for the purchase of a warranty, guarantee, service agreement, or maintenance agreement, is taxable, whenever the item covered is taxable.

Both the gross revenue tax and sales tax are imposed at the same rate, 5%, and are based on the gross revenue received from the retail sale of electricity. Nonetheless, the gross revenue tax applies only to sales of electricity at retail in cities and villages, while the sales tax applies to the retail sale of electricity throughout the operating territory of a public power district. The use tax (5%) is imposed on the rental of property and is not subject to the exemption for irrigation and farming.

D. Lease Fee. Some public power districts serve the electric customers residing in city and villages at retail. If the district does not own the electric distribution system within the city or village, it pays a lease fee to the city or village. The lease fee is paid pursuant to a lease that the PPD has either entered into directly or assumed from the Nebraska Public Power District ("NPPD"). I have examined a standard NPPD lease that I believe to be a typical lease with a city or village. The lease provides that the lease fee is based on the "gross retail electric revenues received." (ARTICLE IV, PAYMENTS, NPPD Standard Lease.)

You have asked the following specific questions which I will try to comment on in light of the foregoing authorities.

QUESTION 1: Does the sales tax apply to a minimum electric charge, even though the customer does not use the minimum?

RESPONSE: Yes, unless the sale is exempt for irrigation or farming. The definition of gross receipts provides that the tax is applicable to the gross revenues received by the utility for the sale of electricity. Therefore the minimum charge is applicable to the tax. If a farmer or rancher has an exemption certificate on file with the utility, the sale would not be subject to sales tax.

QUESTION 2: Does the gross revenue tax apply to the amount that the customer is charged for electricity?

RESPONSE: Yes, the gross revenue tax is based on the retail sales of electricity within a city or village.

QUESTION 3: Does the lease fee apply to the amount the customer is charged for electricity?

RESPONSE: Yes. The lease fee is based on the gross retail electric revenues received.

QUESTION 4: Is the gross revenue tax, sales tax, or lease fee applicable to the charge for security lights?

RESPONSE: It depends. To the extent that the security light is located in a city or village, the electric charge associated with the security light is subject to the gross revenue tax and the lease fee. The sales and use tax question is not so simple and will primarily be determined by the way the PPD charges for the electricity and rental/ maintenance of the fixture. I understand that the situation with some PPDs is that the customer is charged a single monthly fee that includes both the rental/maintenance charge for the fixture and the charge for electricity. In this case, the electricity may not be metered and the single monthly charge is based at least in part on the assumption that a security light uses X amount of Kw per hour and the light is on from dawn to dusk. The sales tax is only applicable to the charge for electricity. The use tax is applicable to the rental/maintenance fee. The rental/maintenance charge for the fixture should not be included in the gross revenue tax or lease fee. However, to the extent that a PPD does not meter the electric charges for the security light, in at least one instance that I am aware of, the Department of Revenue took the position that the entire charge including the electric charge was

considered a rental charge subject to the use tax. To the extent that the electricity is metered and the customer has filed a sales tax exemption with the PPD, the sale is exempt from sales tax. To the extent that the entire security light fee is included in the electric rate for the security light, and one charge is made for electricity that is metered, the entire charge is probably exempt if the customer has filed for the exemption. If not, the entire amount is subject to sales and use tax. In any event, the only way that the rental/maintenance fee can arguably be exempt, if it is built into the electric rate that is charged through a meter. Otherwise, it is subject to the use tax and there is no exemption.

QUESTION 5: Does the gross revenue tax, sales tax, or lease fee apply to the fee charged the customer for surge protection or any other products marketed by NEBesco?

RESPONSE: No, in so far as the gross revenue tax and lease fee is concerned. As I understand the surge protection fee, it is primarily a charge for a warranty in connection with the sale of the surge protection equipment. If that is the case, it is subject to sales tax.

QUESTION 6: Is the sales tax or gross revenue tax applicable to the amount charged for the lease fee?

RESPONSE: No, because the lease fee is not a charge for the sale of electricity, even though it is based on the sale of electricity.

QUESTION 7: Is sales tax applicable to the gross revenue tax?

RESPONSE: No, because the gross revenue tax is not a charge for the sale of electricity.

QUESTION 8: Is the gross revenue tax applicable to the amount charged the customer for sales tax or the lease fee?

RESPONSE: No, because the gross revenue tax is only applicable to the amount derived from the sales of electricity within the city or village. Neither the sales tax nor the lease fee is directly derived from the sale of electricity.

If I can clarify anything contained in this letter or if you have further questions or comments, kindly advise.

Sincerely,

FOR THE FIRM



Steven G. Seglin

SGS:rrk