

Memorandum

To: Ms. Debbie Kalfsbeek
Chief
Special Taxes Audit and Carrier Division (MIC:62)

Date: August 19 2014

From: Kevin B. Smith 
Tax Counsel
Tax and Fee Programs Division (MIC:82)

Subject: **Natural Gas Surcharge and Out-of-State Motor Fuel Providers**
Assignment No. 12-518

This memo is in response to your request for a legal opinion regarding the application of the natural gas surcharge imposed pursuant to article 10 (commencing with section 890) of chapter 4 of part 1 of division 1 of the Public Utilities Code¹ (natural gas surcharge law) to liquefied natural gas² (LNG) that is transported into California by truck and consumed either as motor fuel or by an industrial user in this state. The natural gas surcharge is administered by the Board of Equalization (BOE) on behalf of the California Public Utilities Commission (CPUC) pursuant to the Fee Collection Procedures Law (FCPL).³

Specifically, you first ask if the consumption in this state of natural gas as a motor fuel is subject to the natural gas surcharge. If this consumption is subject to the surcharge you next ask whether the company that transports the LNG into California is a public utility gas corporation that is obligated to collect the surcharge under the natural gas surcharge law. Finally you ask if consumption of LNG that the company trucks into the state and delivers to an industrial user in this state is subject to the natural gas surcharge. Each of these questions is discussed below.

BACKGROUND

Facts

According to the facts you have provided, a company (Company) operates a gas plant just across the California border in the state of Arizona. Company pulls natural gas off of an interstate pipeline in Arizona and cools the gas down to form LNG. Company then transports the LNG into California by truck and trailer and delivers the LNG to customers for use as motor fuel or in their industrial processes. We understand that these are retail sales to customers that are for the most part, the ultimate consumers of the LNG. In addition you state that Company also makes wholesale sales of LNG to a California subsidiary (Subsidiary) that operates retail LNG and compressed natural gas (CNG) vehicle fueling stations in the state.

¹ All future statutory references are to the Public Utilities Code unless otherwise indicated.

² Also referred to as "liquid natural gas." (See, e.g., Rev. & Tax. Code, § 8651.6.)

³ Part 30 (commencing with section 55001) of the Revenue and Taxation Code (R&TC).

Relevant Law

The natural gas surcharge is imposed on the consumption of natural gas, unless the gas is used for an exempt purpose, such as to generate power for sale. (§§ 890, subd. (a); , 896.)

Consumption is defined as the “the use or employment of natural gas.” (§ 896.) The natural gas surcharge is collected by public utility gas corporations from all persons who receive gas service from the public utility gas corporation. (§ 890, subds. (b)(1).)

The CPUC regulates public utility gas corporations operating in California. (§ 216, subd. (b).) A “gas corporation” is defined to include “every corporation or person owning, controlling, operating, or managing any gas plant for compensation within this state.” (§ 222 [emphasis added].) A “public utility” is defined to include, among other things, a “gas corporation.” (§ 216, subd. (a) [referred to in the natural gas surcharge law as a “public utility gas corporation” (§ 891, subd. (b))].)

A person who sells, or who owns or operates a facility that sells, CNG at retail to the public in this state for use as motor vehicle fuel, which you state Subsidiary does, is not, for that reason alone, considered to be a “public utility” for purposes of regulation by the CPUC or, accordingly, a “public utility gas corporation” for purposes of the natural gas surcharge law. (§ 216, subd. (f); § 890, subd. (b); § 891, subd. (b).)

DISCUSSIONLNG Consumed as Motor Fuel in This State

As noted above, the natural gas surcharge is imposed on the consumption of all natural gas in this state, unless otherwise exempted. (§ 890, subd. (a).) At issue here is the consumption of natural gas, in the form of LNG, that Company delivers in California for use as motor fuel to power motor vehicles on state highways.⁴ Use of LNG as a motor fuel is not excluded from the definition of “consumption” and therefore may not be exempt from imposition of the natural gas surcharge. However, imposition of the natural gas surcharge is modified by additional criteria.

If Company were a “public utility gas corporation,” it would be required to collect the natural gas surcharge from these customers and remit it to the BOE. (§ 890, subd. (b)(1).) However, as noted above, a “gas corporation” is, as relevant here, “every corporation or person owning, controlling, operating, or managing any gas plant for compensation within this state.” (§ 222.) Since the gas plant that Company operates is located in Arizona, not California, Company is not a “gas corporation” for purposes of section 222 or a “public utility” or “public utility gas corporation” for purposes of section 216, subdivision (a), and section 891, subdivision (b). Therefore, Company is not required, pursuant to section 890, subdivision (b)(1), to collect the natural gas surcharge from these customers.

⁴ An excise tax of six cents per gallon is imposed on LNG “used in an internal combustion engine for generation of power to propel a motor vehicle on the highways” and is either collected from the user by the vendor of the LNG at the time the LNG is sold and delivered into the fuel tank of the motor vehicle or paid to the BOE by the user of the fuel. (R&TC, §§ 8604, 8651.6, 8732, 8753.) The revenue from this tax is deposited in the Highway Users Tax Account in the Transportation Tax Fund. (R&TC, §§ 9301-9304.) This excise tax on LNG is entirely separate from, and imposed for a different purpose than, the natural gas surcharge and will not be addressed in this opinion.

Although these customers are still consumers of natural gas in this state, they are purchasing the gas from a provider that is not a public utility gas corporation (i.e., Company). Accordingly, persons consuming natural gas sold by a provider that is not a public utility gas corporation, which would include Company, are not liable for the natural gas surcharge on the LNG they consume. (§ 890, subd. (b)(1).)

With respect to Subsidiary and other customers to whom Company delivers LNG in California and who then resell the LNG at retail to consumers for use as motor fuel, first, Company is not a “public utility gas corporation,” so is not required to collect the natural gas surcharge from these customers, and, second, these customers are not consuming the LNG themselves, so they are not liable for the surcharge.

Accordingly, we conclude that Subsidiary and the other customers to whom Company delivers LNG in California, and who then resell the LNG at retail to consumers for use as motor fuel, are not “public utility gas corporations” and are not required to collect the natural gas surcharge from their customers. Although their retail customers do consume the LNG for use as motor fuel, since, these consumers do not receive the natural gas from a public utility gas corporation, they are not liable for the natural gas surcharge on the LNG they consume.

Industrial Users of LNG

Regarding Company’s customers that receive LNG in California from Company and who then consume the LNG in their industrial processes. Because Company is not a “public utility gas corporation” it, would not be responsible for collecting the natural gas surcharge from its industrial-use customers to whom it delivers LNG in California.

Please let me know if you have any questions or would like further assistance with respect to this matter.

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cc: Marion Peleo – Legal Department, California Public Utilities Commission
Lynn Bartolo (MIC:57)