FLORIDA
DEPARTMENT
OF REVENUE
Executive Director
Lisa Echeverri

December 10, 2007

Ms. Michelle Hershel
Director, Regulatory Affairs
Florida Electric Cooperative Association, Inc.
2916 Apalachee Parkway
Tallahassee, FL 32301

Re: Letter of Technical Advice 07A-1462
Florida Electric Cooperatives Association
Gross Receipts Tax and Sales Tax – Tax Calculation on Net Billing Credits involving residential solar energy systems
Sections 203.01, 212.02, 212.06, 212.08, and 366.81, F.S. ("Florida Statutes")
Rule 25-6.065(6), F.A.C. ("Florida Administrative Code")

Dear Ms. Hershel:

Pursuant to Rule 12-11.003, F.A.C., taxpayers may seek informal written technical advice from the Department of Revenue ("Department"). Such advice is issued in the form of a Letter of Technical Advice ("LTA"). This LTA is being issued in response to your written request for informal guidance of August 7, 2007, concerning the delivery of excess electricity (generated by solar energy systems) from residential customers to electric utilities. Please note that this LTA constitutes the opinion of the writer only and does not represent the official position of the Department.

REQUESTED ADVISEMENT

You request clarification on the collection of sales tax and gross receipts tax when a residential customer interconnects a photovoltaic ("PV") electric system (i.e., solar energy system) with a cooperative's facilities. Your letter provides, in part, the following:

> Issue 1: Is the electricity sold to a residential customer that has provided an exemption certificate to the cooperative still exempt from sales tax on electricity under the household fuel exemption in Section 212.08(7)(j), F.S., even though the customer is now in the business of selling electricity?
>
> Issue 2: Is the sale of the customer's excess electricity to the wholesale cooperative exempt from sales taxes as a sale for resale?

Issue 3: Is the sale of excess electricity from the customer to the wholesale cooperative exempt from gross receipts tax as a sale for resale?

Issue 4: Does the cooperative have any sales tax liability for power generated and consumed by the customer that does not register on the cooperative's meter (i.e., that is not excess power)?

Issue 5: Does the cooperative have any gross receipts tax liability for power generated and consumed by the customer that does not register on the cooperative's meter (i.e., that is not excess power)?

Issue 6: What is the proper method to calculate sales and gross receipts taxes for residential and commercial customers utilizing net billing (Can the distribution cooperative apply the Net Billing Credit before the sales taxes are calculated and should it offset the distribution cooperative's revenues for calculating its gross receipts tax)?

FACTS

Your letter of August 7, 2007, provides, in part:

* * *

Some … customers own and operate small (less than 10kW) PV energy systems. [Certain electric cooperatives] ["the cooperatives"] offer a net billing option which allows customers to receive credits for excess electricity generated by their PV system. "Excess" electricity is the electricity that is generated by the customer that exceeds the customer's needs at that moment.

The metering/billing process is a multi-step transaction. Generally, after a customer notifies the cooperative that they would like to interconnect a PV electric system to the cooperative's facilities, the cooperative sends the customer an interconnection agreement and request for verification of insurance. Under the terms of the interconnection agreement, any excess electricity generated by the customer is sold to the **wholesale** cooperative provider. Once the distribution cooperative receives the executed documents, the customer's meter is changed out for a special meter (unless the customer's meter is already capable of measuring electricity in both directions) that measures both the amount of electricity supplied by the distribution cooperative to the customer and the excess electricity generated by the customer that is delivered to the wholesale cooperative.

The customer's account is set up to reflect the tariffed retail rate paid by the customer to the distribution cooperative and the rate paid by the wholesale cooperative to the customer (these rates may not be the same) for the excess electricity. The excess power delivered from the customer to the wholesale cooperative is then resold to the distribution cooperative. The resale of excess electricity generated by the customer to the wholesale cooperative is shown as a credit on the distribution cooperative's wholesale power bill. In

> turn, the distribution cooperative reflects the credit on the customer's bill. [emphasis in original]
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> * * *
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> The utility may install an additional meter or metering equipment on the customer's premises capable of measuring any excess kilowatt-hours produced by the SPS [a small photovoltaic system] and delivered back to the utility. … The value of such excess generation **shall be credited to the customer's bill** …. If the utility does not install such a meter or metering equipment, the utility **shall** permit the customer to net meter any excess power delivered to the utility by a single standard watt-hour meter capable of reversing directions to offset recorded consumption by the customer. If the kilowatt-hour of energy produced by the SPS exceeds the customer's kilowatt-hour consumption for any billing period, such that when the meter is read the value displayed on the register is less than the value displayed on the register when it was read at the end of the previous billing period, the utility **shall carry forward credit for the excess energy to the next billing period**. Credits may accumulate and be carried forward for a 12-month period specified by the utility in the SPS Interconnection Agreement. **In no event shall the customer be paid for excess energy delivered to the utility at the end of the 12-month period. [emphasis added]**

The Florida Public Service Commission exercises regulatory authority over utilities. Rule 25-6.065(6), F.A.C., governs the Interconnection of Small Photo Voltaic Systems. While the Rules of the Florida Public Service Commission do not guide us on Florida tax questions, this particular rule is relevant to our analysis because it provides for "net billing" and crediting. The rule provides, in part:

RESPONSE

This response is based on the specific facts and circumstances presented in your letter. This response does not consider situations involving "co-generation," "small power producers," "industrial manufacturing" or persons who produce electricity as a substitute for electricity produced by a utility (except as to your specific question in Issues 4 and 5).

Generally:

There are several things to consider when responding to the issues you present in your letter.

The first is determining whether the residential customer is "in the business" of selling electricity when it delivers excess electricity to the cooperative and receives a credit (or economic benefit under "net-billing"). If so, the next question begs: does this then defeat the exemption on the initial "cooperative to customer sale" for residential households?

"Business" is defined broadly at Section 212.02(2), F.S. It could be said that residential

customers, under the facts presented, are "in the business" of selling excess electricity back to the cooperatives because the residential customers are engaged in an activity for private gain or benefit (such a residential customer likely says at some point: "any excess electricity my PV generates, the cooperative must buy it back, and I will get a credit on my overall electric bill").

Next, if a residential customer is "in the business" of selling electricity and a "sale" is occurring (as that term if broadly defined at Section 212.02(15), F.S.), then arguably, the residential customer must register with the Department as a "dealer" (as that term is defined in Section 212.06(2), F.S.

Further, if a residential customer is "in the business" of selling electricity, then is the sale an exempt sale for resale because the cooperative will be reselling the electricity that it "bought" from the residential customer? The answer is: "yes." Your letter provides that under the terms of the interconnection agreements, any excess electricity generated by the residential customer is sold to the **wholesale** cooperative provider who then gives the **distribution** cooperative a credit on its bill.

But do these determinations involving "in the business" and "sales for resale" defeat the exemption enjoyed by residential customers under these facts. The answer is "no" for several reasons.

First, Section 212.08(7)(j), F.S., provides that the exemption is defeated if the utilities sold "are used" for a nonexempt purpose. Under these facts, the utilities sold by the cooperatives continue to be used for residential purposes by the residential households. The selling of excess electricity by the residential customer does not constitute a "use."

Secondly, we find it significant that utilities such as the cooperatives are required to credit and "net-bill" when residential customers deliver excess electricity to them. As we observed earlier, the Rules of the Florida Public Service Commission (and for that matter, Chapter 366, F.S. -- except for any specific provisions that involve the Department or laws it is charged to administer) do not direct the Department or the public on tax matters. However, the Department is mindful and respectful of the Legislative intent specifically provided for in Section 366.81, F.S. Rule 25-6.065(6), F.A.C., implements this Legislative intent. Section 366.81, F.S., provides, in part:

> The Legislature finds that it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens. … The Legislature further finds that the Florida Public Service Commission is the appropriate agency to adopt goals and approve plans related to the conservation of electric energy …. [T]he Legislature intends that the use of solar energy … be encouraged. …

Under the facts presented in your letter, reading Sections 212.08(7)(j) and 366.81, F.S., together leads to the conclusion that it would be impractical and unreasonable to require residential customers (under these facts) to register as "dealers" with the Department and be responsible for all of the attendant responsibilities that go along with being a "dealer." The residential customer's

delivery of excess electricity and the subsequent credit or "net-billing" does not defeat the exemption provided to residential customers. This conclusion also considers: (a) that the delivery of excess electricity is a "sale for resale" that carries out the Legislature's intent of promoting energy conservation and the use of solar energy; and (b) under the facts presented, Florida Sales Tax would not be due because the customer to cooperative "sale" is an exempt "sale for resale" and Florida Gross Receipts Tax would not be due because the "sale" is not to a "retail consumer."

Based on the discussion above, the Department turns to your specific issues.

Issue 1: Is the electricity sold to a residential customer that has provided an exemption certificate to the cooperative still exempt from sales tax on electricity under the household fuel exemption in Section 212.08(7)(j), F.S., even though the customer is now in the business of selling electricity?

Response: Yes. The exemption for residential households is not defeated. The Department does not issue "exemption certificates" to residential households.

Issue 2: Is the sale of the customer's excess electricity to the wholesale cooperative exempt from sales taxes as a sale for resale?

Response: Yes. The "customer to cooperative" sale is a "sale for resale" and is exempt from Florida Sales Tax.

Issue 3: Is the sale of excess electricity from the customer to the wholesale cooperative exempt from gross receipts tax as a sale for resale?

Response: Yes, but more fundamentally, it is not subject to Florida Gross Receipts Tax because the sale is not to a retail customer.

Issue 4: Does the cooperative have any sales tax liability for power generated and consumed by the customer that does not register on the cooperative's meter (i.e., that is not excess power)?

Response: A residential customer would still be exempt from Florida Sales and Use Tax. A commercial customer would be liable for use tax calculated on the cost price. *See* Section 212.06(1)(b), F.S. However, the commercial customer would be responsible for complying in that situation, not the cooperative.

Issue 5: Does the cooperative have any gross receipts tax liability for power generated and consumed by the customer that does not register on the cooperative's meter (i.e., that is not excess power)?

Response: No, the cooperative would not be liable, but the customer would be. Section 203.01(1)(i), F.S., provides:

> Any person other than a cogenerator or small power producer described in paragraph (h) who produces for his or her own use electrical energy which is a substitute for electrical energy produced by an electric utility as defined in s. 366.02 is subject to the tax imposed by this section. The tax shall be applied to the cost price of such electrical energy as provided in s. 212.02(4) and shall be paid each month. The provisions of this paragraph do not apply to any electrical energy produced and used by an electric utility.

Issue 6: What is the proper method to calculate sales and gross receipts taxes for residential and commercial customers utilizing net billing (Can the distribution cooperative apply the Net Billing Credit before the sales taxes are calculated and should it offset the distribution cooperative's revenues for calculating its gross receipts tax)?

Response: Florida Gross Receipts Tax is levied against the total amount of gross receipts **received** by a distribution company. [emphasis supplied] *See* Section 203.01(1)(c), F.S. The cooperatives should remit Gross Receipts Tax based on what they actually receive (and bill for what they will actually be receiving). In other words, if the bill to the customer is initially $100.00 but after credits is $75.00, Gross Receipts Tax would be due on the $75.00 because that is the total amount that is (or will be) received by the cooperatives.

Sales of electricity to residential households are exempt from Florida Sales Tax. Likewise, as discussed above, a "sale for resale" is exempt from Florida Sales Tax. So, for Florida Sales Tax purposes, how the customer is billed (in situations like the ones presented in your letter) is of no real consequence because no Florida Sales Tax is due on either of the transactions (the cooperative to customer sale, and subsequently, the customer to cooperative sale).

As noted in the first paragraph of this letter, this LTA is being issued in response to the disclosed facts and circumstances of your specific situation, and it does not constitute the official position of the Department. Rather, this letter represents the opinion of the writer only. If you wish an official binding statement, you may file a written request for a Technical Assistance Advisement. Rule Chapter 12-11, F.A.C., outlines the procedure to follow in making this request. This rule chapter of the Florida Administrative Code can be found at http://www.myflorida.com/dor/law/. Any request for a Technical Assistance Advisement should be sent to Technical Assistance and Dispute Resolution, Department of Revenue, P.O. Box 7443, Tallahassee, Florida, 32314-7443.

If you have any further questions with regard to this matter and wish to discuss them, you may contact me directly at (850) 922-4714.

Sincerely,

Eric Russell Peate
Senior Attorney
Technical Assistance & Dispute Resolution

Record ID: 34460