



Illinois Department of Revenue

Legal Services Office
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Springfield, IL 62794

SECOND NOTICE OF PROPOSED RULEMAKING

- 1) Agency: Illinois Department of Revenue
- 2) Title and Ill. Adm. Code Citation of Proposed Rulemaking: Electricity Excise Tax Law, 86 Ill. Adm. Code 511
- 3) Date, Issue, and page number of the Illinois Register in which the First Notice was published: April 12, 2024, Issue 15, 48 Ill. Reg. 5635
- 4) Text and Location of any Changes Made to the Proposed Rulemaking During the First Notice Period: No changes were made.
- 5) Final Regulatory Flexibility Analysis:
 - A. Summary of the issues raised by affected small businesses during the First Notice Period: It is not clear from the comments received if any of the commentors qualify as a small business. All comments received and issues raised are addressed in paragraph 8.
 - B. Description of actions taken on any alternatives to the proposed rule suggested by small businesses during the First Notice Period, including reasons for rejecting alternatives not utilized: The actions proposed by the commentors were not taken because the proposed actions are inconsistent with the provisions of the Electricity Excise Tax Law.
- 6) Analysis of the Economic and Budgetary Effects of the Proposed Rulemaking: An analysis of the economic and budgetary effects is attached.
- 7) Response to Recommendations Made by the Administrative Code Division for Changes in the Rule to Make It Comply with the Codification Scheme: All changes requested by the Administrative Code Division have been made.
- 8) Evaluation of the comments received by the agency from interested persons during the first notice period (but not including any questions raised by the Joint Committee in a preliminary review) including:
 - A. Date of any public hearing held during the first notice period. Name of the person or group requesting a hearing: No public hearing has been requested.

- B. The names and addresses of all individuals or groups making comments or requesting the opportunity to make comments: The Department received one ex parte communication email on April 19, 2024, from James Sherwood, Senior Vice President of McGuire Woods Consulting. This ex parte communication was reported to the Executive Ethics Commission by the Department's Ethics Officer on May 6, 2024. The Report of Ex Parte Communication, copies of emails documenting the communications, and a copy of the Memorandum to the Executive Ethics Commission are attached.

Additionally, the Department received two sets of comments.

The first set of comments was received by email on May 24, 2024, from Brian Urbaszewski, 1440 W. Washington Boulevard, Chicago, Illinois 60607, on behalf of the Members of the Illinois Clean Jobs Coalition Transportation Subcommittee. The following Members are identified in the comments: Neda Deylami, Environmental Defense Fund; Brian Urbaszewski, Respiratory Health Association; Tom Coleman, Climate Reality Chicago Metro; Margarita Parra, Clean Energy Works; Debbie Chizewer, Earthjustice; Kim Knowles, A Just Harvest; Catherine Clarkin, Naperville Environment and Sustainability Task Force; Muhammed Patel, Natural Resources Defense Council; Susan Mudd, Environmental Law & Policy Center; Dany Robles, Illinois Environmental Council; Nathaniel Shoaff, Sierra Club; Juliana Pino, Little Village Environmental Justice Organization; and Sam Houston, Union of Concerned Scientists (hereinafter referred to as "Environmental Commenters" or "ECs").

The second set of comments was received by email on May 27, 2024, from Emily Kelly, Senior Manager, Public Policy, ChargePoint. In addition to Ms. Kelly, the comments were signed by Bill Ehrlich, Managing Policy Advisor, Tesla; Corry Bullis, Director, U.S. Public Affairs, FLO EV Charging; and Anthony Willingham, Government Affairs and Public Policy Lead, Electrify America (hereinafter referred to as "Charging Station Commenters" or "CSCs"). No addresses were provided.

Copies of the comments are attached as exhibits to the Department's Second Notice.

- C. A list of all specific criticisms and suggestions raised in the comments:

The ex parte email from James Sherwood did not raise any criticisms or provide any suggestions. Mr. Sherwood simply asked questions including: "[I]s there any background you can provide on this proposed

rule from last week? Is this revenue going to GRF? Road fund? Any background would be helpful." In response, the Department confirmed the rulemaking is a general update to Part 511 and provided a breakdown of how electricity excise tax funds are distributed.

The Environmental Commenters argue the proposed Section 511.125 regarding EV charging stations falls outside the authority of the Electricity Excise Tax Law. They argue the Law was intended to "avoid the imposition of increased tax burden on individual consumers of electricity." They further claim the proposed rule "also fails to consider the realities of public EV charging stations hosted by small business and small municipalities, and the impact that being required to collect and remit such a tax would have on these entities." The burden placed on persons utilizing EV charging stations would not be borne equitably. Requiring operators of charging stations to collect the tax from customers would harm the economy and citizens of Illinois.

The Charging Station Commenters believe the addition of Section 511.125 incorrectly applies the concept of "delivering electricity" and exceeds the scope of the Electricity Excise Tax Law. The CSCs argue they are the customer, and the electricity is simply an input to their product. The CSCs argue the General Assembly amended the Public Utility Act to provide that an entity that furnishes the service of charging electric vehicles shall not be deemed to sell electricity and is not a public utility; and, therefore, cannot be considered a delivering supplier. The CSCs state that many EV charging stations operate off existing utility service, and the rule will require costly changes to comply. There is no need to change the status quo, and EV charging station owners should be permitted to be treated as retail customers and pay the tax to their electric suppliers. The CSCs also argue that requiring operators of charging stations to collect the tax from customers would harm the economy and citizens of Illinois.

D. The agency's evaluation of each of the specific criticisms and suggestions:

Prior to the enactment of the Electricity Excise Tax Law, the Public Utilities Revenue Act imposed a tax upon persons engaged in the business of distributing, supplying, furnishing, or selling electricity for use or consumption and not for resale. 35 ILCS 620/2. The rate of tax was .32 cents per kilowatt-hour of all electricity distributed or 5% of gross receipts, whichever is the lower rate for the customer. As stated by the General Assembly in its findings to the new Electricity Excise Tax Law, with the new authorization of competition in the provision of electricity, this taxing scheme would no longer be equitable. 35 ILCS 640/2-2. Public Act 90-561, Article I, effective August 1, 1998, enacted the Electric

Service Customer Choice and Rate Relief Law of 1997. In addition, it repealed the tax on persons distributing, supplying, furnishing, or selling electricity for use or consumption and not for resale and imposed a tax on the privilege of using electricity purchased for use and consumption and not for resale. The rate begins at .33 cents per kilowatt-hour for the first 2000 kilowatt-hours used and the rate of tax decreases as the amount of usage increases. In short, because public utilities would have competition for the sale of electricity to consumers, the General Assembly shifted the imposition of the tax from public utilities supplying electricity to persons purchasing and using electricity. Where more than one person participates in the delivery of electricity to a specific purchaser, the last of the suppliers engaged in delivering the electricity prior to its receipt by the purchaser is considered the delivering supplier for purposes of collecting the tax from the ultimate consumer or user of the electricity. 35 ILCS 640/2-3(i).

i. Environmental Commenters (ECS)

The ECs take the General Assembly's statement regarding the avoidance of an increased tax burden on individual consumers of electricity out of context to support its argument. Public Act 90-561 was a major, comprehensive change to electricity regulation that permits competition in the distribution, supplying, furnishing, and selling of electricity for use or consumption, which necessitated a change in the manner of taxing the consumption and use of electricity.

The tax is imposed on persons purchasing electricity for use and consumption. "Persons" is defined broadly, and includes "any natural individual, firm, trust, estate, partnership, association, joint stock company, joint venture, corporation, limited liability company, or a receiver, trustee, guardian, or other representative appointed by order of any court, or any city, town, village, county, or other political subdivision of this State." 35 ILCS 640/2-3.

All sales to a purchaser are presumed subject to tax collection. The Law contains limited exemptions. The Law excludes municipal corporations owning and operating a local transportation system for public service; business enterprises certified under Section 9-222.1 or 9-222.1A of the Public Utilities Act, transactions which may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State, the use of electricity at a project site that has received a certification for tax exemption from the Department of Commerce and Economic Opportunity (DCEO) pursuant to the Manufacturing Illinois Chips for Real Opportunity (MICRO) Act, and the use of electricity at a quantum

computing campus that has received a certification for tax exemption from the DCEO. 35 ILCS 640/2-4. The exemption for quantum computing campuses was recently added by P.A. 103-595, effective June 26, 2024. The General Assembly has not enacted an exemption from tax for EV charging stations or their obligation to collect the tax on sales of electricity to consumers and users of electricity.

The ECs make several policy arguments. They argue the regulation would place "a considerable and undue burden on small businesses and small municipalities, particularly those hosting or operating free or low-cost charging." However, the compliance requirements of collecting and remitting this tax is no more burdensome than any other tax compliance requirement imposed on other small businesses under the sales tax acts or any other tax act. These amendments do not add any undue burden as they are simply integrating statutory requirements into the Department's rules. The ECs' issue is with the statute itself, not the Department's rulemaking.

The ECs acknowledge that electric vehicles and infrastructure already receive federal tax subsidies. The federal government has enacted legislation providing billions for EV infrastructure. Persons offering electricity for free under the rule would pay the tax to their suppliers as they would be considered the end user of the donated electricity. When it comes to "low-cost charging," municipalities and small businesses have elected to subsidize the cost of electricity at EV charging stations for policy reasons. Municipalities and small businesses also have elected to bear the expense of installing and operating the stations. Although it may be low-cost, this electricity is still subject to tax under the Electricity Excise Tax Law. The charging station would be a delivering supplier under the statute, and, therefore, has a responsibility to collect the tax from its customers and remit it to the Department. Ultimately, someone must bear the costs associated with charging stations and be responsible for the tax. The statute places responsibility with the charging station.

The ECs argue that imposition of the tax would be discriminatory, mainly between people who have homes and can charge their EVs at home at arguably lower electricity rates, and people that must rent living accommodations and charge their EVs at non-residential charging units. While Electricity Excise Tax rates do slightly decrease with increased electricity usage, the decrease is minimal. According to the United States Energy Information Administration, "[i]n 2022, the average annual amount of electricity sold to (purchased by) a U.S. residential electric-utility customer was 10,791 kilowatthours (kWh), an average of about 800 kWh per month." See U.S. Energy Information Administration Frequently

Asked Questions (FAQS) webpage at <https://www.eia.gov/tools/faqs/faq.php?id=97&t=3>, last accessed August 26, 2024. The first two levels of tax rates under the Electricity Excise Tax Law are as follows:

(i) For the first 2000 kilowatt-hours used or consumed in a month: 0.330 cents per kilowatt-hour;

(ii) For the next 48,000 kilowatt-hours used or consumed in a month: 0.319 cents per kilowatt-hour;

While purchasers of electricity from EV charging stations will always pay 0.330 cents per kilowatt-hour since the amount of electricity used for a single charge of their vehicle would not exceed the first 2000 kilowatt-hour threshold, the vast majority of Illinois households would also be subject to that same tax rate based on average electricity usage in the United States. Even if an Illinois household does exceed this 2000 kWh threshold in any given month, the tax rate only decreases by 0.011 cents per kWh. This minimal difference is unlikely to occur, and in the event that it does, is not substantial enough to create a discriminatory effect between those who own homes and those who rely on charging stations to power their EVs.

The ECs also argue that "[b]arriers to charging slow the decarbonization of transportation and consequently increase the risks to residents, the economy and the State from the increasing negative impacts of global warming, as well as perpetuate local health-damaging air pollution from gasoline and oil consumption." This argument has no bearing on the fact that the Department is integrating and clarifying a statutory tax imposition in its rulemaking. This argument would be better addressed to the General Assembly in a legislative context rather than in a comment to the Department's rulemaking, which is limited to the confines of the statute.

ii. Charging Station Commenters (CSCs)

The CSCs believe the proposed changes to Section 511.125 incorrectly apply the concept of "delivering electricity" and exceeds the boundaries of the Electricity Excise Tax Law. Moreover, "[r]ather than delivering or selling electricity, EV charging stations are customers of electricity providers and provide a charging service." They argue "[e]lectricity is an input of the charging service, not the product." The CSCs also argue this concept has been memorialized in all 50 states, including Illinois.

The CSCs do not provide any citations to support their claim. Regardless, every statute, including the Electricity Excise Tax Law, must be interpreted based on the language contained in that statute. The CSCs cite to the definition of "delivering supplier", which actually undermines their position. Also, they do not provide the entire definition in their comment.

"Delivering supplier" means any person engaged in the business of delivering electricity to persons for use or consumption and not for resale, but not an entity engaged in the practice of resale and redistribution of electricity within a building prior to January 2, 1957, and who, in any case where more than one person participates in the delivery of electricity to a specific purchaser, is the last of the suppliers engaged in delivering the electricity prior to its receipt by the purchaser.

The CSCs argue they are the customer, and the electricity is simply an input to their product. When formulating their position, they failed to address the language in the definition of "delivering supplier" regarding buildings. Any entity engaged in the practice of resale and redistribution of electricity within a building on and after January 2, 1957, is a delivering supplier, not a customer. In other words, if a landlord sells electricity to a tenant, the landlord is the delivering supplier for purposes of collecting the tax from the tenant and remitting the tax to the Department. EV charging station owners stand in the same place as landlords selling electricity to a tenant. The definition of "delivering supplier" contains no carve out for EV charging stations.

The Department acknowledges the General Assembly amended the Public Utilities Act to add subsection (c) to the definition of "public utility". ("An entity that furnishes the service of charging electric vehicles does not and shall not be deemed to sell electricity and is not and shall not be deemed a public utility notwithstanding the basis on which the service is provided or billed." (220 ILCS 3/3-105)). The intent behind the Public Utilities Act is stated as:

The General Assembly finds that the health, welfare and prosperity of all Illinois citizens require the provision of adequate, efficient, reliable, environmentally safe and least-cost public utility services at prices which accurately reflect the long-term cost of such services and which are equitable to all citizens. It is therefore declared to be the policy of the State that public utilities shall continue to be regulated effectively and comprehensively. It is further declared that

the goals and objectives of such regulation shall be to ensure (a) Efficiency . . . (b) Environmental Quality . . . (c) Reliability . . . [and] (d) Equity . . .

(220 ILCS 5/1-101). This exclusion of EV charging stations from the definition of "public utility" simply removes these entities from the regulations set out in the Public Utilities Act and has no bearing on whether these entities are subject to a tax collection requirement found in a separate statute.

Further, the Public Utilities Act also excludes alternative retail electric suppliers as defined in Article XVI of the Act. (220 ILCS 5/3-105(b)(9)). However, there is no question alternative retail electric suppliers are responsible for collecting and remitting the Electricity Excise Tax. The language in the Public Utilities Act is not controlling. Nothing in the Electricity Excise Tax Law suggests that the tax is imposed only on public utilities as defined in the Public Utilities Act. To adopt CSCs interpretation would be sanctioning an unconstitutional amendment by reference. If the General Assembly truly wanted to exempt EV charging stations from the responsibility for collecting Electricity Excise Tax from their customers and remitting it to the Department, the General Assembly would have specifically stated as much in the Electricity Excise Tax Law itself.

The CSCs state that many EV charging stations operate off existing utility service. "For example, EV charging stations at a multifamily apartment complex would likely utilize the same source of power into the complex and utility meter to provide power to common areas and to EV charging stations. If this proposal were to be finalized, many EV charging stations would be forced to separate out the metering of the house power and the power used for the EV charging stations with a new electric utility meter." This situation would depend on the nature of the arrangement between the landlord and the tenant. If a landlord provides EV charging stations without charge, it would not be required to install a separate meter. Section 511.125(f) as proposed states: "When an operator of an EV charging station provides free electricity to a person, the operator is purchasing electricity for use and consumption, and the delivering supplier must collect the tax from the operator." If the landlord charges for use of the EV charging station, the landlord would be required to record the number of kilowatt hours of electricity consumed.

The CSCs state that there is no reason to change the status quo, and they should be permitted to continue paying tax to their electric suppliers. The Department issued and published on its website a General Information

Letter on September 21, 2021, that stated "[i]t is the Department's position that a person that operates an EV charging station selling electricity is a delivering supplier, must register with the Department, and collect and remit the Electricity Excise Tax based on kilowatt-hours used or consumed by customers. ST-21-0040 (Sept. 17, 2021). The Department issued a subsequent General Information Letter on October 10, 2023.

A company selling electricity to a person operating an electric vehicle (EV) charging station is making a sale for resale and is not responsible for collecting and remitting the tax. A person that operates an EV charging station selling electricity at retail to consumers is the last supplier engaged in delivering electricity is the delivering supplier for purposes of the Law. Such persons must register with the Department and collect and remit the Electricity Excise Tax to the Department based on kilowatt-hours used or consumed by customers. See ST 21-0400-GIL (Sept. 17, 2021)

ST-23-0030-GIL (Oct. 10, 2023). Operators of EV charging stations were placed on notice as early as September 17, 2021, that they may be subject to Electricity Excise Tax. This rulemaking incorporates the Department's earlier pronouncements.

The CSCs' arguments regarding EV goals and equity have been addressed in response to the ECs.

E. A statement that the agency has considered all comments received during the first notice period: The Department has reviewed and considered all comments received during the first notice period.

9) An analysis of the expected effects of the proposed rulemaking, including:

A. Impact on the public: This rulemaking includes a general cleanup of the Electricity Excise Tax rules incorporating policies memorialized in Private Letter Rulings and General Information Letters. The rulemaking deletes outdated language and includes updated statutory text. No additional skills are required to comply with the rules being amended pursuant to these general cleanup efforts. Persons providing free electricity at EV charging stations must pay the Electricity Excise Tax to their supplier. Persons that operate EV charging stations selling electricity at retail to consumers are the last suppliers engaged in delivering electricity and are the delivering suppliers for purposes of the Law. Such persons must register with the Department and collect and remit the Electricity Excise

Tax to the Department based on kilowatt-hours used or consumed by customers.

- B. Changes in the agency's programs or structure resulting from implementation of the rulemaking: None.
- C. Impact of proposed rule on small businesses. Methods used by Agency to comply with 5 ILCS 100/5-30, including reasons for rejecting any methods not utilized: Small businesses operating EV charging stations and selling electricity to persons charging EVs must register with the Department, collect the Electricity Excise Tax, file returns, and remit the tax to the Department of Revenue. This is similar to the process any small business selling tangible personal property must comply with. They must register under the Retailers' Occupation Tax Act and Use Tax Act to file returns and remit tax to the Department. This rulemaking also includes a general cleanup of the Electricity Excise Tax rules incorporating policies memorialized in Private Letter Rulings and General Information Letters. The rulemaking deletes outdated language and includes updated statutory text. No additional skills are required to comply with the rules being amended pursuant to these general cleanup efforts. The Department is currently administering the Electricity Excise Tax Law as required by statute, and therefore, the methods described in 5 ILCS 100/30 are not legal or feasible in meeting the requirements of the Electricity Excise Tax Law. The Department published the proposed rulemaking in the Illinois Register and on the Department's website.

10) A justification and rationale for the proposed rulemaking, including:

- A. Any changes in statutory language requiring the proposed rulemaking: Public Act 102-669 and P.A. 102-700 created exclusions from tax for Reimagining Energy and Vehicles in Illinois (REV Illinois) Act projects and Manufacturing Illinois Chips for Real Opportunity (MICRO) Act projects, respectively.
- B. Any changes in agency policy, procedures, or structure requiring the proposed rulemaking: Section 511.125 is being added to incorporate Department policies from letter rulings regarding electric vehicle charging stations.
- C. Relationship to any relevant federal rules, regulations, or funding requirements: None
- D. Court orders or rulings which are related to the rulemaking: None

E. A complete explanation of any other reasons for the proposed rulemaking:
No other reasons exist.

11) Does this rulemaking include an incorporation by reference pursuant to Section 5-75 of the Illinois Administrative Procedure Act? No.

Agency Personnel Who Will Respond to Joint Committee Questions Regarding the Proposed Rulemaking:

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