

**BEFORE THE
PUBLIC UTILITIES COMMITTEE
OF THE OHIO HOUSE OF REPRESENTATIVES**

**HOUSE BILL 143
PROPONENT TESTIMONY OF THOMAS M. ZAINO, JD, CPA
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Thank you Chairman Cupp, Vice-Chair Carfagna, Ranking Member Ashford, and distinguished members of House Public Utilities Committee. My name is Tom Zaino, and I am Managing Member of Zaino Hall & Farrin LLC. I am here today in my capacity as tax counsel to One Energy Enterprises LLC. But I also represent multiple Ohio businesses who are involved in this issue with the Department of Taxation. My testimony is to urge support for House Bill 143 sponsored by Representative Sprague.

Background

In 1999, the General Assembly passed Senate Bill 3 which restructured Ohio's energy market. Certain taxes were eliminated as a result of the broader efforts to restructure electric utilities, and the Ohio General Assembly enacted a new form of an excise tax on the distribution of each kilowatt-hour (kWh) used by an end user in this state. This tax is known as the kWh tax and became effective in 2001. The kWh tax is assessed on kilowatt hours of electricity distributed to end users in Ohio and can be collected through the electric distribution company or through the customer itself as a self-assessing purchaser. However, the Revised Code exempts from the kWh tax those who self-generate electricity. It does this by making clear that an end user in the state who "self-generates electricity" is not an electric distribution company.

“Electric distribution company” does not include an end user of electricity in this state who self-generates electricity that is used directly by that end user on the same site that the electricity is generated...” R.C. 5727.80(A)(2).

While the Revised Code does not provide a definition for “self-generates,” it does define “self-generator” in the public utility portion of the Revised Code (Title 49).

“Self-generator” means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner’s consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under contract. R.C. 4928.01(A)(32).

Why Clarification is Needed

Title 57, the tax portion of the Ohio Revised Code that establishes the kWh tax, only uses the phrase “self-generates” and does not directly reference the definition contained in Title 49 of the Revised Code. This has led the Department of Taxation to take the stance that even though a company is legally a self-generator, it does not “self-generate” power if it uses a third party or even if it uses the standard banking practice of lease financing. Without a legal mandate or a change of the statute, the Department of Taxation insists that it may assess the kWh tax if an end user does not, itself, own the electric generating facility and the land it sits on. But as I have already mentioned, the definition of “self-generator” does not require this—the term “self-generator” was added to the law in the same bill that added the kWh exemption for one who “self generates.” The definition of “self-generator” allows those who *host* an electric generation facility on *its premises* to qualify as a self-generator *even if the facility is installed or operated by an agent under contract*. The Department of Taxation’s position is contradicting what I believe is the plain language of the statute and legislative intent by saying a self-generator does not self-generate electricity. Not only does the Department of Taxation’s application contradict Ohio law, it also increases costs on businesses and undermines a growing industry in the state.

From the start, the kWh tax has only been assessed on the distribution of electricity. This tax was never intended to be imposed on those that generate their own electricity; whether that self-generator installs, owns, and operates a facility or hires someone else to do so. Both the definition of self-generator and the kWh tax exemption for those who self-generate were adopted in 1999 in Senate Bill 3. For nearly seventeen years, businesses and customers have been operating under the clear interpretation of the definitions established in the Revised Code.

What H.B. 143 is Intended to Do

H.B. 143’s changes do not provide a subsidy for the self-generation industry—self-generation has been exempt from the kWh tax since its inception. Instead, the changes are intended to clarify the law that has existed for nearly 17 years and to eliminate the Department of Taxation’s new interpretation of how the kWh tax should be applied.

The bill is also intended to prevent the Department of Taxation from double taxing Ohio businesses. Under its new interpretation, the Department of Taxation could collect the kWh tax from two different taxpayers for a single kWh of electricity. For example, if a self-generator paying the kWh tax for the energy produced by their on-site generation produces excess power and sends it to the electric distribution grid, then both the self-generator and any end user in the State of Ohio who ultimately buys that excess electricity will pay the kWh tax—i.e., resulting in double taxation.

Conclusion

Many companies in Ohio have already made the choice to self-generate electricity in order to have more control of their electricity needs, as well as to stabilize and reduce their electricity costs over a long period of time. The Department of Taxation's new interpretation endangers future investment by manufacturers and their partners in on-site energy generation. Businesses in Ohio deserve to know when a tax applies and when it does not. A kWh tax that exempts those who self-generate, but leaves those who are "self-generators" subject to the tax is confusing, creates uncertainty for those working to make investments in Ohio, and makes no sense. House Bill 143 is not a change in tax policy. The bill is merely a clarification of the intent already clearly expressed by the legislature that a "self-generator," in fact, "self-generates" energy.

Mr. Chairman, thank you for your attention. I will be happy to answer any questions.