

Adoption Hearing Transcript for R125-11
July 25, 2012
9:00 am – 10:15 am

Director Crowley: Good morning, my name is Stacey Crowley and I am the Director of the Nevada State Office of Energy. This hearing is being conducted to afford all interested parties a reasonable opportunity to comment upon proposed regulation R125-11 regarding the amendment of R094-10. I will be conducting this hearing today in Carson City with video conference to Las Vegas. I want to begin by asking that you all please be sure to sign-in on the sign-in sheets, and indicate if you will be commenting today regarding the proposed regulation, R125-11. If you have written comments to provide, please give those to Monica (in Las Vegas) or to Lorayn (in Carson City). All comments will be posted on the NSOE website. There are handouts on the table as well.

If you have provided your e-mail on the sign-in sheet, you will be added to the service list and will receive all future notices including dates and locations for future training.

I also ask that you please turn off your cell phones or put them in silent mode.

Is there anybody on the phone? Ok, nobody has joined this meeting by phone.

In your handouts, we have provided you a copy of the:

- Hearing notice
- Proposed Regulation LCB file number R125-11 dated 01/23/12
- Second Revised Proposed Regulation LCB file number R125-11 dated 07/19/12
- NRS 701A.360-390
- A copy of all the comments we have received regarding this matter, and

I wanted to also review the process up to date. An informal stakeholder session was held on May 29, 2012, and we held a public workshop on June 7, 2012 to solicit comment on the proposed regulation. Comments received in writing and in verbally in the workshop were considered and any proposed changes are reflected in the Second Revised Proposed Regulation dated July 19, 2012.

Cassandra Joseph, Deputy Attorney General: We've provided 30-day written notice in advance of this hearing to inform the public of the general topics to be discussed; namely, amendment of R094-10 to implement the provisions of NRS 701A.300- 390, which authorize the Director to grant partial abatement of local sales and use taxes, the taxes imposed pursuant to chapter 361 of NRS. Copies of the proposed amendments dated January 23, 2012, as well as the most recent proposed amendments dated July 19, 2012 are available on the table. We invite public comment regarding these proposed amendments. I will turn it back over to Stacey.

Director Crowley: Today is Wednesday, July 25, 2012, and the time is 9:16 AM. I want to briefly go over the reason behind these regulations. The primary reason is that pursuant to SB 426 of the 2011 Legislature the Renewable Energy and Energy Efficiency Authority went away, and all of the duties and responsibilities of that agency went to the Nevada State Office of Energy. So we had to change the language that referred to the Commissioner, to the Energy Director. So that was the impetus but also it allowed us to reach out to the stakeholders that have dealt with this process over the past two or more years and understand if there were any discrepancies or clarifications that needed to be made. So that was the primary reason for these regulations being proposed. The other components included the removal of the pre application process in these proposed regulations, we clarified the definition of “the construction of the facility” and we revised the definition of “hourly wage” based on comments from stakeholders, and a couple of other minor things. I know that there was at least one comment based on the second revised proposed regulation and I’ll open it up now to comments both from Carson City and Las Vegas if there are additional comments.

Wes Henderson, Nevada Association of Counties: First of all I would like to thank you Stacey, for making the change on page 27 from the “may” to the “will” in regards to the audit, it was requested by county commissioners and we appreciate that. A concern we have is on page 22 of the regulation under subsection (g) where the word “and” has been changed to the word “or” where it’s talking about buying power tools and motorized heavy equipment, including bulldozers, graders, loaders and other similar equipment. The concern we have with the word “or” is that if a specialized piece of equipment such as a motor grader or bulldozer is needed for site preparation for construction, these are fairly expensive pieces of equipment and it would be a huge amount of sales tax that would be abated on these. The concern with the word “or” is that it could be used for the construction phase and not necessarily remains on the site during the operation. We understand that it would be burdensome for a proponent to get equipment that was only used for construction and have to keep it on the facility during operation. We think that if it is a construction-only piece of equipment that’s going to be removed, that there should be some claw back or proration of the sales tax abated. As I said, these pieces of equipment are expensive and they have a long life expectancy. That is our concern with that change.

Director Crowley: I would like to open that up to discussion if possible, I’m not sure if everybody is following this, it’s the July 19th second revised proposed regulation version, page 22 (g) at the top of the page and this is from section 26 of R094 that talks about the sales and use tax provision, and what Wes is commenting on is the last line of (g) suggesting that perhaps it reads “throughout the construction of the project” he would like to bring “and” back in, project and operation of the facility, “or both” would be scratched because that would be redundant.

Wes Henderson: I hate to say put “and” back in there but there has to be some way if the piece of equipment is only going to be used for construction and it has a longer life expectancy then do some proration effect for the sales tax abatement. There are pieces of

equipment that couldn't be used for the operation of the facility and are only required for the construction phase.

Brent Keele, McDonald, Carano: I think in the context of a purchase that makes a lot of sense. In the context of a lease, where they are actually leasing the equipment just for the construction phase and there's a smaller sales and use tax apportioned to the lease. When they lease equipment there's not always sales tax apportioned, it depends on how the owner of the equipment handled things, they could either not pay sales tax originally and pay it on the lease payments or the owner of that could pay sales tax on the equipment and then lease it out without sales tax and there's no way for the developer to control that. It's something the owner does. To the extent that there is sales tax attributable to that lease, I think that is what we're trying to catch when we're putting the lease language in there, when they do have this heavy equipment it is expensive like Wes talked about. A lot of the times they are going to rent cranes, they're going to rent drilling equipment. So I agree with him with the purchase context but not the lease context. Maybe we could tinker with that a little bit so with the lease you only have to have it during the construction, not during the operation but with the purchase I could see why you would have it through both, or prorate somehow.

Wes Henderson: We totally agree with that lease provision.

Cassandra Joseph: So maybe what we could do is add a bit of a long sentence at the end of this and leave it as proposed in July 19th but after "or both" comma and to the extent purchase will not remain on the site of the facility throughout the operation a prorated sales tax abatement would apply.

Paul Thomsen, Ormat: I guess that I don't fully understand the situation. Can you give me an example? For the purchase of the equipment, for example, we may own and operate the rig but we don't purchase it specifically for the use of the construction of one project. So we would lease it from our subsidiary during the construction phase and then send it on its merry way to the next project to do construction and so forth and we wouldn't take a sales tax break on the full cost of that equipment for its use on site.

Cassandra Joseph: Brent may be able to explain, but in that case what I think you've got is a purchase by subsidiary but the actual entity that's taking the abatement is doing it via a lease. You may have a situation where you've got a company that's actually purchasing it for that specific project, so they would be initially taking the abatement on the purchase.

Paul Thomsen: And then the equipment would have to stay on site all the time, and be used in the operation of the facility?

Cassandra Joseph: If the entire abatement on the purchase were to be applied to that entity, but then it was moved to a different project at some point, it would have to be prorated.

Paul Thomsen: I am having trouble with the example, if I buy a bulldozer for construction, how am I going to use that bulldozer in everyday use to keep a generation facility operating? It just doesn't happen, right?

Director Crowley: Right, I think that was the point, you're most likely not going to do that, you're probably either going to buy it for the first time for this project and...

Paul Thomsen: You're just trying to make it crystal clear that you can't take the abatement on the purchase of equipment used in construction.

Wes Henderson: The full amount.

Paul Thomsen: What amount? Why not the full amount?

Wes Henderson: What we're saying is if you buy a piece of equipment to use in the construction phase and you take the abatement on the sales price of that piece of equipment and then you don't keep it there because you don't have any need for it during the operations phase then that abatement should be prorated.

Josh Hicks, Brownstein, Hyatt, Farber, Schreck: Just to make a few comments, I think the background of this, like Brent says, is that when a piece of equipment is purchased, the purchaser is going to elect to either pay the sales tax entirely up front on it or to actually remit payments on the lease stream. So if it's being paid on the lease stream, it really effectively is being apportioned anyway. And as far as the upfront purchase, I think if we're going to be trying to do some kind of apportionment we're probably going to have to get the department of taxation involved because I don't see them necessarily signing off on some kind of apportionment like that. I'm not saying it's not a way to do it, but they are the ones who are going to be collecting it, and in my experience, they tend to not really like those kind of arrangements being made without their involvement.

Cassandra Joseph: What is the, what Paul is talking about, what is the likelihood of, certainly there is going to be some equipment that is purchased and used throughout the operation of the facility, is that right?

Brent Keele: Yes I think there will be some equipment that will be used, I think the bulldozer is an example of something that in most circumstances is not going to be use on the site of the facility all the time, but a vehicle that is used for maintenance on the site of facility, a truck that is driving around on the site of the facility, something like that is an example that would be consistently there.

Cassandra Joseph: So if we don't want to get into the prorated tangle, what we could do is just add the word "and or" operation back in and get rid of the "or both" in which case it sounds like in most cases that would work for equipment that was going to remain on the site throughout the operation, if you had a situation where something was going to be used on the site for the construction phase then that language would essentially force people to do a lease for that.

Brent Keele: I think that's fine, I just want to make certain that it's clear that the lease works. I think that's kind of the way, at least my clients have approached this already.

Cassandra Joseph: That makes the most business sense anyway, so why don't we just take out the, put the "and" back in and get rid of the "or both" at the end of that subparagraph (g).

Director Crowley: So would that still work with what we added the "or leased" above, does that then change how the leasing goes?

Cassandra Joseph: No, I think that's fine because you can purchase or lease but the deal is you've got to use it for construction and the operation of the facility.

Brent Keele: I just want to clarify, if you lease a piece of equipment, you're saying that now you have to lease it for both the construction and the facility? Or just the construction, because they're only going to lease the equipment for just the construction phase.

Cassandra Joseph: Right, that is the way I understood it.

Director Crowley: So that would be part of the abatement.

Wes Henderson: And you also wouldn't want to box them in if they were buying a piece of equipment that was for the operation and not be able to get the abatement they are due for that. That's the problem, the word "and" is really sticky here. We're sympathetic to their needs but it's just on the equipment that's purchased, not leased, it is purchased strictly for the construction phase. If the piece of equipment has a long service life.

Josh Hicks: Just to echo some of Brent's comments too, I don't think the intent of the legislation is really to say you have to use this equipment on both construction and operation. I think it could be either or, so I think whatever we do here today, we've got to keep that in mind, that it could be either of those. I tend to like the "or" language actually a little better, I think it's a little more open ended and maybe doesn't get interpreted that way.

Cassandra Joseph: But then how do you address the issue that Wes is talking about?

Josh Hicks: I think that, I would suggest that probably we talk to the department, maybe even legislation is a better way to deal with, to do that. Like I said, I don't know how you really get to that apportionment piece of it. The sales tax, if you're not doing it on a lease, it's due at the time of the purchase, and you don't take discounts depending on how you use it later, it's just due up front at the time. To me, when I read the legislation, if you are buying it and it's subject to the abatement you get the benefit of that abatement, and if we were going to do something where we are backing out some part of that tax and

paying it back to the state I think you probably need some legislation or specific rules to deal with it that way.

Cassandra Joseph: One other option and I'll throw this out there, what we could do is we could separate the purchased and the leased language so what you could do is say if the power tools or motorized heavy equipment are specifically purchased for exclusive use on the site and will remain on the site of the facility throughout the construction and operation of the facility. So tie the "and" to the purchased and have a separate clause that says "or if leased" and then you could use the, I'm not sure if that is going to work, but it sounds like if we can separate out the leased versus the purchased, then the leased is automatically going to take into consideration the proration. So if it's leased it could be "and/or" but if it's purchased it has to be "and".

Brent Keele: I kind of like the idea of separating the two, it allows you to accomplish something in a practical manner, you could for the purchase, just say "for the operation of the facility", because if they are using it on the operation it's not going to matter if they used it on construction too, that way you wouldn't have to do the "and/or" and it would take in to account a situation where they may buy it just for operation, the key for this I think is operation rather than the construction.

Wes Henderson: We don't want to preclude a purchase just for construction.

Cassandra Joseph: I can work on some language separating out the purchased versus the leased and we can go over that before the end of the hearing. I don't know if anybody else has comments on that or comments on anything else, we can move on to other topics.

Director Crowley: Yes, if you don't mind working on a little bit of language, we might take a fifteen minute break or so, on that one. We can go through any other comments that folks might have on the second revised proposed regulation dated July 19th. Are there any comments down in Las Vegas?

None

Brent Keele: One other comment, first up I probably should have said this earlier, but you guys did a wonderful job of putting this together and the revisions were great. I had one question/comment on page 17 of the revised regulation, subsection four on that page, where we changed it so to determine the wage, you are dividing by the total wages paid to all employees. Just as an administrative thought that, we like the idea of looking at it on a weekly basis because I think it's easier to show a week when you're spot checking. Just like any audit, you are not going to audit every precise piece of information we take, so I like that spot checking. My comments earlier on this were basically to say in the event you pick a bad week, which can happen, you should be able to demonstrate over the course of construction, I think it's a practical matter by just requiring them to demonstrate over the course of the construction, it does increase the administrative burden and it may cause some problems when the construction phase is longer than your annual compliance period if you are in the middle of construction during the compliance

period because you are measuring two separate times, I think the weekly option at least gives you a way to avoid that conflict. In an ideal world I would love to see you measure on a weekly basis and to the extent that you don't comply you would be able to demonstrate over the course of construction that you did comply. Because that's really what the statute says it gives you both your auditing more administratively friendly measurement period but it doesn't disqualify it if there was something weird about one particular week.

Director Crowley: So you might suggest going back to the original language but then saying if in the event you can't demonstrate the adequate hours you could work with the director to determine compliance another way.

Brent Keele: I think so or you could almost have it be a two-tiered measurement on a weekly basis to the extent that the if they don't comply on a weekly basis they can demonstrate by the total wages over the course of the project divided by the total hours, kind of a combination of the two and so it's almost a fallback if you didn't make it that particular week you're disqualified from the abatement.

Director Crowley: We had the example of Scott Scherer's project, the week that we selected for the compliance period was a holiday week and he requested if we could look for another week and we said absolutely. I wonder if we can leave some flexibility in there, which is really all we need, to understand the situation and if it's reasonable we can keep that flexibility.

Brent Keele: I think that is in line with the intent, I mean the intent really is that you are paying these guys the right wage over the course of construction. You are going to have unique situations, I've had projects where there's weeks where they shut down for a half day because of wind or they may have construction members heavily focused on putting up fencing or doing some various more menial labor one week that have more focused technical labor another week, so one week the wage is higher over the course of the construction that meets the statutory intent of having a high wage, but if you happen to pick a bad week or something where they are ten cents under the requirement when you average it out, you should be able to demonstrate and I think just having that flexibility is what you need to administer it properly.

Cassandra Joseph: So I guess I am a little bit confused because I think that, it sounds like what you are saying is when you look at it on a weekly basis it might be a little bit easier but can sort of give you a false information because it is a small window which is why we changed it to make it a broader window which is maybe perhaps more complicated administratively but that way you don't run into the problem of having like a week where everybody is on vacation. I actually think that by changing this to "over the course" is broader, but it also provides for them most flexibility.

Brent Keele: I think it definitely provides the more accurate information, the more accurate scope of what you're looking at. Just like if you are auditing anyone you audit every precise transaction you are going to have a more accurate story than if you piece

out transactions, kind of a balancing effect. Is it worth the additional administrative effort to go through all of the wages for all of the weeks, or to the extent that they can pick a week, they meet it and figure you're good. What's the additional risk of them not meeting compliance that you are putting out there by lowering the burden to just check a week? Are you concerned that's a week that is high and they're going to pay under wages the whole time after that? This is kind of a risk analysis that a part of any sort of audit.

Josh Hicks: Just to make a comment, I don't have any problem adding some flexibility as Brent is suggesting, but I also like the language that you put in here. For a lot of projects that's actually going to be easier for them to deal with rather than the weekly, still look at the whole life of the project and I think that's helpful.

Director Crowley: I am just wondering if we have the flexibility in our compliance request, we have the compliance form that I can change. The Director can change as necessary. I wonder if we can tie this language in the compliance form, draw out two weeks of the period, I'm not sure if that is counter to what we put in the regs.

Brent Keele: The current compliance form is nice because you know the two weeks that you are going to have, once you get the form, you could change those around, but you know the two weeks you are going to have and you can provide the precise information including all of the payroll records. If we are going to check over the full course of construction are you going to require the payroll records for the full course of construction? That will be a huge thing, versus looking at a couple of weeks.

Cassandra Joseph: It also makes it consistent with, if you look at the full time employee, so section 13 on page 16, 2 (a) and the way that the full time employee is evaluated is based on over the course of the second quarter, so again it's not looking at it on a weekly basis but more over the course of a period so it just makes it consistent with that. Again, I think that the impetus there was just to have a little bit more accuracy. So as Stacey suggested before, maybe the compliance report could narrow the request to weekly.

Director Crowley: In terms of what you've submitted, but what you would have to demonstrate full compliance throughout the construction period and then provide two weeks of data to support that.

Brent Keele: I am fine with that, so you're not providing data for the whole second quarter, otherwise you would never get done looking at data.

Cassandra Joseph: So in other words, the way that it's written the calculation would be done by dividing the total wages paid by all employees who performed construction work on the project during the course of the construction period excluding management and administrative employees.

Director Crowley: We will now take a 15 minute break.

Director Crowley: We have carefully considered all comments, and will adopt as proposed with the Second Revised Proposed Regulation R125-11 dated July 19th as well as today's revisions. Cassie will read the revision out loud.

Cassandra Joseph: Section 15 (g) Sec. 26. 1 will now read:

(g) Power tools and motorized heavy equipment, including, without limitation, bulldozers, graders, loaders and other similar equipment, if the power tools or motorized heavy equipment is specifically purchased for exclusive use on the site of the facility and will remain on the site of the facility throughout the operation of the facility, or is specifically leased for exclusive use on the site of the facility and will remain on the site of the facility throughout the construction of the project or operation of the facility.

Brent Keele and Josh Hicks: We are okay with these changes.

Director Crowley: I hereby adopt these regulations with amendments. Thank you, this hearing is adjourned at 10:15 AM