

TEXAS ADMINISTRATIVE CODE

TITLE 34:	PUBLIC FINANCE
PART 1:	COMPTROLLER OF PUBLIC ACCOUNTS
CHAPTER 3:	TAX ADMINISTRATION
SUBCHAPTER O:	STATE AND LOCAL SALES AND USE TAXES

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Crime control and prevention district--A district organized under Local Government Code, Chapter 363 (Crime Control and Prevention Districts), located within the boundaries of a municipality that imposes a sales and use tax on the residential use of natural gas and electricity.

(2) Electric utility--Any entity owning or operating for compensation in this state equipment or facilities for producing, generating, transmitting, distributing, selling, or furnishing electricity whose rates for the sale of electric power are set by the Public Utilities Commission under the Public Utility Regulatory Act. The term does not include:

(A) a qualifying small power producer or qualifying co-generator, as defined in the Federal Power Act, §3(17)(D) and §3(18)(C), as amended (16 United States Code §796(17)(D) and §796(18)(C)); or

(B) any person not otherwise a public utility that owns or operates in this state equipment or facilities for producing, generating, transmitting, distributing, selling, or furnishing electric energy to an electric utility, if the equipment or facilities are used primarily for the production and generation of electric energy for the person's own consumption.

(3) Fabrication--To make, build, create, produce, or assemble components of tangible personal property, or to make tangible personal property work in a new or different manner.

(4) Fire control, prevention, and emergency services district--A district organized under Local Government Code, Chapter 344 (Fire Control, Prevention, and Emergency Medical Services Districts), located within the boundaries of a municipality that imposes a sales and use tax on the residential use of natural gas and electricity.

(5) Manufacturing--Every operation commencing with the first stage of production of tangible personal property and ending with the completion of tangible personal property. The first production stage means the first act of production and it does not include acts in preparation for production. For example, a manufacturer gathering, arranging, or sorting raw material or inventory is preparing for production. When production is completed, maintaining the life of tangible personal property or preventing its deterioration is not a part of the manufacturing

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process. Tangible personal property is complete when it has the physical properties, including packaging, if any, that it has when transferred by the manufacturer to another. Also see §3.300 of this title (relating to Manufacturing; Custom Manufacturing; Fabricating; Processing).

(6) Processing--The physical application of the materials and labor necessary to modify or to change the characteristics of tangible personal property. The property being processed may belong either to the processor or the customer, the only tests being whether the property is processed and whether it will ultimately be sold. Direct use of natural gas or electricity in processing will be referred to as exempt use. Processing does not include remodeling or any action taken to prolong the life of tangible personal property or to prevent a deterioration of the tangible personal property being held for sale. The repair of tangible personal property belonging to another by restoring it to its original condition is not considered processing of that property. The mere packing, unpacking, or shelving of a product to be sold will not be considered to be processing of that product.

(7) Remodeling--To make tangible personal property belonging to another over again without causing a loss of its identity, or without causing the property to work in a new or different manner.

(8) Residential use--Use of natural gas or electricity in a building or the portion of a building occupied as a residence and includes:

(A) use by the owner of a home, apartment complex, housing complex, condominium, campground, recreational vehicle park, nursing home, or retirement home occupied by the owner as a residence;

(B) use by a tenant in a home, apartment complex, housing complex, condominium, campground, recreational vehicle park, nursing home, or retirement home occupied by the tenant as a residence under a contract for an express initial term of more than 29 consecutive days. Absent a contract, only the period exceeding 29 consecutive days will be considered residential use, when supported by valid documentation (i.e., receipts, canceled checks, etc.); and

(C) use for common areas of an apartment complex, housing complex, condominium, campground, recreational vehicle park, nursing home, retirement home, or homeowners' association, such as use for a recreation room, swimming pool, security gate, or for street lights and exterior lighting in a walkway or parking area.

(D) Residential use does not include use in health care or detention facilities, including hospitals, rehabilitation centers, substance abuse treatment centers, psychiatric facilities, prisons, jails, or other detention centers, or use by the owner or operator of a health care or detention facility.

(9) Tenant--A person who is authorized by a lease to occupy a dwelling to the exclusion of others and who is obligated under the lease to pay rent. The term does not include a

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patient or inmate of a health care or detention facility, including a hospital, rehabilitation center, substance abuse treatment center, psychiatric facility, prison, jail, or other detention center.

(b) State and local sales and use taxes applicable. The furnishing of natural gas or electricity is a sale of tangible personal property and presumed to be taxable. All the provisions in Tax Code, Chapters 151 (Limited Sales, Excise and Use Tax), 321 (Municipal Sales and Use Tax Act), 322 (Sales and Use Taxes for Special Purpose Taxing Authorities), and 323 (County Sales and Use Tax Act) applying to the sale of tangible personal property, apply to the sale of natural gas or electricity.

(c) Exempt uses of natural gas and electricity. Except as provided in subsection (d) of this section, an exemption for natural gas and electricity applies to state and local sales and use taxes imposed by Tax Code, Chapters 151, 321, 322, and 323. Natural gas and electricity are exempted from sales and use taxes when sold for:

- (1) residential use;
- (2) use in agriculture, including dairy or poultry operations and pumping for farm or ranch irrigation;
- (3) direct or indirect use or consumption, including electricity lost in the lines, by an electric utility engaged in the purchase of electricity for resale;
- (4) use in timber operations, including pumping for irrigation of timberland;
- (5) direct use in:
 - (A) powering equipment that qualifies for exemption under Tax Code, §151.318 (Property Used in Manufacturing) or §151.3185 (Property Used in the Production of Motion Pictures or Video or Audio Recordings and Broadcasts), (including equipment that is permanently affixed to or incorporated into realty) to process tangible personal property for sale as tangible personal property, other than preparation of or the storage of prepared food, as defined in §3.293 of this title (relating to Food; Food Products; Meals; Food Service);
 - (B) lighting, cooling, and heating in the manufacturing area during the actual manufacturing or processing of tangible personal property for sale as tangible personal property, other than preparation or storage of prepared food;
 - (C) exploring for, producing, or transporting a material extracted from the earth;
 - (D) electrical processes, such as electroplating, electrolysis, and cathodic protection;
 - (E) the off-wing processing, overhaul, or repair of a jet turbine engine or its parts for a certificated or licensed carrier of persons or property;
 - (F) providing, under contract with or on behalf of the United States government or

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foreign governments, defense or national security-related electronics, classified intelligence data processing and handling systems, or defense-related platform modifications or upgrades;

(G) the repair, maintenance, or restoration of rolling stock;

(H) a data center that is certified by the comptroller as a qualifying data center under Tax Code, §151.359 (Property Used in Certain Data Centers; Temporary Exemption) in the processing, storage, and distribution of data by a qualifying owner, qualifying operator, or qualifying occupant of the data center; or

(I) a large data center project that is certified by the comptroller as a qualifying large data center under Tax Code, §151.3595 (Property Used in Certain Large Data Center Projects; Temporary Exemption) in the processing, storage, and distribution of data by a qualifying owner, qualifying operator, or qualifying occupant of the data center.

(d) Local sales and use taxes on natural gas and electricity.

(1) Residential use of natural gas and electricity is subject to local sales and use tax in the following local taxing jurisdictions:

(A) a municipality which has elected to impose the municipal sales and use tax on the residential use of natural gas and electricity under Tax Code, §321.105 (Residential Use of Gas and Electricity);

(B) a fire control, prevention, and emergency services district whose board of directors, by order or resolution, has imposed a sales and use tax on the residential use of electricity under Tax Code, §321.1055 (Imposition of Fire Control or Crime Control District Tax on the Residential Use of Gas and Electricity); or

(C) a crime control and prevention district whose board of directors, by order or resolution, has imposed a tax on the residential use of electricity under Tax Code, §321.1055.

(2) Natural gas and electricity used in a qualifying data center is subject to local sales and use taxes imposed under Tax Code, Chapters 321, 322, and 323.

(e) Use of gas or electricity in an exempt manner by an independent contractor engaged by the purchaser of the gas or electricity to perform one or more of the activities described in subsection (c)(5) of this section is considered use by the purchaser of the gas or electricity.

(f) Predominant use.

(1) Natural gas or electricity used during a regular monthly billing period for both exempt and taxable purposes under a single meter is totally exempt or taxable based upon the predominant use of the natural gas or electricity measured by that meter. A

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person who performs a processing, manufacturing, or other exempt function must establish the predominant use of the natural gas or electricity based upon 12 consecutive months of use.

(2) If, in the regular course of business, a person performs a processing, manufacturing, or other exempt function only part of the year and a nonprocessing, nonmanufacturing, or other taxable function for the remainder of the year, the predominant use may be established for that period of time the processing, manufacturing, or other exempt function occurs based on the predominant use during that period.

(3) When determining the predominant use of natural gas or electricity, utilities used to operate machinery exempt under subsection (c)(5)(A) of this section and for lighting, cooling, and heating in the manufacturing area during actual manufacturing or processing of tangible personal property for sale, as set out in subsection (c)(5)(B) of this section, are exempt. Natural gas and electricity used to operate lighting, cooling, and heating in manufacturing support areas are taxable. Manufacturing support areas include, but are not limited to, storage, engineering, office, accounting, research and development, break, eating, and restroom areas. Natural gas and electricity used in an area open to the public for the purpose of marketing a product ready for sale are taxable. Utilities used to operate other nonproduction machinery or equipment are taxable.

(g) Determining predominant use: utility studies.

(1) A person claiming a sales tax exemption because the predominant use of natural gas or electricity purchased through a single meter is for processing, manufacturing, fabricating, or another nontaxable use must have a natural gas or electricity utility study performed to establish the predominant exempt use of the natural gas or electricity.

(A) The study must list all uses of the utility, both exempt and taxable, the times of usage, the energy used, whether the use was taxable or exempt, and the percentage of exempt use of the natural gas or electricity as determined by the study.

(B) Twelve consecutive months of utility usage must be a part of the study.

(C) The kilowatt rating or BTU rating, duty factor, where needed for cycling equipment, and electrical or natural gas computations must be certified by a registered engineer or a person with an engineering degree from an accredited engineering college.

(D) The owner of the business must certify that all items using natural gas or electricity (depending on which utility is covered by the study) are listed and that the hours of use for each item are correct. The certification of both the engineer and the owner must appear on the face of the study.