

COMMENTS OF THE NEW YORK PUBLIC SERVICE COMMISSION
CONCERNING THE PROPOSED GROSS RECEIPTS TAX TARIFF

PRELIMINARY STATEMENT

The New York Public Service Commission (PSC) hereby submits to the New York Independent System Operator (NYISO) Board of Directors (Board) comments concerning the proposed change to the NYISO tariff, which would place legal liability on the Direct Customers for the collection of the Gross Receipts Tax (GRT).

Several parties filed appeals of the Management Committee's (MC) decision, at its March 2, 2005 meeting, to approve Motion No. 2 - proposed tariff amendment addressing the GRT and Direct Customers (GRT tariff). It is critical that the Board remand this proposal for further stakeholder collaboration. To do otherwise, would be to ask FERC to determine an issue of State tax law that is unrelated to the operation and liability of the NYISO.

BACKGROUND

The proposed GRT tariff requires (1) Direct Customers to supply a Reseller's Certificate, or (2) a certificate exempting the Direct Customers' transactions from the GRT, or (3) a written agreement from each applicable taxing authority that the Direct Customer accounts for and pays directly the local GRT and states that the locality waives any claims for GRT liability against sellers and acknowledges that the sellers may enforce the taxing authority's waiver of GRT liability.

Pursuant to N.Y. Tax Law, §186-a entities who sell electricity are required to record and collect the applicable level of taxes on its gross income. The assessment of GRT was phased out as of January 1, 2005. However, all electricity sellers remain responsible for recording and collecting GRT that precedes January 1, 2005.

N.Y. General City Law §20-b permits a municipality to assess a GRT if the transaction and consumption of the electricity takes place within its boundaries. New York City (NYC or the City) is exempted from this dual standard and may apply a GRT on the sale of electricity so long as consumption of the electricity is within its City limits.¹ Because the transaction – sale of electricity to Direct Customers – is taking place where the NYISO is located, the City's GRT provision appears to be the only one applicable to sales of electricity to Direct Customers located within the City's limit.

In assessing its obligation to record and collect the GRT, the NYISO sought and received clarification of its obligation from the New York State Department of Tax and Finance (Department of Tax). The Department of Tax in an advisory opinion,² determined that NYISO was not responsible for the collection of the GRT.³

COMMENTS

If the Board files the tariff it will place FERC in the position of determining the meaning of various New York State and local tax laws. While parties make policy arguments about why the tariff is appropriate, ultimately the question for FERC will be whether the tariff comports with New York State and local tax laws. Additionally, in this situation, unlike that associated with the collection of Sales Tax, the NYISO is not facing legal liability for the collection of the GRT, as indicated by the Department of Tax in its Advisory Ruling. Not only is it unfair to ask a federal agency to interpret New York State and local tax laws, it is unlikely

¹ New York City requires that "every utility shall pay to the commissioner of finance an excise tax." (NYC Code, Charter and Rules §11-1102).

² The New York Independent System Operator, Inc., Adv OP Comm T&F, January 14, 2000, TSV-A-00(1)(c).

³ Unlike the GRT, however, the NYISO was deemed by the Department of Tax to be responsible for the collection of sales tax.

that in the event of litigation FERC will receive deference from a court because the scope of its authority under the Federal Power Act does not include interpretation of New York State and local tax laws.⁴

The parties have spent a great deal of time and effort trying to come up with a workable solution concerning the collection of the GRT. However, the proposed GRT tariff is unlikely to stand scrutiny.⁵ Since it is likely that the parties will be back at the drawing board, we urge the Board to send the tariff back for further collaboration now rather than later.

Respectfully submitted,

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Dated: March 29, 2005
Albany, New York

⁴ Pursuant to Chevron USA v. National Resources Defense Council, Inc., 467 U.S. 837 (1984), the Court will provide an agency deference where an agency is construing a statute which it administers. Here FERC does not administer New York State and local tax laws.

⁵ The tariff appears to improperly place the legal obligation concerning the GRT on buyers.