

Summary of Fluent Energy Positions to
NYISO Business Issues Committee (BIC)
GRT and Sales Tax Issues

12/13/04

The following summarizes Fluent Energy's position concerning items to be discussed in both the NYISO's 12/15/2004 presentation materials distributed to Market Participants of the Business Issues Committee (BIC) and the current draft amendment language:

We urge BIC Participants and the New York ISO to:

1. Strike language from any motion addressing Gross Receipts Tax (GRT).
 - a. No liability for GRT on sellers (Generators) into the NYISO has been established, nor credible evidence submitted. Direct Customers have not been shown to present any viable threat whatsoever to other Market Participants of the NYISO.
 - b. GRT related issues cannot be properly addressed without the participation of the governing tax authorities and/or the appropriate legislative entities.
 - c. Attempts to address any competitive inequity concerns between Market Participants based on the applicability of or conformance to GRT-related tax law, including the imposition of GRT-related requirements on Market Participants circumvents the authority of the NYS Public Service Commission to properly administer the nature of Retail Access programs, and actually risks creating competitive inequities.

2. Failing Item 1 above, at a minimum:
 - a. Separate Sales Tax-related language from GRT-related language in any draft amendment.
 - i. General concurrence on Sales Tax certificate requirements on Direct Customers allows this issue to be addressed in a straightforward manner, in keeping with the registration of the NYISO as a sales tax collection agent.
 - ii. In the event of any appeal, this can be better limited to the focal point of contention.
 - b. Request an Advisory Opinion of the NYS Department of Taxation and Finance, prior to imposing GRT-related requirements on Direct Customers, to determine if GRT liability (at both state and local municipal levels) for sellers of

energy and/or energy services into the NYISO administered markets even exists. Fluent Energy is willing to apply for such an Advisory Opinion at no cost to the NYISO or other Market Participants.

- c. Evaluate and consider, prior to imposition, whether the ability of Market Participants to conform to any proposed imposition of new requirements is possible and reasonable.
 - i. Requiring Direct Customers to create affiliated entities to sell energy to themselves may not be possible. Direct Customers include, but are not limited to, entities such as municipalities, school districts, State universities, private universities, hospital systems, regulated financial institutions, large industrial and commercial companies, and publicly traded corporations. Many Direct Customers would be required to undergo an exhaustive approval process that may ultimately preclude the creation of such affiliates. The costs of creating and administering such affiliates may also be prohibitive.
 - ii. Requiring Direct Customers to secure “GRT Exemption Certificates” may also be an impossible requirement to meet. Many local governments will not have the ability and/or the motivation to consider applications for such certificates.
- d. Require all Market Participants that purchase energy and/or energy-related services from the NYISO to demonstrate the same standards of compliance or exemption proposed for Direct Customers.
 - i. Failure to do so allows some Market Participants to purchase from the NYISO under burden of proof of GRT tax status, while others face no such burden.