

# New York State Sales Tax and Gross Receipts Tax Issues

December 15, 2004

Business Issues Committee Meeting

Agenda #8

# Introduction

NYISO faces two basic issues:

- Fulfilling its legal obligation as NYS sales tax collection agent
- Addressing Market Participants' concerns about the possible imposition of Gross Receipts Taxes ("GRTs") arising from sales to "Direct Customers."

# Today's Agenda

- Discuss the nature of the sales tax and GRT issues
- Solicit Market Participant input on solutions to these issues and discuss possible tariff amendments
- Reach a consensus, conceptually, on an approach to resolving these tax issues that will be considered by the Management Committee at its January, 2005 Meeting

# Sales Tax: How the Problem Arose

- Tariff permits sales directly to end-use customers (so-called “Direct Customers”)
- There are Direct Customers today that have sales tax liability for purchases from NYISO Administered Market
- NYS Department of Taxation and Finance notified NYISO in Fall 2003 that NYISO is required to register as a collection agent for sales tax on electricity sold in spot market and consumed by Direct Customers

## *As Collection Agent - NYISO*

- Could be liable for MPs (purchasers) who fail to remit sales tax
- Would have to implement changes to billing and settlement system involving \$1 million up front expenditure and \$100 – \$150K annual recurring expense
- Expenses would be borne by the entire market to administer the sales tax liability of direct customers

# NYISO's Response to Notice by NYS Department of Taxation and Finance

- Unsuccessfully attempted to convince NYS Tax Department to reconsider and reverse its determination that NYISO should register as collection agent
- Began dialogue with NYS Tax Department about market changes that: (i) would culminate in NYISO's registration as sales tax collection agent, and (ii) eliminate transactions that impose a sales tax liability upon NYISO

# NYISO Proposed Solution

- Require Direct Customers to provide exemption certificate or direct pay certificate as condition of direct service
- Allows NYISO to fulfill legal obligation to register as collection agent but avoids expenditure of MP funds to administer sales tax function

# Summary of Sales Tax Issue

- NYISO has a legal obligation that must be satisfied, i.e., registration as sales tax collection agent
- NYS Department of Taxation and Finance expects compliance by early 1<sup>st</sup> quarter 2005



# Gross Receipts Tax Background

- Imposed on sellers of utility services
- State GRT on commodity sales expires 1/1/05
- Over 350 local GRTs also exist

# NYISO's Legal Status Under GRT

- In 2000, NYISO petitioned for and received from NYS Tax Department an advisory opinion stating that NYISO is not a business taxable under the GRT
- Also, in contrast to the sales tax requirements, NYISO is not legally obligated to collect GRTs

# GRT Concerns

- MPs have raised concerns that: (a) certain stakeholders avoid GRT thereby creating an unlevel playing field; and (b) NY State or local municipalities may seek to impose GRTs on sellers into NYISO Administered Markets
- NYISO has taken no position on the taxability of any spot market sales for GRT purposes

# NYISO Position on MP's GRT Concerns

- Will facilitate collaborative effort to develop solutions to Market Participant concerns
- Will facilitate dialogue with NYS Tax Department and potentially affected parties
- Will not collect or administer any tax for which it is not legally responsible
- Will not provide tax or legal advice to individual market participants or sectors

# Possible Tariff Solution

- Addresses both the NYISO's legal obligations under sales tax law and Market Participants' concerns about potential GRT liability
  - Defines “Direct Customer” as “a Customer purchasing any service directly from any of the ISO Administered Markets for its own consumption or use and not for resale”
  - Imposes conditions on Direct Customers whereby Direct Customers must:
    - Hold a valid exemption certificate from the taxing authority that exempts the Direct Customer or the transaction from the associated tax, or the substantial equivalent thereto; or
    - Be a governmental entity that is not subject to the tax or whose transactions are not subject to a tax imposed upon a third party; or
    - Hold a valid sales tax direct pay permit and enter into a formal written arrangement with the taxing authority pursuant to which the Direct Customer accounts for and pays directly to the taxing authority GRTs arising from its purchases; and

- Regarding local GRT, the Direct Customer may alternatively demonstrate:
  - [A] That each jurisdiction within NYS in which the Direct Customer will use any service under this Tariff does not impose a gross receipts tax; or
  - [B] That the receipts from the purchase by or sale to Direct Customer of such services are not subject to the gross receipts tax imposed by such jurisdiction
  - Pursuant to [A] above, Direct Customers must provide the NYISO a certificate or other satisfactory written evidence from the jurisdiction, an opinion of counsel, or an attestation by an officer authorized to make such attestations
  - Pursuant to [B] above, Direct Customers must provide the NYISO a certificate or other satisfactory written evidence from the jurisdiction