

October 7, 2004

Mr. Glenn Haake  
General Counsel  
Independent Power Producers of NY, Inc.  
19 Dove Street, Suite 302  
Albany, NY 12210

Dear Glenn:

This is in response to your letter dated October 5<sup>th</sup>, in which IPPNY raises questions about its members' Exempt Wholesale Generator status ("EWG"), their possible liability for New York gross receipts taxes ("GRT") and NYISO's authority to permit certain direct sales under its tariffs. Today I received a letter from Keyspan raising the same issues.

Your concerns stem from the possibility that generators selling into the NYISO's spot market may be subject to GRT for the portion of those sales consumed by "direct customers." As you are aware, in 2000 the State Department of Taxation and Finance determined, in an advisory opinion, that the NYISO is not subject to GRT for any of its activities. NYISO's outside counsel also advises that, unlike the sales tax laws, the GRT statute does not require NYISO to act as a collection agent for market participants that might be subject to this tax. The NYISO has taken no position as to whether generators' or any other parties' sales into the spot market are, as a matter of law, taxable for GRT purposes. That question can only be addressed by the taxing authorities, the affected market participants, and perhaps the legislature and the courts. The NYISO would, of course, facilitate a dialogue on these issues between the market participants and the Department of Taxation and Finance.

While NYISO has no legal responsibility for administering the GRT laws, it *is* responsible for fairly administering New York's electricity markets pursuant to its FERC approved tariffs.

The NYISO has properly administered its tariffs by permitting sales to certain large direct customers. Such transactions are, and have been, contemplated by the NYISO's tariffs since they were first developed in 1997. Thus, IPPNY's members are, or should have been, aware that a limited amount of direct sales have occurred since NYISO's start-up in 1999.

While the issue has, to our knowledge, never been resolved in court, we understand that in two similar cases considered by FERC such sales would not jeopardize a generator's EWG status under PUHCA. *See New England Power Pool*, 106 FERC ¶ 61,051 (2004) and *Southern California Edison Co.*, 80 FERC ¶ 61,262 (1997). We are aware of no reason why a different conclusion would apply to NYISO's markets.

IPPNY and Keyspan also state that NYISO must immediately cease sales to direct customers because of the perceived GRT exposure and the alleged EWG problem. If IPPNY and Keyspan believe there is a need to modify the tariffs with respect to such sales, those changes should be pursued through the NYISO's governance process where all affected parties can air their views. While we understand your members' consternation about a possible tax liability, NYISO does not believe it is appropriate, under these facts, to unilaterally alter tariffs that have been in effect and properly administered for almost five years.

If you have any questions, please call me at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Fernandez". The signature is written in a cursive, slightly slanted style.

Robert E. Fernandez

cc: W.J. Museler  
Gavin J. Donahue  
James M. D'Andrea, Esq.