

114 FERC ¶61,087
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

New York Independent System Operator, Inc.

Docket No. ER05-1507-000

ORDER ON TARIFF FILING

(Issued January 31, 2006)

1. On September 23, 2005, the New York Independent System Operator, Inc. (NYISO) proposed revisions to its Market Administration and Control Area Services Tariff (Services Tariff) that would require market participants to provide certain documentation to the NYISO to ensure that sales of energy under the NYISO-administered markets do not trigger a responsibility for the NYISO to collect or remit New York state or local taxes (September 23 Filing). The proposed documentation requirements are intended to enable the NYISO to avoid substantial expense and administrative burdens that it would otherwise incur to comply with the New York State Sales and Compensatory Use Tax laws.¹ The Commission conditionally accepts the proposed tariff sheets, to be effective February 1, 2006, as requested, subject to Commission acceptance of the compliance filing directed herein.

Background

2. The NYISO states that under New York state's tax law, a sales tax is imposed on: (i) retail sales of tangible personal property; (ii) sales (other than sales for resale) of various utility service, including electricity and electric service; and (iii) sales (other than for resale) of other specified services.² The payment of sales tax is the responsibility of

¹ The NYISO estimates that it would incur \$1 million of initial costs and \$150,000 recurring annual expenses to establish, maintain and operate a system to collect and remit sales taxes. NYISO filing at n.8.

² See the NYISO's filing at 3 (citing New York State Tax Law, Articles 28 and 29 (Tax Law)).

the buyer and most often imposed at the time and point of sale.³ Under the Tax Law, the seller generally is responsible for collecting, reporting and remitting the sales tax to the New York State Department of Taxation and Finance (Tax Department).

3. According to the NYISO, on November 25, 2003, the Tax Department concluded that it is necessary “to treat the NYISO as an agent of the [sellers] which sell electricity and electric service through the NYISO and its markets, [finding the NYISO] jointly responsible with [the sellers] for the collection and payment . . . of any tax due on such sales or uses of such electricity and electricity service.”⁴ According to the NYISO, the Tax Department reasoned that as administrator of energy auctions, the NYISO plays a role analogous to brokers and auctioneers, both of which are treated as co-vendors for sales tax purposes. While the Tax Department declined to relieve the NYISO from the obligation to register as a sales tax collection agent, it did agree that if the NYISO “could structure its markets so that no sales taxes were due at the time of sale or ever, the NYISO’s responsibilities as a sales tax collection agent would be largely *pro forma*.”⁵ To accomplish this, the Tax Department suggested that all market participants produce adequate documentary proof that either no sales tax was due as a result of the transaction or that they were paying their sales tax directly to the Tax Department.⁶ The NYISO states that it believes that it would have no corporate liability in the event a market participant defaults on a sales tax obligation, as long as it reasonably relied upon the documentation submitted by the market participant. Thus it would be unlikely that there would be a liability for sales tax defaults that would have to be socialized among market participants.

4. In response to the Tax Department’s suggestion, the NYISO initiated a collaborative process with market participants and the Tax Department to develop revisions to the Services Tariff that would structure a situation where no state taxes would be due on any transactions in the NYISO’s markets, while still allowing direct customers to participate in those markets. In drafting the proposed tariff revisions, the parties debated the best means to comply with the registration, reporting and remittance

³ *See Id.*

⁴ *See NYISO’s filing at 3.*

⁵ *Id.* The NYISO would still be required to register and to report on sales tax collection, but it would not need to expend funds to implement collection, accounting and remittance mechanisms.

⁶ *Id.*

requirements required by the Tax Department, while minimizing administrative burdens and expense. On August 1, 2005, the NYISO's Management Committee unanimously approved the tariff revisions advanced in the September 23 Filing. On August 16, 2005, the NYISO's Board of Directors approved the proposed tariff revisions.

5. Under the proposed tariff revisions, every customer, and every agent of a customer, taking any services under the Services Tariff must provide certain specified documentation to ensure that their transactions do not trigger a sales tax liability, *i.e.*, one for which the NYISO would be required to account. Agents are also required to submit, in addition to the specified exemption documentation, satisfactory evidence establishing their status as agent of a customer.

6. The NYISO states that the exemption documentation required depends upon the type of entity the customer is and whether the customer is required to be registered with the Tax Department. If the customer is: (i) registered or required to be registered with the Tax Department; or (ii) is a non-New York state purchaser, it must provide one of the following valid, properly completed New York state exemption documents: a Resale Certificate, an exempt organization certificate, an exempt purchase certificate, or a direct pay permit. The NYISO states that any customer classified under sections 1116(a)(1)-(3) of the Tax Law as (i) the State of New York or one of its agencies; (ii) the United States or one of its agencies; or (iii) the United Nations or another international organization of which the United States is a member must submit satisfactory evidence demonstrating that it is such an entity, and its purchases are not subject to sales tax. Finally, if the customer: (i) is not registered and not required to be registered with the Tax Department; and (ii) is not one of the types of entities described in sections 1116(a)(1)-(3) of the Tax Law, the customer must provide a valid, properly completed exempt organization certificate. The NYISO states that the ultimate goal of these documentation requirements is to assure that none of the customers' transactions trigger a sales tax that the NYISO would be required to collect, report and remit, while providing as much flexibility as possible for customers to meet the requirements and participate in the NYISO-administered markets.

7. The proposed tariff revisions also include provisions to deal with a customer or agent who experiences a change in its tax status such as termination of its registration or exemption or if a customer can no longer rely on the documentation it submitted to the NYISO. A 10-day cure period from the time of its change in status is provided for a customer to remedy issues that result in non-compliance and to notify the NYISO prior to facing termination of participation in the NYISO-administered markets. Upon learning of a change in a customer's status, the NYISO is required to notify the Tax Department of the identity of the non-compliant customer along with certain information as to the customer's transactions. A customer who has not cured within the requisite period is

considered in “Default” and the NYISO has the authority to suspend and/or terminate the Defaulting customer from participation in the NYISO-administered markets upon notice to the Commission.

Public Notice, Interventions and Protest

8. Notice of the NYISO’s filing was published in the *Federal Register*, 70 Fed. Reg. 58,211 (2005), with motions to intervene and protests due on or before October 14, 2005. Motions to intervene were filed by Multiple Intervenors, AES Eastern Energy, L.P., the Mirant Parties, and the New York Transmission Owners.⁷

9. On October 14, 2005, EPIC Merchant Energy, LP, SESCO Enterprises LLC and Black Oak Energy, LLC (collectively, Financial Marketers) filed a motion to intervene and protest. Financial Marketers argue that the NYISO’s proposed tariff revisions should be rejected because it is an effort to use federal tariffs to monitor, enforce, and enhance the taxing powers of the Tax Department. Moreover, Financial Marketers argue that the proposal is unlawful because it improperly combines state tax interests with federal authority, and because no Commission-approved tariff should require a customer to submit tax forms or seek a tax exemption that could not lawfully be required by the taxing authority itself. Financial Marketers argue that customers subject to the proposed tariff revisions may not be buying electricity (which is defined as tangible personal property under New York law), but rather may be engaging in virtual trading involving the buying and selling of financial instruments involving intangible property.⁸ Additionally, Financial Marketers state that some market participants may never own, hold title to, or take delivery of electricity in New York. Further, Financial Marketers assert that a market participant that does not conduct business in New York cannot lawfully be required to file tax forms (*i.e.*, a Resale certificate or other exemption certificate) with the State of New York or its claimed agent the NYISO. Finally, Financial Marketers argue that some market participants that are “non-New-York

⁷ The New York Transmission Owners are Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, New York Power Authority, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Orange and Rockland Utilities, Inc. and Niagara Mohawk Power Corporation, a National Grid Company.

⁸ Financial Marketers assert that contracts are intangible property under New York State law and, unlike electricity, are not subject to taxation.

purchasers” are not even eligible, let alone legally required, to file any of the four forms listed in the proposed Services Tariff since these forms were not designed to cover entities that were not purchasing tangible personal property.

10. On November 15, 2005, the NYISO filed an answer to the Financial Marketers’ protest. NYISO argues: (1) its proposal is a reasonable attempt to comply with applicable state law, not an inappropriate attempt to enforce or enhance New York state’s taxing authority; (2) its proposal will not “embroil” the Commission in New York state tax law questions, but granting the protest would; (3) the proposed solution requires a minimum burden for the protestors to comply; (4) its proposal would not require the protestors, or any other entity to make filings, or register, with New York state beyond their current registration obligations that already exist; (5) the protestors ignore the NYISO’s obligation to comply with all applicable New York state laws, and misrepresent the Commission precedent that they cite; (6) the protestors have not shown that the NYISO’s proposal is unconstitutional or offered any other convincing legal rationale for rejecting it; (7) the protestors would undermine the NYISO’s independence by overriding its decision to comply with New York state tax law instead of defying it; and (8) the protestors did not participate in the governance process leading to stakeholder approval of this filing and are now making an impermissible end-run around that process.

Discussion

11. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 384.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the NYISO’s answer to Financial Marketers’ protest because it has provided information that assisted us in our decision-making process.

12. The Commission accepts NYISO’s proposed tariff revisions, as modified herein, as a just and reasonable reporting requirement that is minimally burdensome on individual market participants, while providing overall cost benefits to all market participants that use the NYISO’s services. We note, moreover, that the proposed revisions were the product of numerous stakeholder meetings, with input from the Tax

Department, in which NYISO asserts protesters did not participate. Further, the proposed revisions were approved unanimously, with abstentions, at the August 1, 2005 Committee meeting, and approved by the NYISO's Board of Directors.⁹

13. The Commission rejects Financial Marketers' arguments that the proposed tariff revisions should be rejected because they are an effort to use federal tariffs to expand New York state's taxing authority, or improperly embroils the Commission in state taxing issues. The Commission is not making any determination regarding the tax liabilities of particular entities under New York state tax law. We view the NYISO's proposal, as modified herein, as a minimally burdensome reporting requirement, and we are not delving into the interpretation of state tax law.

14. Financial Marketers argue that some market participants that are "non-New York purchasers" may not be eligible to file any of the four forms listed in the proposed tariff since they were not designed to cover entities engaging in "virtual" trades.¹⁰ NYISO responds in its answer that Financial Marketers are mistaken since "under the proposed Services Tariff section 8.4(A)(1), such entities need only provide the NYISO with a New York State Resale Certificate confirming that any purchases in the NYISO-administered markets were made for purposes of resale. As out-of-state entities that are not required to register with New York State, their Resale Certificates would identify the State(s) in which they are registered to collect taxes, or if they are not required to register, they would provide a statement to that effect."¹¹ NYISO states that it needs all market participants to provide Resale Certificates, or comparable "exemption documents" in order to avoid the imposition of more stringent Tax Department requirements.¹²

⁹ See *Atlantic City Electric Co.*, 77 FERC ¶ 61,148 at 61,574 (1996) (discussing the "principle of independence" for ISOs); *Wisconsin Electric Power Co.*, 79 FERC ¶ 61,158 at 61,728 (1997); *Alliance Companies*, 91 FERC ¶ 61,152 at 61,580 (2000). The Commission has also ruled in favor of ISO/RTO tariff proposals when approved by a broad stakeholder consensus over the proposals of individual parties. See, e.g., *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,319 (2000); *Sithe New England Holdings, LLC and Sithe New Boston, LLC v. New England Power Pool and ISO New England Inc.*, 86 FERC ¶ 61,283 (1999), *reh'g denied*, 88 FERC ¶ 61,080 (1999); *PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,212 at 62,035 (1998).

¹⁰ Financial Marketers' protest at 5.

¹¹ NYISO's answer at 8.

¹² *Id.*

However, we find that it is not clear from the proposed tariff language of section 8.4 whether entities that are not engaged in the purchase of electricity in New York would be able to obtain a Resale Certificate or other New York State exemption document available to entities that do purchase electricity in New York. Accordingly, consistent with the explanation in its answer, NYISO is directed to revise proposed section 8.4 of its tariff to make explicit that the list of examples of exemption documents in the Proposed Services Tariff section 8.4(A)(1) is not exhaustive, and customers may provide “comparable” exemption documents that would allow the NYISO to structure its markets so that no sales taxes are due at the time of sale or ever. With this modification to the proposed tariff, the Commission is satisfied that it will not be unduly burdensome for non-New York state “virtual” purchasers to acquire and file such an exemption document with the NYISO.

The Commission orders:

The Commission conditionally accepts NYISO’s proposed tariff sheets, to be effective February 1, 2006, as requested, subject to Commission acceptance of the compliance filing directed herein.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.