

Select Energy - DRAFT Position Paper Regarding GRT

Note: There is reference to an IPPNY document in this paper. That document has been modified and this paper does *not* reflect any changes that have been made. We believe it doesn't change any conclusion(s) we have come to.

NYISO staff and its committees have undertaken addressing both Sales Tax (ST) and Gross Receipts Taxes (GRT) at three different forums in the last month.

The Management Committee, after lengthy debate, passed a measure that agreed with the NYISO's compliance with the NYS Tax Department (NYS TD) ruling that they register as a collector of Sales Tax. This is an empty gesture as the measure passed requires parties to provide the ISO with either direct pay certificates or sales tax exemption certificates. The reason for this is simple, for the ISO to collect and remit ST would result in a major and costly modification to its systems and deflect attention from other needed changes.

This leaves the GRT center stage. To summarize:

- The NYISO has an NYS TD advisory opinion that they carry no liability for paying GRT.
- The NYS GRT expired on 12/31/2004.
- To date, there has been no interest expressed by the NYS TD to pursue any issues as to applicability of the GRT to NYISO based transactions. (However, there is anecdotal evidence of the tax department pursuing GRT payments.) Presumably this lack of interest extends to the 400 odd municipalities that have a GRT still in force.
- Supplier (this may be over-generalized as the concerns have largely been expressed by Generators) concerns have centered on, that if the NYISO bears no responsibility for GRT and since GRT applies to the seller, that they, the Suppliers could be exposed to GRT payments. However, this exposure, should it exist at all, would apply only to commodities sold via the NYISO to its direct customers; those buying on their own behalf. Others, buying through another party – a 3rd party LSE in a reseller's role, for example – do not reflect a risk back on the Suppliers but, as the reasoning goes, to 3rd party LSE, in this example. Most of the proposed solutions to this issue rest on that reasoning.

Our position is that this exposure risk assessment is possibly flawed and the proposed changes that have been circulated may only serve to “poke the sleeping dog” and at a minimum institute onerous administrative burdens.

- The NYISO will engage in direct sales of commodities (energy, ICAP etc.) to end users. These users, once specifically identified as Direct Customers (as a defined term) only exist as phrased extension to the definition of a Load Serving Entity¹ (LSE).

¹ From the NYISO OATT Definitions:

1.16a Load Serving Entity (“LSE”): An entity, including a municipal electric system and an electric cooperative, authorized or required by law, regulatory authorization or requirement, agreement, or contractual obligation to

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- IPPNY currently has in circulation a proposed fix to the GRT issue. It begins with re-instituting a Direct Customer (DC) definition^{2,3} The following is a point by point summary paraphrasing the proposal to be done on an annual basis (the entire text is included at the end):

1. Provide the ISO with a reseller certificate.

Presumably since this would be on behalf of said same Direct Customer, essentially the DC would no longer be purchasing directly from the NYSIO and presumably then act in the role of an LSE.

2. Provide a current exemption certificate (or substantially equivalent to) from each applicable taxing authority⁴.

Our experience with this is that municipalities do not want to be bothered with this issue or have expressed the opinion that the ISO makes the sale. In essence they do not want or are unwilling to provide such exemption. In a few cases, we were requested to pay and we opined to the contrary and nothing ever again arose.

This “exemption” provision also carries with it two other issues. First, and most important, it “pokes the sleeping dogs”. By having all these parties making requests for “exemptions” it may in fact simply make an issue out of a non-existent one. Second, it places an enormous administrative burden both on the DCs, LSEs and the municipalities. If this approach were to be taken, then we believe the ISO should take a pro-active role in interacting with the municipalities as was suggested at the 12/6/2004 S&PWG meeting.

3. Be a governmental entity that is exempt.

Presumably this is a “no action needed” component of the proposal. These parties know who they are and that no GRT is involved.

4. Provide the NYISO with a current written agreement with the taxing authority pursuant to which the DC accounts for and pays directly to the taxing authority GRTs arising from its purchases, which agreement must provide that the taxing authority:

- i. Waives any and all claims for GRT liability against all sellers into the NYISO markets in respect of the Direct Customer’s purchases under the NYISO Tariff, and

supply Energy, Capacity and/or Ancillary Services to retail customers located within the NYCA, *including an entity that takes service directly from the ISO to supply its own load in the NYCA.* (Emphasis added)

² “Direct Customer: a Customer purchasing any good or service directly from any of the NYISO-administered markets for its own consumption or use and not for resale.”

³ ConEd has submitted revision appearing to just reference a Customer buying for its own use.

⁴ ISO staff has indicated that, except for NYC, the GRT statutes for municipalities indicate collection of the tax for transactions that originate and consummate within the same municipality. NYC’s statute is one based on consumption only.

Select Energy - DRAFT Position Paper Regarding GRT

- ii. Acknowledges that all sellers into the NYISO markets are third party beneficiaries of the formal written agreement with standing to enforce its terms and conditions.

Again, from our experience, this simply is not going to work. Municipalities expect this tax be remitted by the seller and, by requesting such an agreement, may simply encourage their review and potential to apply GRTs where they may not be today. We may be trying to make tax law by voting in Tariff provisions.

IPPNY also offers an alternative (paragraph B) the foregoing with the following:

1. Demonstrate on an annual basis that each jurisdiction in which a DC purchases from the NYISO under its Tariff that it does not impose a GRT.

IPPNY further would accept TO Tariff sheets as evidence of non-applicability of GRTs. We do not know the degree to which the referenced Tariffs detail which municipalities have or apply a GRT. Also, this would amount to acceptance of TO Retail Tariffs as a form of tax advice.

2. The receipt for the purchase of or sale to the DC of such goods or services are not subject to the GRT imposed by each jurisdiction.

Both of these again “poke the sleeping dogs” and add administrative burden.

- For the efforts of various proposals to contain potential GRT liability there is one area that has been raised but not completely vetted. Transmission Owners, buying energy for their own facilities in essence look like DCs. This would be true unless they specifically had a 3rd party organization buying for this end use load on their own behalf. Further, there is the question of exposure to GRT for these purchases unless the tax law specifically exempts their own load purchases from GRT applicability⁵.

Any solution needs to address this issue as well.

- While this does not impact on the ISO, we have the ability to have bilateral transactions between Suppliers and Loads in NY. To our recall, this issue also has received no discussion, but any direct sale of that nature would certainly seem to have GRT exposure. IPPNY has indicated that physical bilateral sales would be subject to GRT, if applicable.
- To our knowledge and belief, no entity taking service directly from the NYISO remits or otherwise pays GRT in any jurisdiction. With the expiration of the state GRT (and taxes tied to it such as the MTA tax) there are no GRTs applied by municipalities either to DCs or other LSEs *with the exception of NYC* in the case of the latter as they have a consumption only standard while most others have a source and consumption standard for their GRT.

⁵ ISO staff indicates that if the party holds a “reseller certificate” then the state has no interest in applying the GRT to such consumption.

Select Energy - DRAFT Position Paper Regarding GRT

We do not see how any document(s) as being currently suggested can allow us to retain direct service entities **and** prevent liability to the generators/suppliers. We pay GRT for retail loads in NYC and absent some law based exemption (which does not exist for GRT as it does for the Sales Tax), consumption in the city is likely subject to the tax. If the city wants its tax revenues, the next party in line is the ISO – with their advisory opinion saying its not their responsibility – and next are the generators. We ask, where is the solution here?

This brings us to our proposal.

- All entities purchasing on their own behalf should have a reseller certificate. How that is constituted would be up to them – via a buyer’s cooperative or a load by load basis, etc. This would apply to TOs if they are, in fact, making direct purchases for their own use.
- The phrase at the end of the LSE definition should be struck. (Italicized words on footnote 1)
- Applicability of the GRT is then up to their corporate assessment of the applicability of the GRT in any jurisdiction and avoids any burdensome municipal by municipal polling as to GRT applicability and request for statements related thereto.

We believe this is the best way to wall off the liability for the GRT. We simply do not believe that the certificates or letters will, even if obtainable, will provide the requisite protection.

Select Energy - DRAFT Position Paper Regarding GRT

To: Distribution
From: Glenn D. Haake
Date: January 7, 2005
Re: Direct Customers Issue

Set forth below is proposed language to address the gross receipts tax issue:

First, add the following definition to the tariff: "Direct Customer: a Customer purchasing any good or service directly from any of the NYISO-administered markets for its own consumption or use and not for resale." *

*Note: this definition must be modified in the manner the NYISO acknowledged it must develop to address the issue raised at the January 5, 2005, Management Committee meeting to reflect the fact that we don't intend these provisions to require Suppliers to be obligated to satisfy these conditions with respect to their purchases from the NYISO, including balancing energy, ancillary services and ICAP transactions.

- A. With respect to each jurisdiction in which a Direct Customer owns or operates a facility that engages in direct purchases from the NYISO, by January 15 of each year the Direct Customer must:
1. Provide to the NYISO a current reseller's certificate; or
 2. Provide to the NYISO a current exemption certificate from each applicable taxing authority that exempts the Direct Customer or the transaction from any state or local gross receipts tax (GRT) that exists in the subject jurisdiction, or the substantial equivalent thereto; or
 3. Be a governmental entity that is not subject to the GRT and whose transactions are not subject to a tax imposed upon a third party; or
 4. Provide the NYISO a copy of a current written agreement with the taxing authority pursuant to which the Direct Customer accounts for and pays directly to the taxing authority GRTs arising from its purchases, which agreement must provide that the taxing authority: (i) waives any and all claims for GRT liability against all sellers into the NYISO markets in respect of the Direct Customer's purchases under the NYISO Tariff, and (ii) acknowledges that all sellers into the NYISO markets are third party beneficiaries of the formal written agreement with standing to enforce its terms and conditions.
- B. As an alternative to the procedure set forth in Section A, the Direct Customer may annually demonstrate to the satisfaction of the NYISO that:
1. Each jurisdiction in which the Direct Customer will engage in direct purchases under the NYISO Tariff does not impose a GRT; or
 2. The receipts from the purchase by or sale to the Direct Customer of such goods or services are not subject to the GRT imposed by such jurisdiction.
- C. The showing required under Section B.1, above, can be satisfied by presenting to the NYISO current tariff leaves for each utility in whose service territory the Direct Customer engages in direct purchases under the NYISO Tariff (see, e.g., Statement 35 of PSC 207 (Niagara Mohawk)) showing that each such jurisdiction does not have in effect a GRT) [i.e., that the jurisdiction is not listed on the Statement]
- D. The Showing required pursuant to Section B. 2, above, shall require the Direct Customer to provide the NYISO a certificate or other satisfactory written evidence from each applicable taxing authority.