

City of New York

March 29, 2005

Via Hand Delivery

Mr. John W. Boston
Board Chairman
New York Independent System Operator
3890 Carman Road
Schenectady, NY 12303

c/o Mr. Mark S. Lynch
President and Chief Executive Officer
New York Independent System Operator
3890 Carman Road
Schenectady, NY 12303

**Re: Notice of Motion in Opposition to Appeal of the Management
Committee's March 2, 2005 Decision Concerning Treatment of Gross
Receipts Tax Issues**

Dear Chairman Boston:

Pursuant to the Procedural Rules for Appeals to the NYISO Board, The City of New York hereby submits three copies of its Motion in Opposition to Appeals to the action of the Management Committee at its March 2, 2005 meeting concerning the treatment of Gross Receipts Tax issues.

A copy of this Notice of Appeal has been electronically transmitted to Ms. Kristen Kranz to facilitate service on the members of the Management Committee and electronic website posting.

Very truly yours,

Michael J. Delaney

Michael J. Delaney, Esq.

Attachments

cc: Rob Fernandez, Esq.
Mollie Lampi, Esq.

Motion in Opposition By The City of New York
To Appeals of the Management Committee Decision
Of March 2, 2005 Concerning Treatment of
Gross Receipts Tax (“GRT”) Issues

In accordance with Article 5 of the NYISO Agreement, and Section 4.01 of the Procedural Rules for Appeals to the ISO Board, the City of New York (“City”) hereby files its Motion in Opposition to the appeals filed herein by Fluent Energy Corporation, KeySpan-Ravenswood LLC, and Multiple Intervenors. Appellants challenge an action taken by the Management Committee on March 2, 2005 to add tariff language establishing requirements applicable to Direct Customers that purchase NYISO services. Under the terms of the approved vote under challenge here, Direct Customers would simply be asked to satisfy one of three options: possession of a valid reseller’s certificate, status as a GRT-exempt entity, or an agreement from the applicable local taxing authority indicating that liability claims against sellers into the NYISO market for GRT payments would be waived.

Despite the claims of the appellants, such alternative choices are not unduly burdensome, and do nothing more than attempt to prevent the potential loss of local gross receipts taxes through the use of practices such as purporting to purchase at wholesale in the NYISO market for the purpose of resale while not in fact reselling. While some may view this as a clever stratagem to avoid the incidence of taxes (particularly where the tax in question has been eliminated at the State level), others may reasonably interpret it as a potential evasion strategy that both deprives local government entities of lawful revenue, and unfairly disadvantages those market participants who dutifully follow the letter and

spirit of the law. Addressing this issue on behalf of the NYISO and its members is a fully justified exercise of the governance process

In addition, it is not sound policy for the NYISO to permit practices that can clearly operate inequitably simply because the issue in question is no longer one of Statewide import. As noted by one Appellant in its filing (Multiple Intervenors, at p. 6, n. 8), the GRT issue still has particular significance in New York City, particularly since the City GRT does not require origination of the transaction in its territory. And therefore, as was implicitly recognized by Multiple Intervenors, this lends credence to the concern that some parties are placed in a commercially untenable position vis-à-vis Direct Customers in the State's biggest energy market.

For the City, as the largest governmental entity in the State with a current GRT tax, this concern is not a trivial one. While there has been a view expressed that it is not the NYISO function to address matters of tax policy (MI at p. 7), the City would characterize the issue differently: it is the proper role of the NYISO to ensure that its market is not being used to confer undue commercial advantage on some Market Participants at the expense of others. This is particularly the case in light of the NYISO mission to administer "an open, competitive and non-discriminatory wholesale market for electricity" (NYISO website statement, cited by MI at p. 8).

Discrimination in effect, even if unintended, is assuredly a legitimate concern for Market Participants to address as they have in the Management Committee motion here. In addition, we all have a continuing interest in avoiding the potential creation of a complex future tax dispute that would only serve to distract the NYISO and its members from the work that is central to the mission of the organization.

It is of course conceivable that in the future the GRT will become a non-issue in the City, or in other local jurisdictions. Discussions concerning revision or replacement of the City GRT might occur, for example, in the context of Statewide tax conformity measures. But that theoretical possibility must yield to the current reality – and to the live issue currently before the NYISO and its Market Participants.

The incidence of the tax here may not fall on the NYISO as a market maker rather than a seller *per se*, as was apparently confirmed, at least concerning the former State-imposed GRT, by an advisory opinion from the New York State Tax Department in 2000. However, potential liability of market suppliers for GRT payments exists (Proceedings of Business Issues Committee on September 22, 2004; comments of NYISO staff counsel). While others have disputed the latter view (e.g., letter of October 5, 2004 from Glen Haake on behalf of IPPNY to NYISO General Counsel Robert Fernandez), it remains an issue that has provided much of the impetus for the passage of the measure here.

It is noteworthy that the Management Committee approval vote here was very substantial, with nearly 75% of those market participants voting favoring adoption of the measure. While such a vote total cannot be determinative in considering an appeal, and the Board must consider the issues that arise before it on their own merits, widespread market participant support remains a legitimate factor for the Board's consideration.

In addition, NYISO Staff participated fully in the governance committee meetings on this subject and conducted an independent review of the proposal and the rationale supporting it, as well as the claimed burdens that it would allegedly impose. The Staff concurred in support of the GRT-related tariff provisions. It is thus thoroughly unpersuasive to suggest, as one Appellant does (Fluent Energy, Section 4, unpaginated

pp. 7-8), that the measure broadly supported in the Management Committee here merely represents a parochial form of special interest protectionism. In addition, while KeySpan-Ravenswood has characterized its appeal as a filing more in the nature of a request for clarification, the City disputes the expressed view of the company that the effect of the motion passed in the Management Committee is to implicitly create a NYISO retail market. The real concern behind the motion is in part that some entities may attempt to blur the wholesale-retail distinction in the State's energy market, not that there is any ambiguity concerning the fundamental nature of the NYISO-administered market.

Conclusion

For all the above reasons, the City urges the Board to uphold the March 2, 2005 decision of the Management Committee to mandate reasonable requirements on Direct Customers who purchase service from the NYISO, and to thereby take fundamentally fair steps to ensure compliance with local GRT requirements.

Dated: March 29, 2005

Respectfully submitted,

Michael J. Delaney

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