

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-07(20)S
Sales Tax
July 26, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S051110A

On November 10, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from David Sholk, LLC, 432 Willow Street, Lockport, NY 14094. Petitioner, David Sholk, LLC, provided additional information pertaining to the Petition on March 24, 2006.

The issues raised by Petitioner are:

1. Whether Petitioner's transactions in the New York Independent System Operator virtual electric market are subject to the New York State sales and use tax.
2. Whether Petitioner is required to be registered as a vendor for sales tax purposes.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is a market participant in the New York Independent System Operator (NYISO) virtual electric market. NYISO administers the distribution of electricity across the state among and between generators and consumers. The persons who participate in the ISO markets may be resellers or entities that consume large amounts of power in their business operations. In administering the distribution of electricity among and between generators and consumers, NYISO also acts as a billing and collection agent for the sales and purchases of electricity by these parties.

The NYISO regulates both virtual and physical electric markets, offering various levels of participation in the NYISO electric markets. All participants are required to register with NYISO and must otherwise meet the applicable NYISO qualifications (NYISO Technical Bulletin 074). Whether or not registered as market participants for other purposes, a separate NYISO registration as a market participant in the virtual market is also required for both current and prospective NYISO customers to participate in virtual bidding.

NYISO Technical Bulletin 074, *Virtual Bidding in the Day-Ahead Market*, states, in part:

Virtual bidding is the submission of bids for the financial purchase or sale of energy, rather than or in addition to the physical delivery or purchase of energy in the NYISO-administered electric markets.

Virtual Bidding enables Qualified NYISO Customers to:

- buy energy (Virtual Load) in the Day-Ahead Market (DAM) at day-ahead prices and sell it in the Real-Time (RT) Market at real-time prices and;

- sell energy (Virtual Supply) in the DAM at day-ahead prices and buy energy to cover the sale in the RT market at real-time prices (Virtual Supply).

Virtual Load and Virtual Supply transactions are financial transactions only and have no effect on real time physical energy consumption.

A *virtual load* and a *virtual supply* are established for all virtual transactions. The *virtual load* and *virtual supply* established for virtual transactions are separate from the *physical load* and *physical supply* which are established for physical transactions. Existing NYISO bidding rules for physical load and physical supply are not affected by the virtual load and virtual supply bidding rules (NYISO Technical Bulletin 074).

A NYISO News Release entitled *New York ISO Announces Successful First Week of Virtual Bidding*, dated November 14, 2001, provided the following description of the Virtual Electric Market, further describing the financial aspects of virtual trading:

Virtual supply and virtual load transactions are financial transactions only and have no effect on Real-Time physical energy consumption, nor do they compromise the physical commitment of energy resources for the purpose of system reliability. Instead, they help to even out price differences between markets as traders seek to arbitrage the price differences between markets. Virtual trading provides a means for companies outside the electricity industry, such as financial institutions to become involved in New York's markets. It also provides a means for existing market players to hedge themselves against risk.

Petitioner, as a participant in the virtual electric market, engages in this financial arbitrage of energy prices between the Day-Ahead Market and Real-Time Market. Petitioner neither generates nor consumes electricity. Petitioner only participates in the virtual electric market bidding on the supply and demand of energy. Petitioner neither takes delivery of, nor is obligated to deliver, any electricity on account of purchases and sales in the ISO virtual market.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

* * *

(b)(1) The receipts from every sale, other than sales for resale, of the following:
(A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; . . .

Section 1134(a)(1)(i) of the Tax Law provides, in part:

Every person required to collect any tax imposed by this article, other than a person who is a vendor solely by reason of clause (D), (E) or (F) of subparagraph (i) of paragraph eight of subdivision (b) of section eleven hundred one of this article, commencing business or opening a new place of business . . . shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business or opening a new place . . . whichever comes first. . . .

The NYISO Market Administration and Control Area Services Tariff provides, in part:

2.194b Virtual Transaction

Any bid to purchase or offer to sell Energy in the Day-Ahead LBMP market submitted at the load bus specified for Virtual Transactions.

* * *

4.2.2 Day-Ahead Load Forecasts, Bids and Bilateral Schedules

A. General Customer Forecasting and Bidding Requirements

* * *

(ii) Customers submitting Bids in the Day-Ahead Market, other than Pre-scheduled Transaction Requests, shall provide the ISO, as appropriate with:

1. Bids to supply Energy, including Bids to supply Energy in Virtual Transactions;

* * *

4. Bids to purchase Energy, including Bids to purchase Energy in Virtual Transactions; and

* * *

E. Bids to Supply Energy in Virtual Transactions

Customers submitting bids to supply Energy in Virtual Transactions shall identify the Energy, in [mega watts] available in the Day-Ahead Market ... and the price(s) at which the Customer will voluntarily make it available.

F. Bids to Purchase Energy in Virtual Transactions

Customers submitting bids to purchase Energy in Virtual Transactions shall identify the Energy, in [mega watts], to be purchased in the Day-Ahead Market ... and the price(s) at which the Customer will voluntarily purchase it.

* * *

4.5 Real-Time Market Settlements

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B. Settlement for Customers Scheduled to Sell Energy in Virtual Transactions in Load Zones

The Actual Energy Injection in a Load Zone by a Customer scheduled Day-Ahead to sell Energy in a Virtual Transaction is zero....

* * *

E. Settlement for Customers Scheduled to Purchase Energy in Virtual Transactions in Load Zones

The Actual Energy Withdrawal in a Load Zone by a Customer scheduled Day-Ahead to purchase Energy in a Virtual Transaction is zero....

Opinion

Petitioner is a participant in the NYISO virtual electric market. Petitioner's purchases and sales are only financial in nature; Petitioner neither generates nor consumes electricity. Petitioner does not, by virtue of its participation in the virtual market, actually physically receive or physically transfer electricity. Virtual transactions are a hedging mechanism for market participants (generators, resellers, consumers), and NYISO allows additional participants that are not engaged in actually generating physical supplies, reselling physical electricity and/or electric service, or consuming physical loads to participate in the markets. Further, as provided in section 4.5 of NYISO's Services Tariff, zero actual energy is withdrawn or injected in a load zone (a geographic area of energy consumption) by a customer scheduled to buy or sell energy in a virtual transaction.

Virtual bids are separate from bids for the physical purchase and sale of electricity in the NYISO physical markets. Petitioner does not purchase or sell any taxable items or services when Petitioner merely buys or sells in a NYISO virtual transaction. Accordingly, Petitioner's transactions in the NYISO virtual electric market are not sales of electricity or electric service subject to sales tax under section 1105(b)(1)(A) of the Tax Law. When Petitioner acts solely as a participant in the NYISO virtual market, Petitioner is not a vendor for purposes of section 1101(b)(8) of the Tax Law and is not required to register as a vendor pursuant to section 1134 of the Tax Law.

DATED: July 26, 2007

/s/
Jonathan Pessen
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Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.