

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

TSB-A-08(3)S
Sales Tax
January 8, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070626A

On June 26, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from AB Energy, Inc., 948 Avon Crest Boulevard, Niskayuna, New York 12309.

The issue raised by Petitioner, AB Energy, Inc., is whether Petitioner's transactions in the New York Independent System Operator virtual electric market are subject to New York State sales and use taxes.

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

The New York Independent System Operator ("NYISO") is a not-for-profit corporation responsible for the operational control of New York State's bulk transmission system and the administration of spot markets for the wholesale trading of electricity, capacity and related ancillary services. The electricity spot markets administered by NYISO utilize a bidding process that sets prices competitively. Electric generators bid the price they are willing to accept for the electricity they produce, and load-serving entities ("LSEs") bid the amount of load they need to serve (i.e., the amount of electricity they need to buy) and the maximum price they are willing to pay.

NYISO operates a two-settlement system where electricity prices are determined in day-ahead and real-time markets. The day-ahead and real-time markets allow electric generators and LSEs to establish binding financial commitments to buy and sell electricity one day ahead of the actual physical operating day. The real-time market is the physical market where the price of electricity is a function of the actual amount of energy that is produced by generators to meet LSEs' actual load requirements. Commitments established in the day-ahead market are settled against the real-time market based on the differences between energy production and consumption scheduled in the day-ahead market and actual real-time production and consumption during the operating day. For example, a generator that actually produces 90 megawatts but was committed in the day-ahead market to provide 100 megawatts would be paid for 100 megawatts at the day-ahead price but would be required to pay the costs of 10 megawatts at the price determined in the real-time market.

In addition to, and separate from, the markets for the trading of physical energy discussed above, NYISO also operates a virtual market (the "Virtual Transactions Market"). The Virtual Transactions Market is designed to allow entities that neither generate electricity nor serve load to submit "virtual" bids for purely financial purchases or sales of virtual electricity, rather than purchases or sales associated with the physical generation, delivery, or consumption of electricity. NYISO's virtual bidding procedures allow qualified entities to buy virtual electricity

(“virtual load”) or sell virtual electricity (“virtual supply”) in the day-ahead market at day-ahead prices.

Virtual bids are submitted to NYISO separately from physical bids. NYISO knows which bids are virtual and which ones are physical. While virtual bids affect prices in the day-ahead market, the bids have no impact on the actual amount of electricity that is dispatched or the amount of electricity that is consumed in the real-time market. Once a virtual load or supply bid is scheduled into the day-ahead market, NYISO’s Virtual Transactions Market automatically sells in the real-time market at real-time prices the same amount of virtual electricity that was bought in the day-ahead market or buys in the real-time market at real-time prices the same amount of virtual electricity that was sold in the day-ahead market. Unlike the bids submitted by generators and LSEs that are associated with the actual physical generation, delivery, and consumption of electricity, virtual transactions are financial transactions only. Virtual transactions can never involve the physical generation, delivery, or consumption of electricity because, by design, the same amount of virtual electricity that is sold/bought in the day-ahead market is automatically bought/sold in the real-time market.

Virtual transactions assist the electricity markets by allowing the arbitrage of price differences between the day-ahead and real-time markets and increasing price liquidity in the electricity markets.

Petitioner is a New York corporation with its principal place of business in Niskayuna, New York. Petitioner neither generates electricity nor serves load in NYISO’s administered electricity markets. Petitioner trades solely in NYISO’s Virtual Transactions 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 Transactions 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.

David Sholk, LLC, Adv Op Comm T&F, July 26, 2007, TSB-A-07(20)S, included the following description of the financial aspects of the Virtual Transactions Market:

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.

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 Transactions 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. See *David Sholk, LLC, supra*.

DATED: January 8, 2008

/s/
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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.