

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. ER05-1507-001

ORDER ON COMPLIANCE FILING

(Issued July 21, 2006)

1. On March 6, 2006, the New York Independent System Operator (NYISO) made a filing to comply with the Commission's January 31, 2006 Order that required the NYISO to revise section 8.4 of its Market Administration and Control Area Services Tariff (Services Tariff). Section 8.4 of the Services Tariff requires market participants to provide certain documentation to the NYISO to ensure that their transactions in the NYISO-administered markets do not trigger any responsibility for the NYISO to collect or remit New York State or local sales taxes. The Commission conditionally accepts the proposed tariff sheets, to be effective February 1, 2006, as requested, subject to Commission acceptance of the further compliance filing directed herein.

Background

2. On September 23, 2005, the NYISO proposed revisions to its Services Tariff that would require market participants to provide certain documentation to the NYISO to ensure that transactions in the NYISO-administered markets do not trigger a responsibility for the NYISO to collect or remit New York State or local sales taxes. NYISO's proposed documentation requirements were intended to enable the NYISO to avoid expense and administrative burdens that it would otherwise incur to comply with the New York State Sales and Compensatory Use Tax laws. On January 31, 2006, the Commission conditionally accepted the proposed tariff sheets, subject to Commission acceptance of a compliance filing.¹

¹ *New York Independent System Operator, Inc.*, 114 FERC ¶ 61,087 (2006).

3. In the January 31 Order, the Commission rejected the arguments of the Financial Marketers² 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. In this regard, the Commission declined to make any determination regarding the tax liabilities of particular entities under New York State tax law and found that NYISO's proposal, as modified, to be just and reasonable and a minimally burdensome reporting requirement.³

4. The Commission also found that it was 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.⁴ Accordingly, the NYISO was directed to revise proposed section 8.4 to make explicit that the list of examples of exemption documents in section 8.4(A)(1) was not exhaustive, and customers could provide "comparable" exemption documents that would allow the NYISO to structure its markets so that no sales taxes were due at the time of sale or ever.

Compliance Filing

5. In its March 6, 2006 compliance filing, NYISO revised section 8.4 of its Services Tariff to: (i) make explicit that the list of examples of exemption documents is not exhaustive; and (ii) add another option for market participants to satisfy the requirement to assure that no New York State or local sales tax responsibility is triggered.⁵ NYISO requests that its filing become effective on February 1, 2006.

Notice of the Filing and Protest

6. Notice of the filing was published in the *Federal Register*, 71 Fed. Reg.13831 (2006), with interventions and protests due on or before March 27, 2006. Epic Merchant Energy LP (EPIC) filed a protest.

7. EPIC asserts that the proposed revisions to section 8.4 of the NYISO Services Tariff must be further clarified or changed because the language proposed is ambiguous

² EPIC Merchant Energy, LP, SESCO Enterprises LLC and Black Oak Energy, LLC.

³ *New York Independent System Operator, Inc.*, 114 FERC ¶ 61,087 at P 12-13.

⁴ *Id.* at P 14.

⁵ As relevant here, NYISO proposed to modify section 8.4(1) to require "...in the case of a Customer that is a non-New York State purchaser, other comparable evidence of exemption that no sales taxes are due at the time of sale or ever...".

and has already created significant compliance problems. EPIC maintains that the revised language was added because some participants do not qualify to file any of the New York State tax exemption documents/certificates and thus, absent another compliance mechanism, cannot comply with NYISO's revised language. EPIC explains that it is one of the participants affected by this tariff revision because it is a non-New York company which engages in financial or "virtual" transactions in NYISO and never makes retail sales/purchases of electricity in New York.

8. EPIC further contends that, although the proposed tariff revision states that other comparable evidence of exemption can be submitted, when EPIC sought to comply with this requirement, the NYISO refused to accept its submission. According to EPIC, NYISO indicated orally that EPIC'S proposed exemption form was probably not sufficient, but has consistently refused to say what evidence would be sufficient. EPIC believes that it is now clear that the proposed revision to section 8.4 is too ambiguous and that NYISO must be directed to give affected participants more guidance on what evidence will be sufficient to comply with its terms. EPIC points out that this guidance is needed because serious consequences can follow for any customer that fails to satisfy the tax exemption filing requirement, such as service suspension, termination, or the customer being considered to be in default. Additionally, EPIC argues that NYISO should be directed to develop a compliance form that is comparable, in form and content, to the certificates that all other participants are permitted to submit, in order to avoid NYISO imposing requirements that may be unduly burdensome.⁶ Finally, EPIC believes that NYISO should not be permitted to submit general tariff language, stating only that other comparable evidence of exemption must be provided, and then tell participants it will not decide what evidence will suffice until after the Commission acts on its compliance filing.

Discussion

9. The Commission will accept the NYISO's filing as being in satisfactory compliance with the directives in our January 31 Order. However, EPIC's protest raises a concern as to NYISO's administration of its proposed tariff. Section 8.4(1) of the proposed tariff states that "other comparable evidence of exemption that no sales taxes are due at the time of sale or ever" must be provided by a customer, such as EPIC, that is a non-New York State purchaser. In requiring the NYISO to add this provision, the Commission believed that it would not be unduly burdensome for non-New York state purchasers, to acquire and file such exemption document with the NYISO. EPIC now informs us that this provision, without further explanation or guidance, has proven burdensome and has not been adequate to allow it, or other non-New York State

⁶ EPIC explains that it should be possible to give NYISO the information it seeks without the burden of multiple calls and e-mails, multiple submissions, or satisfying other expensive compliance requirements, such as an opinion letter from a law firm.

purchasers to comply with the NYISO's sales tax exemption requirement. Therefore, the Commission will require the NYISO to further amend section 8.4 of its Services Tariff to provide specific guidance on what documentation, comparable to the certificates that all other participants are permitted to submit, would allow non-New York State purchasers to satisfy NYISO's sales tax exemption requirement. NYISO is directed to make this compliance filing within 30 days of the date of this order. Pending acceptance of the new compliance filing, NYISO cannot suspend or terminate service, or consider a customer to be in default due to its failure to furnish satisfactory sales tax exemption documentation.

The Commission orders:

(A) The Commission hereby conditionally accepts NYISO's proposed revised tariff sheets, to be effective February 1, 2006, as requested, subject to Commission acceptance of the further compliance filing directed herein.

(B) The Commission hereby directs NYSIO to submit, within 30 days of the date of issuance of this order, a further revision to section 8.4 of its Services Tariff setting forth the specific means by which non-New York State purchasers can comply with the sales tax exemption provisions of its tariff.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.