



*The
power
to shape
the future*

Response of

National Energy Marketers Association

to

State of New York

Department of Taxation and Revenue

Opinion of Counsel

Relating to

Sales of Electric Transportation Services

File No: L11.010

Dated January 1, 1999

January 6, 1999

National Energy Marketers Association
3220 N Street, NW, Suite 338
Washington, DC 20007
Tel: (202) 333-3288; Fax: (202) 333-3266
<http://www.energymarketers.com>

I Introduction

The National Energy Marketers Association (NEMA) is a national, non-profit trade association representing a regionally diverse cross-section of both wholesale and retail marketers of natural gas and electricity. **NEMA** also represents producers, generators, transporters, and marketers of energy-related information, services and technology throughout the United States.

NEMA was created specifically to work with representatives of state and federal governments, large and small consumer groups and utilities to devise fair and effective ways to implement restructuring of both the natural gas and electricity markets. **NEMA** is committed to the implementation of laws, regulations, standards of conduct, rates, tariffs and operating procedures that (a) provide all customers meaningful choice, (b) implement open, efficient, liquid and price-competitive energy markets, and (c) that encourage the development of new and innovative energy services and technologies, at the earliest possible date.

II The “Restructured Environment” Has Not Changed the Facts, the Substance or the Application of Section 1105(b) of New York State Tax Law as it Applies to Electric Transportation Services

Section 1105(b) imposes a sales tax on “the receipt from every sale, other than sales for resale, of gas, electricity, refrigeration and steam, and gas, electricity, refrigeration and steam service of whatever nature...”. For at least the past 13 years, it has been settled New York State law that energy transportation services do not fall within the definition of “gas, electricity, refrigeration and steam, and gas, electricity, refrigeration and steam service of whatever nature...”¹. It is settled law that when a utility provides the service of transporting “gas, electricity, refrigeration and steam” it is defined under New York law as the “transportation of goods” and such utility is engaged in “contract carriage”. Contract carriage for the transportation of “gas, electricity, refrigeration and steam” is specifically not among the services subject to sales tax pursuant to Sections 1105, 1107 or 1109 of the Tax Law.

The Department of Taxation and Finance, the State of New York State Tax Commission and the Commissioner of Taxation and Finance have each issued long standing, definitive opinions on this specific issue. Each have held that the transportation of energy is not subject to 1105(b) nor is it defined as gas, electricity, refrigeration and steam, and gas, electricity, refrigeration and steam service of whatever nature...” The one paragraph statement to the contrary in the Opinion of Counsel issued January 1, 1999 is not only expressly contrary to these

¹ See: Advisory Opinion No. 9841220A, State of New York Tax Commission, October 16, 1985; Advisory Opinion No. Z960404C , State of New York Tax Commissioner of Taxation and Finance, December 26, 1996; and Department of Taxation and Finance, Opinion of Counsel, dated January 30, 1997.

long standing, established legal precedents but is also contrary to the same Counsel's opinion issued on January 30, 1997.

Counsel bases this new opinion on the existence, as of January 1, 1999, of a "restructured environment", and that this "restructured environment" somehow changes either the applicable facts or law surrounding the above legal precedents under 1105(b) of New York tax law. Neither the facts relating to the transportation of energy nor the legal and regulatory structure ("environment") under which such transportation services are currently provided, changes either the underlying nature of the transaction, or the legal and policy reasons underlying the long-standing exclusion of transportation services and/or contract carriage from existing sales or use taxes imposed on tangible personal property.

Currently "gas, electricity, refrigeration and steam, and gas, electricity, refrigeration and steam service of whatever nature..." in Section 1105(b) of Tax Law refers to bundled utility sales of energy coupled with related billing, metering and distribution services. NEMA is urging the state of New York, generally through proceedings before the New York Public Service Commission (PSC) to change the "environment" under which all utility services are provided so that utility services will no longer be bundled and therefore defined as "gas, electricity, refrigeration and steam service". Additionally, once utilities stop providing energy commodities bundled with related billing, metering and utility distribution services, NEMA is urging that such utilities no longer be subject to the concomitant "obligation to serve" as that term is defined under New York law. Once the legal and regulatory "environment" is, in fact, "restructured" in the state of New York, current Section 1105(b) will automatically apply on a competitively-neutral basis to all market participants based on existing law and precedent. Prior to the full implementation of unbundling of energy services in the state of New York, under no circumstances is it either appropriate or timely to impose a new tax by administrative fiat on the transportation of goods or contract carriage of electricity.

III

A New Tax on Electric Transportation Services Should Not be Implemented by an Administrative Opinion and Will Damage the State's Progress Towards Restructuring

Much progress toward restructuring has occurred and considerably more progress is planned over the next several years. However, energy is not currently sold or transported under a sufficiently "restructured environment" to issue a one paragraph Opinion of Counsel that effectively reverses much of the progress that the state has made thus far to implement the very "restructured environment" upon which the new Opinion of Counsel is based. Imposing this new tax on the transportation of goods and/or contract carriage, by an administrative opinion, without a vote of the legislature, before the legal and regulatory "environment" in the State of New York is in fact "restructured" eliminates more than a decade of well-established law and practice, will increase both prospectively and

retroactively the cost of energy to thousands of consumers transporting energy under existing contracts for carriage and will effectively destroy customer choice programs that consumers and early adopters had been relying on.

Many NEMA members have made substantial investments to serve consumers in the state of New York based, in part, on the laws under which energy transportation is legally defined as the transportation of goods and or contract carriage. Numerous consumers have also entered into contracts in reliance on existing law. To repeal this law without a vote, notice or grand-fathering existing contracts, harms both marketers and consumers without due process of law.

IV Imposing a New Energy Tax Without a Vote of the Legislature Conflicts with the 1998 State Energy Plan

Several days before the January 1, 1999 Opinion of Counsel was issued, the State released its 1998 State Energy Plan. This Plan is replete with goals, strategies and principles promoting and encouraging competition in gas and electric markets. In fact, the Plan states:

Governor Pataki's commitment to reduce energy costs by lowering taxes, streamlining and eliminating the necessary regulations, and providing electricity and natural gas customers a greater choice underpins New York's energy strategy. (SEP p. 1)

It is respectfully submitted that the Opinion of Counsel conflicts with the principle strategies of the New York State Energy Plan as it (1) increases taxes on electricity; (2) negatively impacts consumers by raising energy costs and eliminating customer choice programs; and (3) undermines and dismantles the State's ongoing efforts to foster competition in the electric retail market.

New York's energy prices for all fuels have been historically higher than the national average, prompting the State to aggressively pursue competition and consumer choice in the gas and electric markets (SEP p. 1-4). The higher price for electricity has underscored the "critical" importance of transitioning to a competitive market. SEP pp. 3-4; 1-4.²

Current New York State energy policy is to reduce taxes on energy, not increase them. Recognizing that one of the major contributors to the high cost of energy in the State of New York is state and local taxes, the State Energy Plan proclaims, in unequivocal terms:

² There are obvious detrimental effects of higher energy prices on residential consumers, small businesses and industries. The Plan validly recognizes that energy prices are a major factor in business location and expansion decisions and that any reduction in energy costs will not only make businesses and industries more competitive with other regions, but will inure to the benefit of the ultimate consumer (SEP p. 1-5).

New York should encourage reduction of energy taxes as a means to lower energy costs and make energy prices more competitive, thereby promoting economic development including the retention and creation of jobs. (SEP p. 1-16).

The January 1, 1999 Opinion of Counsel increases the taxes on energy, raises prices to consumers and significantly contradicts current state policy. Instead of fostering a competitive business climate with which to attract new businesses and jobs to New York, the Opinion renders energy prices uncompetitive to the detriment of economic development and consumers.

V **Conclusion**

The January 1, 1999 Opinion of Counsel directly undermines these significant goals for which New York State has been striving. The application of a new tax on transportation services automatically increases the cost of energy to both energy marketers attempting to establish the retail energy marketplace in New York, as well as to consumers who were promised energy savings. The net effect of this ill-advised and ill-timed opinion is that energy marketers will depart from the New York market, thereby undermining recent PSC attempts to encourage competition and economic growth within the State. Worse yet, many consumers will have the prices they negotiated under preexisting transportation contracts increased, changing radically the economics of many past transactions.

NEMA strongly supports the efforts of the state to implement the changes in law and policy necessary to create a “restructured environment” for the sale and transportation of energy and related services and technologies. Indeed, such a restructured environment could lead to substantially greater economic productivity, lower energy costs and a more competitive business climate in the state. All of these effects should raise New York state tax receipts far more than imposing a new tax on energy consumers, effective January 1, 1999, without a vote of the legislature and before restructuring has had an opportunity to benefit the New York economy.

For all of the above reasons, NEMA urges the state of New York to rescind the Opinion of Counsel issued January 1, 1999, before significant and irreparable damage is done to the newly developing markets for energy-related services and technology.

Respectfully submitted

Craig G. Goodman
President