

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(50)S
Sales Tax
November 30, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000719B

On July 19, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Consolidated Edison Company of New York, Inc., 4 Irving Place, Room 1875-S, New York, New York 10003.

The issues raised by Petitioner, Consolidated Edison Company of New York, Inc., are:

1. Whether if Petitioner were to separate its gas and electricity transmission and distribution functions from its wholesale and retail supply of gas or electricity by putting its wholesale and retail supply of gas or electricity (“retail functions”) into a separate corporate entity, the reduced sales tax rates under Section 1105-C of the Tax Law would apply to the transmission and distribution charges.
2. If the answer to Issue 1 is yes, whether the reduced sales tax rates would apply to gas and electricity transmission and distribution charges if the new company were a subsidiary of Consolidated Edison, Inc. and a sister company of Petitioner.
3. If the answer to Issue 1 is yes, whether the reduced sales tax rates would apply to gas and electricity transmission and distribution charges if the retail functions were physically located in the same building as the transmission and distribution company.
4. If the answer to Issue 3 is no, whether the reduced sales tax rates would apply to the gas and electricity transmission and distribution charges if the retail functions were physically located in another building from the transmission and distribution company.

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

Petitioner is a regulated public utility incorporated in the State of New York on November 10, 1884. It is a subsidiary of Consolidated Edison, Inc. (“CEI”), a public utility holding company under the Public Utility Holding Company Act of 1935 (“PUHCA”), which is exempt from registration with the Securities and Exchange Commission (“SEC”) in accordance with Section 3(a)(1) of PUHCA. CEI was incorporated in the State of New York on September 3, 1997. Petitioner is engaged in the business of furnishing electricity, gas and steam utility services to the general public within New York City and Westchester County.

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In August 1994, the New York State Public Service Commission (the "PSC") began hearings with respect to restructuring the New York electric industry to foster competition in the generation of electricity and offer customers a choice of energy providers (The Competitive Opportunities Proceeding, Case No. 94-E-0952). On May 20, 1996, PSC issued an order that endorsed a fundamental restructuring of the electric utility industry in New York State. The PSC directed Petitioner and most of the other electric utilities in New York subject to a Competitive Opportunities Proceeding to file restructuring plans by October 1, 1996, addressing, among other things, retail access, divestiture, and a corporate reorganization. On October 1, 1996, Petitioner filed its plan with the PSC.

On September 23, 1997, the PSC issued its Order Adopting Terms of Settlement Subject to Conditions and Understandings in Cases 96-E-0897 and 96-E-0916 (hereinafter "the Order"). The Order, with the conditions and understanding set forth therein, adopted and incorporated the terms of the Amended and Restated Settlement Agreement dated September 19, 1997, among Petitioner, PSC staff and other parties (the "Settlement Agreement"). The Settlement Agreement provides for a transition to a competitive electric market through the divestiture of Petitioner's electric generating facilities and the development of a retail access plan under which Petitioner's customers could choose alternative suppliers of electricity. It is currently planned that, by November 1, 2000, all of Petitioner's electric customers would have the choice to buy electricity from other suppliers. The delivery of electricity to customers will continue to be through Petitioner's transmission and distribution ("T & D") systems. All of Petitioner's gas customers are already permitted to buy gas from other suppliers and the delivery of the gas is through Petitioner's T & D system. For those customers that do not buy their electricity or gas from an alternative supplier, Petitioner will continue to provide both the T & D service and the gas or electricity to those customers ("bundled service"). Retail choice is not available to Petitioner's steam customers (these customers are separately billed for steam service, apart from the billing for electric or gas T & D or commodity services).

In order to further Petitioner's efforts to introduce competition into the electric industry, a recommendation has been made to separate and move the retail functions into a regulated subsidiary company.

The new company would be a subsidiary of CEI (the holding company) with its own employees who will be responsible for all energy purchases for customers who currently purchase supply from Petitioner. It is anticipated that the functions integral to the new company operations will include all existing customer operations (e.g., call centers, billing, collections, etc.); energy services activities charged to customer accounting and sales; cash processing treasury functions; electric and gas supply; mailroom operations; and customer outreach staff in corporate communications. Approximately 2,000 employees would staff the proposed organization. Petitioner would continue to provide the T & D services. The objective is to separate functions that align with other energy service companies (ESCO's) so as to isolate cost elements that compare with the ESCO's and separate those costs from those of the T & D function.

The demarcation between the T & D and retail functions is the meter. The physical ownership, testing, installation and removal of meters will remain with the T & D function. Meter data services, including meter reading, customer requested turn-on and turn-off, and turn-off for non-payment will be the responsibility of the new company. Also, integral to this proposal is the independence of billing systems of T & D and the new company. As a regulated entity, the new company will be subject to all regulatory and statutory stipulations for a utility.

It is assumed that the newly formed subsidiary of CEI is in fact a separate and distinct entity from Petitioner that operates independently of Petitioner and holds itself out to the public as a separate legal entity.

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:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, including gas and gas service and electricity and electric service of whatever nature, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery, and, with respect to gas and gas service and electricity and electric service, any charges by the vendor for transportation, transmission or distribution, regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery or transportation, transmission, or distribution is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale....

Section 1105(b)(1) of the Tax Law imposes a tax upon:

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; (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service; (C) a telephone answering service; and (D) a prepaid telephone calling service.

Chapter 63 of the Laws of 2000, added new Section 1105-C of the Tax Law which provides, in part:

Reduced tax rates with respect to certain gas service and electric service. Notwithstanding any other provisions of this article or article twenty-nine of this chapter:

(a) The rates of taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter on receipts from every sale of gas service or electric service of whatever nature (including the transportation, transmission or distribution of gas or electricity, but not including gas or electricity) shall be reduced each year on September first, beginning in the year two thousand, and each year thereafter, at the rate per year of twenty-five percent of the rates in effect on September first, two thousand, so that the rates of such taxes on such receipts shall be zero percent on and after September first, two thousand three.

Opinion

Technical Services Bureau Memorandum entitled Application of Sales Tax to Sales of Certain Utility Services, January 29, 1999, TSB-M-99(1)S, announced a change in policy with respect to the imposition of sales tax on charges for transporting and distributing electricity and natural gas. The original effective date of TSB-M-99(1)S was April 1, 1999. This effective date was changed to April 1, 2000, as reflected in TSB-M-99(1.4)S. TSB-M-99(1.4)S, provides, in part:

Historically, electricity or gas, along with (among other things) the service of getting it to the consumer, was provided by one party, the utility, and the entire charge was subject to sales tax. In a restructured environment, one company will be selling electricity or gas and another company will be providing the service of (among other things) getting the electricity or gas to the customer. The phrase “gas, electricity...and gas, [and] electric...service of whatever nature” imposes tax on the services of both parties in the provision of electricity or gas.

Therefore, the Department has determined that the fee a utility charges the customer for getting the electricity or gas to the customer is subject to state and local sales tax as a charge for electric or gas service.

With respect to Issues 1, 2 and 3, Petitioner’s receipts from the sale of T & D of electricity and gas to a customer, which electricity and gas are sold by a separate vendor, would qualify for the reduced rate of sales tax under Section 1105-C of the Tax Law. See Technical Services Bureau Memorandum entitled Sales and Use Taxes on Gas and Electricity, June 9, 2000, TSB-M-00(4)S. The fact that the separate vendor is a subsidiary of Consolidated Edison, Inc. and a sister company of Petitioner or that the retail functions may be physically located in the same building as Petitioner,

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would not alter the determination that Petitioner's receipts from the sale of the T & D of electricity and gas qualify for the reduced rate of sales tax under Section 1105-C of the Tax Law.

Issue 4 does not need to be addressed based on the conclusion in the preceding paragraph with respect to Issue 3.

DATED: November 30, 2000

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.