

New England Energy Alliance

BY HAND

January 31, 2007

Mr. Alan LeBovidge
Commissioner
Department of Revenue
100 Cambridge Street, 8th Floor
Boston, MA 02114

Re: Comments on Proposed Regulation 830 CMR 62C.3.1

Dear Commissioner:

The New England Energy Alliance, Inc. (the "Alliance") respectfully submits the following comments on Proposed Regulation 830 CMR 62C.3.1 concerning Public Written Statements. Our Executive Director, Paul Afonso, plans to present oral testimony on the Proposed Regulation at the public hearing scheduled for 10 a.m. on Thursday, February 1, 2007.

Overview of the Alliance

The Alliance is a coalition of many of the largest energy providers serving New England, as well as business and trade organizations and other parties advocating for action to ensure that the region has adequate energy resources and infrastructure to sustain its economic growth and prosperity. Formed in 2005, the Alliance works to stimulate public awareness and debate, educate policy makers and opinion leaders, and help identify solutions to ensure that the region has secure, reliable, and affordable energy supplies. It also identifies and responds to public policy initiatives which may inadvertently jeopardize the energy industry's efforts to build and maintain sufficient infrastructure to meet the region's ever-growing demand for electricity and natural gas.

The Alliance members represent all segments of the energy industry including electric distribution companies, natural gas pipeline companies, electricity generating companies, competitive suppliers selling natural gas and electricity to commercial, industrial, and residential customers, and energy trade associations. Our members include Constellation New Energy, Dominion Resources, Duke Energy Gas Transmission, Entergy Corporation, KeySpan Energy, National Grid, Northeast Utilities, SUEZ Energy North America, TransCanada Corporation, the Edison Electric Institute, and the Nuclear Energy Institute. In addition, leaders of some of New England's major businesses and labor organizations, as well as experts on energy and environmental programs, policies and technologies, have volunteered to help the Alliance as

Advisors to develop and guide its plans and programs. A list of the members of our Advisory Council and additional information on the Alliance can be found at www.newenglandenergyalliance.org.

Energy Supply Context of Comments

The Alliance was formed to address what appears to be a worsening energy supply picture in New England. In 2005, the Alliance commissioned one of the nation's leading energy economics consulting firms, Analysis Group, to conduct an adequacy assessment of New England's energy infrastructure. Among the key findings of the report were the following:

- New England's existing electricity and natural gas infrastructure will be inadequate to reliably meet the region's demand within the next several years. Current resources will be insufficient to maintain the reliability of the electric grid in parts of New England as soon as 2008.
- . . . [E]stimates of demand for natural gas during winter peaks reveal potential supply/delivery shortages as soon as 2007 without additional gas supply resources and delivery capacity.
- In short, plausible scenarios of demand exceeding available supplies and delivery capacity for both electricity and natural gas occur as soon as within the next two years and the need for additional supplies may already be upon us (fn omitted).¹

In light of New England's pressing need for more energy resources, now is the time to move forward with substantial investments of energy infrastructure of all types in Massachusetts and throughout New England. However, as the Analysis Group also observed, "uncertainties affecting energy markets are chilling investments."² As explained in further detail below, the Alliance is respectfully requesting that the Department not add to the regulatory uncertainties in Massachusetts which are chilling investments in energy infrastructure.

Proposed Blanket Revocation is Problematic

The Department recently issued Proposed Regulation 830 CMR 62C.3.1, concerning public written statements of the Department (the "Proposed Regulation"). Among other things, paragraph 11 of the Proposed Regulation would revoke and make obsolete, prospectively, certain public written statements not set forth in the latest edition of the official MASSTAX Guide and Supplements or Code of Massachusetts Regulations. Based on this standard, for example, Technical Information Releases issued by the Department prior to 1974, Directives issued prior to 1986, and Letter Rulings issued prior to 1977, would be revoked.

¹ Analysis Group (Susan F. Tierney and Paul J. Hibbard), *New England Energy Infrastructure--Adequacy Assessment and Policy Review*, November, 2005, at 6.

² *Id.*

Included in this proposed blanket revocation of pre-1977 rulings would be two critical rulings (the "Utility Rulings") issued by the Department in July, 1966, shortly after the enactment of the Sales and Use Tax as Chapter 14 of the Acts of 1966. The Utility Rulings address the exemptions from Sales Tax provided by subsections 6(r) and 6(s) of Chapter 64H. These subsections provide exemptions for, among other things, "Sales (purchases) of materials, tools and fuel, or any substitute therefore . . . which are consumed and used directly . . . in the furnishing of steam or electricity when delivered to consumers through mains, lines or pipes" and "Sales (purchases) of machinery, or replacement parts thereof, used directly . . . in the furnishing of steam or electricity when delivered to consumers through mains, lines or pipes."

The Utility Rulings provide that property purchased, leased or used in Massachusetts by companies providing electricity and their contractors is taxable or tax-exempt under subsections 6(r) and 6(s) depending on the classification of such property as chargeable to production, transmission, distribution and general plant accounts prescribed by Massachusetts Department of Public Utilities (now the Department of Telecommunications and Energy) Uniform System of Accounts. The Utility Rulings go on to provide a multi-page, line-by-line detailed listing of items of property under each account as taxable or tax-exempt. The Massachusetts Department of Telecommunications and Energy has adopted, with some minor modifications, the Uniform System of Accounts ("USofA") prescribed by the Federal Energy Regulatory Commission ("FERC"). 220 CMR 51.00 (Uniform System of Accounts for Electric Companies); Code of Federal Regulations, Title 18, Conservation of Power and Water Resources, Parts 1-399. The Utility Rulings thus provide helpful, unambiguous and very detailed guidance to the affected energy companies, and to the Department of Revenue, in determining the taxability of virtually hundreds of items of property.

Impact of Proposed Revocation of the Utility Rulings

For over forty years, suppliers of electricity and natural gas have been able to rely on the Utility Rulings as clear and unambiguous evidence as to how the sales and use tax exemption under subsections 6(r) and 6(s) of Chapter 64H applies to virtually every item of property purchased by them. As the Department is aware, the construction of energy infrastructure, be it natural gas pipelines and storage facilities, generating facilities or electric transmission facilities, routinely involves the use of multiple contractors and subcontractors to purchase and install hundreds of thousands, if not millions, of dollars of equipment for a single new energy facility. To require the suppliers, their contractors and subcontractors, as well as the Department of Revenue, to rely on general principles to classify virtually hundreds of items of otherwise ambiguous character on a case-by-case basis, without reference to the Utility Rulings, would foster a system of regulatory chaos, imposing considerable additional compliance costs on industry, in addition to the added tax burdens from items deemed taxable on a case-by-case basis.

Revocation of the Utility Rulings would create three important public policy problems: increased energy costs to consumers, regulatory uncertainty for energy companies (and the Department of Revenue in applying the sales and use tax to utilities), and a more negative investment climate for the maintenance and construction of energy infrastructure.

- **Increased Energy Costs**

By unambiguously extending the sales and use tax exemption to energy company contractors, the cost of constructing and maintaining energy facilities was reduced by the amount of those exemptions. In order to remain solvent, regulated energy companies must recover their costs from ratepayers; merchant energy companies must recover their costs from the markets. In either case, lower capital costs mean fewer dollars having to be recovered from consumers in order for the energy companies to remain viable. This is extremely important in Massachusetts which has historically had among the highest energy costs in the nation. According to the New England Public Policy Center at the Federal Reserve Bank of Boston, Massachusetts ranks seventh in the nation in highest energy prices.³ Revocation of the Utility Rulings, and thereby curtailing the sales and use tax exemption to contractors of natural gas and electricity suppliers, would necessarily lead to even higher energy costs for businesses and individual consumers.

- **Creation of Regulatory Uncertainty**

The Proposed Regulation provides that “any taxpayer or other person wishing to rely prospectively on any written materials revoked under this section must apply to the Rulings and Regulations Bureau of the Department of Revenue for a determination or ruling regarding the validity of the document in question.” Proposed Rule 830 CMR 62C.3.1(11)(d). Assuming, *arguendo*, that the Department were to reinstate the Utility Rulings, there is no guaranteed schedule for doing so. Energy companies would have no assurance that procurements made during the interim period would ultimately enjoy the exemption. Separate bookkeeping would be required for procurements made from the date of revocation until the date of reinstatement of the exemption. The Alliance views this as chaotic and unnecessary.

- **Creation of a More Negative Investment Climate**

Fairly or not, Massachusetts already has a reputation of being a difficult state in which to permit and construct new energy facilities. The blanket revocation of the Utility Rulings would only add to that perception. Unfortunately, new energy infrastructure is sorely needed throughout the United States. Many of the energy companies which serve Massachusetts have investment opportunities across the country. To the extent that the tax regulations in Massachusetts are perceived as changing dramatically with little notice or opportunity to present evidence on the merits, investment capital will go elsewhere. The Alliance believes that this blanket revocation is the type of change in tax regulations which the investment community will view quite negatively. We also believe that many other industries and taxpayers would be adversely affected by the loss of certainty and continuity that would result from the blanket revocation of decades of respected and well-tested sources of law.

³ U.S. Department of Energy, Energy Information Administration, *State Consumption*.

Requested Action

For the reasons state above, the Alliance respectfully requests that the Proposed Regulation be revised by deleting paragraph 11. If the Department believes that individual regulations and rulings should be revoked because they no longer reflect the Department's view on the subject matter, the Department should individually consider and propose revocation of those regulations and rulings. Affected parties should be given an opportunity for a hearing and an opportunity to submit evidence on the specific regulation or ruling proposed for revocation.

Alternatively, we respectfully request that the Utility Rulings be added to the list of exceptions to blanket revocation set forth in paragraph 11(c) of the Proposed Regulation.

Sincerely yours,



Carl Gustin
President