New York City Tax Appeals Tribunal

In the Matter of CASTLE POWER LLC Petitioner.	DECISION TAT (E) 04-32 (UT)

The Commissioner of Finance of the City of New York ("Respondent" or "Commissioner") filed an Exception to a Determination of an Administrative Law Judge (the "ALJ") dated October 6, 2006 (the "ALJ Determination"). The ALJ Determination dismissed a Notice of Determination (the "Notice") issued by the New York City Department of Finance (the "Department") but denied Petitioner's request for costs. The Notice asserted a deficiency of New York City Utility Tax ("City UT") for the periods beginning January 1, 1998, and ending December 31, 2002, (the "Tax Periods") in the amount of $3,943,647.07, including interest and penalties.[1] Castle Power LLC ("Petitioner") filed an Exception to that portion of the ALJ Determination denying Petitioner costs in this matter. Petitioner appeared by Joseph P. Stevens, Esq., and Peter M. Metzger, Esq., of Cullen and Dykman LLP. Respondent appeared by Martin Nussbaum, Esq., Assistant Corporation Counsel, New York City Law Department. The Parties filed briefs and oral argument was held before the New York City Tax Appeals Tribunal (the "Tribunal"). Commissioner Robert J. Firestone did not participate in this Decision.

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[1] Prior to January 1, 1998, City UT was due on a monthly basis. Thereafter, City UT is due on a monthly or semi-annual basis, depending on the volume of receipts. New York City Administrative Code § 11-1104.e. The Parties stipulated that the penalties of $1,167,342.69 asserted in the Notice were subsequently withdrawn and are no longer at issue.

During the Tax Periods, Petitioner was a gas marketer engaged in supplying natural gas at retail to end users that owned or occupied premises located in New York City (the "City") and other locations within and without New York State (the "State") where the gas was ultimately used or consumed.[2] Petitioner is a single member limited liability company formed pursuant to the Delaware Limited Liability Company Act and is a wholly-owned affiliate of Castle Oil Corporation.[3]

During the Tax Periods, Petitioner did not have any plant, equipment, offices or employees in the City. Nor did Petitioner own, operate, lease or control any gas pipelines, mains, services or related equipment. Petitioner did not seek or receive any franchise, consent, permit or other authorization from the City to conduct business in the City. No claim has been made that any such franchise, consent, permit or other authorization was required of Petitioner. Petitioner's only office in the State was located outside the City in Harrison, New York (the "Harrison Office"). All of Petitioner's employees in the State were located in the Harrison Office. However, occasionally some of Petitioner's employees would visit end users in the City to solicit business.

Historically, prior to deregulation, the natural gas industry in the United States comprised four groups: producers, interstate pipeline operators (the "Pipelines"), local

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[2] The ALJ's Findings of Fact, although paraphrased and amplified herein, generally are adopted for purposes of this Decision, except as noted below. Certain Findings of Fact not necessary to this Decision have not been restated and can be found in the ALJ Determination. Both Respondent and Petitioner take exception to a number of Findings of Fact made by the ALJ. Except as noted below, we find that the ALJ's Findings of Fact accurately reflect the Record. Both Petitioner and Respondent used Arabic numerals when preparing their respective exhibits for the hearing (the "Hearing") on Petitioner's petition filed in response to the Notice (the "Petition"). Petitioner's exhibits are identified as "T Ex._" (for "Taxpayer's Exhibit"). Respondent's exhibits are identified as "C Ex._" (for "City's Exhibit"). Joint exhibits are identified as "J Ex._".

[3] J Ex. 1, para. 1; C Ex. 24, Exhibit B, at 1. In Finding of Fact 9, the ALJ found that Petitioner was a subsidiary of Castle Oil Corporation. Although neither Party took exception to Finding of Fact 9 in this regard, we have modified that Finding of Fact to more accurately reflect the Record.

distribution companies (the "LDCs") and customers or end users.[4] Producers locate and process natural gas in production areas such as the southern United States and the Gulf of Mexico. The Pipelines transport the gas from the production areas to the "city gates"[5] where the interstate pipelines connect to separate pipelines owned and operated by the LDCs. The LDCs transport the gas via their pipelines from the city gates to the end users' premises.

The LDCs operating in the City during the Tax Periods were Consolidated Edison Company of New York, Inc. ("Con Edison") and the Brooklyn Union Gas Company ("BUG") (collectively the "Utilities"). Petitioner was not affiliated directly or indirectly with either of the Utilities or any of the Pipelines that transported gas for use by Petitioner's end users in the City.

The deregulation of the natural gas industry at the federal and state levels created the opportunity for marketers such as Petitioner to purchase the gas commodity from producers and to sell it to end users. In the transactions that are the subject of the case at bar, the transportation of the gas from the city gates to the end users was separately contracted for and separately billed for by the LDCs, as more fully described below.

The transactions at issue can best be understood in the context of the deregulation of the natural gas industry at the federal and State levels. Beginning in 1938, the Pipelines were subjected to federal regulation by the Federal Power Commission, later renamed the Federal Energy Regulatory Commission ("FERC").[6] The Pipelines offered bundled gas service

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[4] The terms "customers" and "end users" are used interchangeably in this Decision to refer to the buyers of gas for the buyers' own use and consumption.

[5] The city gates are not necessarily at the border of the City. The term refers to designated points on the gas distribution system where an LDC takes delivery of the gas from a Pipeline. The city gates involved in this case were located in Staten Island, New York and in White Plains, New York.

[6] For a history of federal deregulation of the gas industry, *see* General Motors Corp. v. Tracy, 519 U.S. 278, 283-85 (1997); Tennessee Gas Pipeline Co. v. Urbach, 96 N.Y.2d 124, 127 (2001). *See also*

including both the gas commodity and transportation of the gas from the production areas to LDCs at the city gates. Because the Pipelines were not required to transport gas owned by anyone else, they effectively controlled the interstate market for gas. Through long-term contracts with producers and LDCs, the Pipelines were assured adequate supplies and markets for their gas service.

In 1978, Congress and FERC took steps to deregulate the interstate gas industry, including lifting gas commodity price controls and actions designed to encourage the Pipelines to transport gas owned by others that was not purchased from the Pipelines. As a consequence of these steps, LDCs began to purchase gas directly from producers or non-Pipeline marketers and purchased only transportation service from the Pipelines. Increasing numbers of large industrial customers similarly purchased gas directly from producers or marketers and contracted with the Pipelines and the LDCs for transportation services. Some large industrial customers even built their own pipeline connections directly to the Pipelines bypassing the LDCs completely.

Federal deregulation of the natural gas industry (the "Federal Restructuring") culminated in FERC's issuance of Order 636 [7] in 1992, which mandated, rather than merely encouraging, the Pipelines to "unbundle" their sales of the gas commodity from their transportation function. The Pipelines became primarily common carriers of natural gas rather than merchants of gas. Thus the Federal Restructuring facilitated the sale of gas by the producers as an unregulated commodity at prices subject to market competition.

Charles G. Stalon and Reinier H.J.H. Lock, *State-Federal Relations in the Economic Regulation of Energy*, 7 Yale J. on Reg. 427 (Summer, 1990); and FERC Order 636, 57 Fed. Reg. 13,267 (April 16, 1992) codified at 18 C.F.R. Part 284 ("Order 636") at 13,270-72.

[7] 57 Fed. Reg. 13,267 (April 16, 1992). Order 636 was clarified by Orders 636-A, 57 Fed. Reg. 36,128 (August 12, 1992) ("Order 636-A"), and 636-B, 57 Fed. Reg. 57,911 (December 8, 1992).

Order 636 provided the paradigm under which the interstate natural gas industry operated after the Federal Restructuring. Order 636:

- required the Pipelines to unbundle their gas sales and transportation functions "*at an upstream point near the production area.*" [Emphasis added.][8]
- allowed the Pipeline or a marketer to sell the gas commodity and transportation services under a single contract under which the end user that purchased gas from the Pipeline or marketer could designate the Pipeline or the marketer as the purchaser's agent to make the necessary arrangements for delivery of the gas to the city gate.[9] However, FERC cautioned that it would "be up to the customer to ensure that its supplies are capable of physical delivery."[10]
- anticipated the creation of "pooling areas" to permit gas merchants to aggregate supplies either at places "where title passes from the gas merchant" or at balancing areas with the expectation that inter-pipeline market centers would develop naturally that would allow gas purchasers and sellers to come together.[11]
- provided for the release and assignment of pipeline capacity under a system directed by the Pipelines.[12]

The issuance of Order 636 prompted the states to consider restructuring the intrastate gas industry, which was dominated by the LDCs. In the State, the agency that regulates gas sales and distribution is the New York Public Service Commission (the "NYPSC"). In 1993, the NYPSC commenced a proceeding to consider and evaluate possible responses to Order

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[8] Order 636, 57 Fed. Reg. 13,267, 13,279.

[9] Large end users who purchased gas directly from marketers generally used agents (most often the marketers themselves) to handle various administrative matters such as arranging for the transportation of the gas to the city gate.

[10] Order 636, 57 Fed. Reg 13,267, 13,288.

[11] *Id.* at 13,290.

[12] *Id.* at 13,278.

636 at the State level.[13] The NYPSC restructured the gas industry in the State in accordance with the NYPSC Orders (the "State Restructuring"). The NYPSC stated that the framework of the State Restructuring was intended to:

> assure that (1) incumbent LDCs and new entrants can compete; (2) customers benefit from increased choices and improved performance resulting from a more competitive industry; and (3) core customers continue to receive quality service at affordable rates.[14]

As were the Pipelines under the Federal Restructuring, the LDCs were required to offer unbundled transportation service under the State Restructuring, including access to upstream pipeline capacity, storage facilities and receipt points. Unlike the Federal Restructuring, however, the State Restructuring permitted LDCs to continue to offer bundled gas service. The State Restructuring also permitted smaller customers to form groups to purchase gas and have it transported for the group by an LDC to allow "smaller customers

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[13] Judicial notice is taken of: Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, Case 93-G-0932, Order Instituting Proceeding (October 28, 1993) ("NYPSC 1993 Order"); Discussion Paper Re: FERC Order 636 Its Effect on New York State Gas Distribution Utilities and Their Customers, State of New York Department of Public Service Energy and Water Division (September 1993) ("NYPSC Discussion Paper"); Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, Case 93-G-0932, Opinion No. 94-26 (December 20, 1994) ("NYPSC Opinion 94-26"); Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, Case 93-G-0932 *et al*, Order on Reconsideration (August 11, 1995) ("NYPSC 1995 Order"); Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, Case 93-G-0932 *et al*, Order Concerning Compliance Filings (March 28, 1996) ("NYPSC March 28, 1996 Order"); and Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, Case 93-G-0932, Order Resolving Petitions for Rehearing (as amended September 17, 1996) ("NYPSC September 17, 1996 Order"). These six documents are collectively referred to as the "NYPSC Orders."

[14] NYPSC Opinion 94-26 at 5.

to enjoy some of the benefits of competition that have only been available to the larger gas users."[15]

The NYPSC requires LDCs to submit for its approval statements setting forth the LDCs' rate schedules and business practices for various services. These statements are referred to as "tariffs". These tariffs must conform to NYPSC requirements to be approved. LDCs were required to issue tariffs reflecting the mandates of the State Restructuring. The resulting tariffs apply to various service classifications. Under some service classifications, an end user purchases gas directly from the LDC and the LDC also transports the gas to the end user's premises. This type of end user (a "Bundled Sales Customer") receives one gas bill from the LDC that covers both the gas commodity and its transportation. This type of "bundled" service is what historically was available from LDCs before the State Restructuring and it continues to be the service used by most small retail end users following the State Restructuring. These transactions are not at issue here.

Under other service classifications, the end user purchases only transportation of the gas by the LDC from the city gate to the end user's premises. These end users purchase the gas commodity and certain other related services from a marketer such as Petitioner. This type of end user is referred to as receiving "transportation service" from an LDC and receives two bills, one from the marketer for the gas commodity and related services, such as transportation of the gas from the production area to the city gate, and another bill from the LDC for the cost of transporting the gas from the city gate to the end user's premises and related services. It is this type of transaction that is at issue in this matter.

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[15] NYPSC March 28, 1996 Order at 24. Aggregation of small customers was necessary because it was not practical for the LDCs to separately contract to transport small quantities of gas.

In the case of Con Edison, Service Classification 20 ("Con Ed SC 20") governs transactions between Con Edison and marketers, such as Petitioner. In the case of BUG, Service Classification 19 ("BUG SC 19") governs those transactions.[16]

Separate Service Classifications govern transactions between the Utility and the end users purchasing transportation service, individually or as a group. In the case of Con Edison, Service Classification 9 ("Con Ed SC 9") governs these transactions and, in the case of BUG, Service Classifications 16 ("BUG SC 16"), 17 ("BUG SC 17") and 18 ("BUG SC 18") govern these transactions.

The tariffs refer to marketers, such as Petitioner, as "Sellers" and refer to end users purchasing transportation service as "Customers." Under Con Ed SC 20, a "Seller" is defined as "a supplier of natural gas to [a Con Ed] SC 9 Customer or Small Customer Aggregation Group" provided the Seller qualifies under Con Ed SC 20 and files the appropriate application.[17] Con Ed SC 9 defines a "Small Customer Aggregation Group" as a group of at least two customers each of whose individual gas requirement is below a minimum level but whose combined requirement is at least 50,000 therms and "who purchase

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[16] Petitioner and Respondent each provided a version of these tariffs to be entered into the Record as exhibits. Although they contain the same text, the pagination of the exhibits differs. The tariffs are amended from time to time and various pages, referred to in the tariffs as leaves, are amended effective as of a specified date. Respondent submitted several versions of certain leaves with varying effective dates. In reviewing the Record, we have found no relevant substantive differences between the several versions of the same leaves submitted by the Parties. Therefore, for purposes of this Decision, leaves are cited by leaf number and effective date only and, in the interests of brevity, citations are made to Petitioner's exhibits only; duplicate citations to Respondent's exhibits are omitted.

[17] T Ex. 7B, Second Revised Leaf 97 (effective May 9, 1997) Definitions, subsection (4).

gas from the same supplier(s)."[18] Such a group is treated as a single "Customer" for most purposes under Con Ed SC 9.[19]

Similarly, BUG SC 19 defines a "Seller" as "[a] person or entity that meets the Seller qualifications under [BUG SC 19] and is selling gas to a Pool."[20] A "Pool" is defined as:

> [a] group of customers to whom a Seller is selling gas, who are receiving transportation service pursuant to [BUG SCs 16, 17, or 18], whose gas usage is aggregated by the Seller for the purpose of providing service under [BUG SC 19].[21]

BUG SC 19 and Con Ed SC 20 require Sellers such as Petitioner to arrange for deliveries of specified quantities of natural gas to the city gate based upon estimates provided by the Utilities for each end user (derived from the end user's historical consumption data).[22] Petitioner had very little flexibility regarding the amount of gas to be delivered to the city

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[18] T Ex. 7A, Original Leaf 48-A-1 (effective December 1, 1997) Definitions subsection (17). A decatherm equals ten therms. A home uses about one hundred decatherms a year and a commercial business uses about 2000 decatherms. Tr. at 508. A therm equals one hundred thousand BTUs. T Ex. 15. One decatherm represents approximately 1000 cubic feet of natural gas. NYPSC website glossary, http://www.dps.state.ny.us/glossary.html#K.

[19] T Ex. 7A, Original Leaf 48-A-1 (effective December 1, 1997) Definitions subsection (17).

[20] T Ex. 7F, Original Leaf 144 (effective May 1, 1996) Definitions-Seller.

[21] *Id.* Definitions-Pool. Con Ed SC 20 applies to marketers selling to individual customers purchasing transportation services from Con Edison as well as to marketers selling to customers that are part of a "Small Customer Aggregation Group." By contrast, BUG SC 19 applies only to marketers selling to customers that are part of a Pool. In this Decision, the terms Pool and Group are used interchangeably to refer to these aggregated groups of end users.

[22] In the case of an unspecified number of Petitioner's large end users, the end user, rather than the Utilities, specified the quantities of gas required.

gates.[23] Accordingly, Petitioner caused to be delivered to the "Transfer Points"[24] on the interstate pipelines the sum of all its end users' requirements as determined by the Utilities, increased by the amount required for fuel and line loss.[25]

For Pools, BUG SC 19 and Con Ed SC 20 authorize the Utilities to provide "Balancing Service" under which if the deliveries to the city gate: (a) are less than the quantity required to be delivered to the city gate; or (b) less than the quantity of gas delivered by the Utility and consumed by the end user, the Utility provides the difference and assesses an Imbalance Charge. Where deliveries to the city gate: (a) exceed the quantity required to be delivered to the city gate; or (b) exceed the quantity of gas delivered by the Utility and consumed by the end user, the Utility generally retains the excess and provides an Imbalance Credit. The Balancing Service permits positive imbalances for some end users to be offset against negative imbalances for other end users, thereby minimizing or eliminating Imbalance Charges.[26]

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[23] The tariffs generally allow for a variance of a small percentage in the amount of gas required to be scheduled. *See, e.g.,* T Ex. 7F, First Revised Leaf 148 (effective July 1, 1996). The Utilities are not required to accept deliveries greater than a specified amount. *See, e.g.,* T Ex. 7B, Second Revised Leaf 105 (effective December 1, 1997) Operational Matters, subsection C(4); T Ex. 7F, Original Leaf 146 (effective May 1, 1996) Character of Service.

[24] Transfer Points are the points at which gas purchased near the production areas first enters the interstate pipelines.

[25] "Fuel" in this context refers to a certain amount of gas needed to be burned in the pipeline as fuel to transport the gas. "Line loss" refers to the small percentage of gas lost in transit.

[26] The tariffs also provide for balancing of supplies at the city gates for customers of the same marketer whether or not they are members of a Pool. T Ex. 7B, Second Revised Leaf 99 (effective August 1, 1997) subsection B. Marketers were also charged for these services. Petitioner takes exception to the ALJ's Finding of Fact 21 to the extent that it implies that balancing services were provided only for pooled customers. We have modified that Finding of Fact to more accurately reflect the Record. The tariffs also provide for trading of gas at the city gate among customers transporting gas through the same pipeline. *See* T Ex. 7C, Third Revised Leaf 87 (effective October 1, 1997) subsection (n).

With respect to Pools, the Utilities look to the Seller in the first instance for payment of Imbalance Charges. For example, Con Ed SC 9 provides that:

> For a Customer that is a participating member of a Small Customer Aggregation Group . . . [Con Edison] shall aggregate the daily surplus and deficiency imbalances for all members for purposes of determining net imbalances and the Seller shall be responsible for applicable Imbalance, Minimum Delivery and Cashout Charges under [Con Ed SC 20].[27]

However, the Utilities' tariffs differ somewhat in the nature of the Seller's obligation. Con Ed SC 9 permits the end user to designate an agent, either Con Edison or a third party such as Petitioner, to be responsible for ensuring gas deliveries to the city gate and to arrange for transportation and balancing services with Con Edison. In the case of a Group, Con Ed SC 9 requires, rather than merely permitting, the end users to designate such an agent, either the Seller, such as Petitioner, or Con Edison. Where the Seller is designated as an agent, the end user must indemnify Con Edison for any negligence or willful misconduct by the agent and, if the Seller does not pay the Imbalance Charges and other charges, Con Edison retains the right to charge the end user for those charges.[28]

Con Edison provides a form for a separate agency agreement (the "Con Edison SC 9 Agency Agreement"[29]) that it requires from an end user who wishes to appoint an agent. That agreement confirms the designation of a marketer, such as Petitioner, as the end user's agent. The Con Edison SC 9 Agency Agreement states:

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[27] T Ex. 7A, Seventh Revised Leaf 51 (effective May 1, 1996) subsection D; *See also* BUG SC 19, T Ex. 7F, Original Leaf 147 (effective May 1, 1996).

[28] T Ex. 7A, Third Revised Leaf 50-B (effective May 9, 1997) Operational Matters, subsection C.

[29] T Ex. 13.

> Con Edison should consider the nominating, scheduling[30], and other gas control functions performed by Agent as those of Customer. Customer will indemnify Con Edison and hold it harmless from any liability . . . that Con Edison incurs as a result of Agent's negligence or willful misconduct in its performance of agency functions on Customer's behalf.

When Con Edison requested that Petitioner do so, Petitioner obtained this document from its end users and provided it to Con Edison.

In contrast, BUG's tariffs do not make any reference to customers' designation of an agent, whether or not they are members of a Pool. Rather, BUG SCs 16, 17 and 18 provide that if customers are members of a Pool, the Seller, and not the customer, is liable for Imbalance Charges. BUG SC 19 similarly provides that the Seller, and not the customers in a Pool, is responsible for Imbalance Charges.[31]

The Utilities look to the Seller for payment of Imbalance Charges because they do not consider it cost-effective or feasible to bill the individual end users in a Pool for such charges, Tr. at 72-73, 124.

Petitioner received Imbalance Credits and was billed for charges as provided under BUG SC 19 and Con Ed SC 20, including Imbalance Charges.[32]

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[30] "Nominating" and "scheduling" are terms of art in the gas industry for actions taken at the production areas in connection with the transportation of gas by the Pipelines.

[31] T Ex. 7C, Third Revised Leaf 87 (effective October 1, 1997) subdivision (o); T Ex. 7D, Third Revised Leaf 111 (effective October 1, 1997) subdivision (o); T Ex. 7E, Second Revised Leaf 133 (effective October 1, 1997) subdivision (o); T Ex. 7F, Original Leaf 147 (effective May 1, 1996), Fourth Revised Leaf 149-50 (effective February 21, 1997), Second Revised Leaf 151 (effective November 21 1996). Respondent takes exception to the ALJ's Finding of Fact 23 that tariffs provide that the Seller is responsible for Imbalance Charges as agent for the end user. We have modified Finding of Fact 23 to more fully reflect the Record.

[32] J Ex. 1, paras. 12, 14.

In connection with the State Restructuring and with input from the gas industry, the NYPSC developed a sample gas contract (the "NYPSC Sample Contract")[33] to reflect industry practice and to serve as a model so that marketers who wanted to sell gas to end users in the State would know that they could get their contract approved by the NYPSC if they followed that form. The NYPSC Sample Contract also served as a model for end users to compare to their contracts with marketers enabling the end user to know that their particular marketer's business practices were not out of the ordinary. The NYPSC Sample Contract was eventually posted on the NYPSC website. The NYPSC Sample Contract provides in part that:

> Buyer authorizes (marketer) to act as Buyer's designated agent for the arrangement for delivery and transportation of natural gas from transfer point(s) to the respective LDC's City Gate. (Marketer) will act on Buyer's behalf to provide coordination functions thereunder, including but not limited to nominating, scheduling and balancing.

The NYPSC Sample Contract also provides that "(Marketer) will supply Buyer's full requirements for natural gas . . . on a firm basis, and will be responsible for any penalties imposed by the LDC for failure to deliver." "Firm" customers are end users for whom the Seller is required to assure the LDC that sufficient pipeline capacity has been contracted for so that those customers' required quantities of gas will be delivered to the city gates each day. For such customers, the LDC gives priority for transportation of gas from the city gates to the customers' locations. Firm end users are to be distinguished from "interruptible" end users who may have an alternative fuel source, such as oil, that can be used if the amount of gas delivered to the city gates for their use is insufficient at a particular time or if the LDC's own pipeline capacity is insufficient after satisfying all of the LDC's firm transportation

[33] T Ex. 12.

obligations. Petitioner sold natural gas to some interruptible end users during the Tax Periods, however, most of Petitioner's City customers during the Tax Periods were firm customers.[34]

Firm transportation is not equivalent to a guarantee of gas delivery to the customer's location in the event that the Seller does not deliver sufficient quantities of gas to the city gates. The Utilities provided such guarantees under separate provisions of the tariffs.[35]

Petitioner purchased gas from various producers and arranged for that gas to be delivered to the Transfer Points. There are meters at the Transfer Points that allow a purchaser of gas from a producer to confirm that the amount of gas delivered to an interstate pipeline matches the quantity purchased. The Transfer Points involved in this case were located in Mississippi and Louisiana. Petitioner arranged for the Pipelines to deliver the gas to the city gates. There are also meters at the city gates that allow the owner of the gas and the LDC that will be transporting the gas locally to know how much gas was delivered through the interstate pipeline to the city gate. The Utilities took possession of the gas at the city gates and delivered it to Petitioner's end users' premises. Meters at the end users' premises measure the actual amount of gas used by the end users. The meters at the end users' premises are owned by the Utilities and meter readings are taken by the Utilities for billing purposes.

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[34] J Ex. 1, para. 17.

[35] Con Ed SC 9 provides for "Supply Standby Service" and requires "Human Needs" customers to take "Supply Standby Service." T Ex. 7A, First Revised Leaf 48-E-1 (effective May 9, 1997) subsection E. "Human Needs" customers include the typical individual residential customer. *Id.*, Original Leaf 48-A-1 (effective December 1, 1997) Definitions, subsection (11). BUG SCs 16 and 17 provide a similar guarantee called "Standby Gas Service" and similarly require certain customers, including "Human Needs Customers", to take "Standby Gas Service." T Ex. 7C, Second Revised Leaf 82 (effective July 1, 1996); T Ex. 7D, Fifth Revised Leaf 102 (effective October 1, 1997), Fifth Revised Leaf 104 (effective May 29, 1998).

During the Tax Periods, Petitioner entered into written sales contracts (the "Sales Contracts") with its end users. No Sales Contract was binding on Petitioner until it was executed by an officer of Petitioner in the Harrison Office. During the Tax Periods, Petitioner's Sales Contracts took various forms. The duration of the Sales Contracts in the Record ranged from two months to one year. The Sales Contracts generally provided for a fixed price per unit of gas for the duration of the contract. While the tariffs required Petitioner to deliver to the city gates the quantity of gas estimated by the Utilities for each end user or Pool, under the Sales Contracts, the quantity of gas that Petitioner undertook to supply to its end user generally was "all of the natural gas required. . . . The quantity will be what is necessary to meet [the end user's] requirements based on the consumption information [Petitioner] receives from your . . . LDC."[36]

Except for the large end users that specified their own requirements, Petitioner billed its end users based on actual or estimated meter readings furnished by the Utilities during the relevant billing period.[37] These quantities were referred to by Petitioner's witnesses as "billing quantities." These billing quantities did not precisely equal the quantities of gas delivered to the Transfer Points for the specific end user, referred to by Petitioner's witnesses as the "sales quantity".[38] However, Petitioner's witnesses testified that over time, the "sales quantities" closely approximated the billing quantities. The differences between the billing quantities and the "sales quantities" were the result of a variety of factors. These factors included fuel and line loss, metering errors and the Utilities' inability to precisely match the

[36] T Ex. 6A, 6C and 6D. T Ex. 6B and 6E provide only that "[Petitioner] will supply to Buyer and Buyer shall purchase from [Petitioner] 100% of Buyer's natural gas needs. . . ."

[37] The cost of pipeline fuel and line loss was factored in either as an adjustment to the quantity of gas deemed sold or as an adjustment to the commodity price for the gas.

[38] Petitioner's designation of the quantity of gas delivered to the Transfer Point as the "sales quantity" is consistent with its position that the sale took place at the Transfer Point. However, because that is the issue to be decided in this matter, the term "sales quantity" is referred to using quotation marks to indicate that no conclusion is to be inferred from the use of the term.

amounts they required Petitioner to deliver to the city gate on behalf of an end user to that end user's actual consumption.

Petitioner's costs during the Tax Periods consisted of the following components expressed as a percentage:

• Cost of Gas	86%
• Interstate Transport	7%
• Balancing	3%
• Other (general & administrative, selling)	4%[39]

In general, the transportation of gas by the Pipelines was contracted for through a system of capacity release. Tr. at 46-48. Capacity release is a system operated by the Pipelines whereby owners of contract rights to pipeline transportation capacity, including LDCs, can sell those contract rights to others. Through this mechanism, LDCs sell a portion of their capacity rights on the interstate pipelines to end users who purchase gas from marketers, such as Petitioner. The marketers, acting as agents of the customers in arranging for transportation of the gas by the Pipelines, use that pipeline capacity to transport gas to the city gates for the end users.

The per unit price of gas Petitioner charged its end users was designed to reflect, *inter alia*, the charges assessed by the Pipelines for transportation to the city gate and the Imbalance Charges Petitioner paid.[40] Because the Imbalance Charges were not based on fixed prices but rather fluctuated with market conditions, Petitioner bore the economic risk

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[39] T Ex. 9.

[40] Certain of Petitioner's large end users entered into "90%/110% Tolerance Contracts" under which their Imbalance Charges and Credits were not pooled. Petitioner directly billed those Imbalance Charges to those end users whose consumption was outside the tolerance parameters. *See, e.g.,* T Ex. 6B. *See also* Tr. at 37.

(as well as possible benefit) of the difference between the price charged by the Utilities in computing the Imbalance Charges and the price Petitioner charged its end users under each of the Sales Contracts.[41] However, Petitioner was able to hedge this risk because the Sales Contracts terminated at various times and, when Petitioner either renewed a Sales Contract or entered into a new Sales Contract with a different end user, the price charged under the new contract reflected the current cost of the Imbalance Charges and transportation costs.[42]

Petitioner's Sales Contracts designated Petitioner as the end user's agent[43] and authorized Petitioner to aggregate or pool the end user's gas supply with those of its other end users. Petitioner, as the end user's agent, generally scheduled with the Pipelines the quantity of natural gas to be delivered to the Utilities at the city gates based on estimates derived by the relevant Utility from the end user's historical usage. Most of Petitioner's end users were pooled end users. The Pipelines understood that Petitioner was acting as the agent for a Pool when it arranged for a quantity of gas to be delivered by the Pipeline to the city gates.[44]

Petitioner's Sales Contracts stated that title and risk of loss passed from Petitioner to the end user at the "sales point"[45] and that the "sales point" would be at a location outside of

[41] Petitioner's witness testified that the cost of gas transportation by the Pipelines was relatively stable and did not represent a significant risk factor. Tr. at 48-49.

[42] Respondent takes exception to the ALJ's Finding of Fact 25 asserting that the Finding of Fact implied that Imbalance Charges or the difference between the billing quantities and "sales quantities" were minimal. While we disagree with Respondent's characterization of the ALJ's Finding of Fact 25, we note that the Record does not contain conclusive evidence of the magnitude of the Imbalance Charges or price differentials between billing quantities and "sales quantities."

[43] While Respondent stipulated that Petitioner's Sales Contracts designated Petitioner as its end users' agent, she did not stipulate to any of the specifics regarding that agency relationship.

[44] *See* C Ex. 24, Exhibit D, at 3, showing payment to Transcontinental Gas Pipe Line Corp. from "Castle Power Corp. A/A for Pooled Customers." A/A presumably indicates "as agent."

[45] Whether the location designated by Petitioner as the "sales point" is controlling for City UT purposes is the central issue in this matter. Accordingly, the term is referred to using quotation marks to indicate that no legal conclusion is to be inferred from the use of the term.

the State. Some of Petitioner's Sales Contracts provided that the "delivery point" would be the Utility's city gate and that the end user was authorizing Petitioner, as its agent, to arrange transportation of the gas from the "sales point" to the delivery point. The Sales Contracts generally provided that the end user would be billed by the LDC for the cost of transporting the gas from the delivery point to the end user's premises.[46]

The NYPSC Sample Contract and Petitioner's Sales Contracts did not specify a particular location for the "sales point." The NYPSC Sample Contract referred to "Sales Point(s)" indicating that there could be more than one such "sales point." When the contract provided for a flexible "sales point," the marketer had the ability to purchase gas at whatever location was least expensive at the time. Tr. at 519. For example, after Hurricane Katrina, Louisiana gas became very expensive.

The NYPSC Sample Contract also had a provision dealing with delivery points, "sales points", and the point at which title and risk of loss passed. It stated in pertinent part:

> **Delivery Point, Title and Liability**: Title to, possession of and risk of loss of the gas will pass from the Seller to the Buyer at the applicable Sales Point(s). As between the Parties, Seller will be in exclusive control of the gas and responsible for any damage, injury or loss until the gas has been delivered for Buyer's account at the Sales Point(s), after which delivery Buyer will be deemed to be in exclusive control and possession and responsible for any injury, damage or loss.

[46] Certain other Sales Contracts had slightly different delivery provisions but also involved Petitioner acting as its end users' agent in arranging delivery from the out-of-state "sales point" and provided that the LDC would separately bill the end user for transportation from the "sales point(s)" to the end user's premises. T Ex. 6B and 6E.

BUG SCs 16, 17 and 18, governing the relationship between BUG and the end users, provide that the gas to be transported by BUG must be gas owned by the customer or, in the case of a Pool, owned by the Pool, and those tariffs contain title warranty provisions to that effect.[47] Con Ed SC 9 similarly provides that as between Con Edison and the customer, the customer has possession and control of the gas until it is delivered to the city gate and must warrant that it has good and marketable title to the gas delivered to the city gate.[48] BUG SC 19 and Con Ed SC 20, governing the relationship between the Utility and the marketers as Sellers, also provide that the Seller warrants that it has good title to the gas delivered to the city gate[49] despite also providing that the gas is owned by the customer or Pool.[50]

While the NYPSC Sample Contract and Petitioner's Sales Contracts provide that risk of loss passed from the seller to the buyer at the "sales point," as a practical matter, as between Petitioner's end user and the Pipeline, it is the Pipeline that has possession of the gas and bears the risk of loss. Tr. at 42. Once the gas is tendered to the city gate, as between the end user and the Utility, it is the Utility that has possession and risk of loss. Tr. at 62. Nevertheless, once Petitioner tendered the gas to the Pipeline, Petitioner did not have the ability to recall or redirect the gas to itself or elsewhere. Tr. at 51.

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[47] *See, e.g.*, T Ex. 7C, Second Revised Leaf 77 (effective July 1, 1996), which defines a "Transporter" as an "interstate pipeline transporting gas *owned by Customer* to [BUG] for the Customer's account" [emphasis added], Third Revised Leaf 85 (effective November 21, 1996) subsection (c); T Ex. 7B, Second Revised Leaf 104 (effective December 1, 1997) subsection A "Nominating and Scheduling [*End user]-Owned Gas*" [emphasis added]; T Ex. 7F, Original Leaf 146 (effective May 1, 1996) Character of Service.

[48] T Ex. 7A, Third Revised Leaf 51-G (effective December 20, 1997) subsection H, First Revised Leaf 51-H (effective May 1, 1996) subsection I.

[49] *See supra* note 47.

[50] *See, e.g.,* T Ex. 7B, Original Leaf 107 (effective May 1, 1996) subsection E; T Ex. 7F, First Revised Leaf 154 (effective November 21, 1996) subsection (c).

During the Tax Periods, the State imposed a tax on utility services. Tax Law §186-a (the "State UT"). As imposed during the Tax Periods, the State UT was very similar to the City UT and was imposed on retail sales of gas within the State.[51] The Utilities and others selling gas at retail in the City were permitted by the NYPSC to pass the cost of both the State UT and the City UT through to the end user by including it in the cost of gas on the bills remitted by the seller of gas to the end users. The Utilities included the State UT as well as the City UT in the Imbalance Charges billed to and paid by Petitioner. Tr. at 400. After the Federal Restructuring permitted large end users to buy gas for their own use directly from producers and to contract with the Pipelines for transportation services only, these large end users generally purchased gas outside the State and thus avoided the State UT and the City UT. Tr. at 511.[52]

In 1991, in an attempt to impose a State tax on gas end users purchasing gas out-of-state comparable to the State UT, the State enacted Tax Law section 189 imposing a tax known as the "Gas Importer Tax" or "Gas Importation Tax" (the "State GIT") on the importation of gas purchased outside the State for the purchaser's own use within the State.[53] To date, no comparable City tax has been adopted, although in 2005 the City proposed legislation to impose such a tax, which was not enacted.[54]

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[51] The State UT was significantly modified in 2000. Among other things, the amendments eliminated the tax on sales of the natural gas commodity as of January 1, 2005.

[52] *See also* Matter of Penn York Energy Corp., New York State Tax Appeals Tribunal (October 1, 1992).

[53] Laws of New York 1991, ch. 166, §147.

[54] S4780, T Ex. 11.

The Utilities were required to collect the State GIT on gas purchased by end users outside the State but transported by the Utilities within the State.[55] The Utilities charged and collected State GIT from Petitioner's end users during the Tax Periods. Tr. at 402.

The NYPSC and the participants in the State Restructuring process were aware that as a result of the restructuring, more sales would take place outside the State and City that would not be subject to the State UT or City UT.[56] Petitioner's witnesses testified that the marketer groups believed that this would give them a competitive advantage over LDCs. Tr. at 530-532. By selling gas outside the City, the gas marketers could avoid the City UT and could offer lower prices than the Utilities, placing the Utilities at a competitive disadvantage. Tr. 530-31. Because the Utilities' sales of bundled gas service took place in the State, the Utilities could not structure their gas sales so as to avoid the State UT (or City UT on sales in the City). In its 1995 Order, the NYPSC noted:

> Depending upon where the title to gas is transferred, it appears that a marketer can obtain advantageous tax differentials to create a discount of up to 10%.[57]

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[55] *See, e.g.,* T Ex. 7A, Fourteenth Revised Leaf 50 (effective May 9, 1997) subsection J(2), which specifically provides that customers purchasing transportation service from Con Edison will be liable for the State GIT and must pay it to Con Edison.

[56] Petitioner takes exception to the ALJ's Finding of Fact 8 in that it does not include the City as a participant in the State Restructuring proceeding. The NYPSC Discussion Paper states that the NYPSC staff had met with "representatives of . . . [LDCs], interstate pipelines, producers, marketers/brokers and customers. . . ." The City was not listed as a party to Case 93-G-0932, however, the City was listed as a party commenting on LDCs' compliance filings in NYPSC March 28, 1996 Order. In connection with its Exception, Petitioner submitted a copy of a document entitled "Initial Comments of the City of New York on Brooklyn Union Gas Company's Unbundling Proposal" dated January 12, 1996, and signed by Paul A. Crotty, as Corporation Counsel of the City (the "City's 1996 Comments") in which it is stated "[t]he . . . City . . . has a major interest in these tariff filings because it is itself a large consumer of gas and because gas prices affect the economic health and competitiveness of New York City in general." It thus appears that the City participated in and commented on the State Restructuring proceeding although in its capacity as a customer rather than as a taxing authority.

[57] NYPSC 1995 Order, 21.

BUG requested that the NYPSC permit BUG to impose an “affordability fee” on the sales by gas marketers to eliminate the tax differential. Marketers countered BUG’s argument for the fee by arguing that the fee would “thwart competition” and that, in any event, the marketers did not have the “resources to process the influx of requests for service from migration that [BUG] fears.”[58] Ultimately, the NYPSC did not agree to the fee, stating:

> We find that [the requested affordability fee] is a barrier to lower energy prices for consumers. We would expect that any savings will be shared between marketers and consumers and that as competition develops the sharing will increasingly inure to consumers’ benefit.
>
> The tax law is not of our making and, in this instance, presents an issue that the Legislature may wish to address.[59]

However, to limit the potential loss of revenue to the LDCs, the NYPSC limited the percentage of Bundled Sales Customers that could switch to transportation service each year during the first six years after deregulation.[60]

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[58] NYPSC March 28, 1996 Order, 39-40.

[59] *Id.* at 40. Respondent takes exception to the ALJ’s Finding of Fact 8 that the NYPSC and the participants in the State Restructuring anticipated increased out-of-state sales of gas resulting in possible revenue losses. In support of her exception, Respondent cites a statement appearing on page 50 of the NYPSC September 17, 1996 Order. However, the statement cited was made by a party to Case No. 93-G-0932 (identified only as “Multiple Intervenors”) and not by the NYPSC. Thus we find the ALJ’s Finding of Fact properly reflects the Record.

[60] In the City’s 1996 Comments, the City objected to BUG’s proposed affordability fee stating “we are sympathetic to the competitive disadvantage local utilities face because of their higher tax rates. . . . [But the] tax differential is a legislative issue and not one that should be addressed through equalization adjustments. The affordability fee should not be allowed.” The NYPSC specifically exempted the City from the limits on the percentage of Bundled Sales Customers permitted to convert to transportation during the early years of the State Restructuring. NYPSC March 28, 1996 Order, 26 n.2, 40. We note that the Corporation Counsel’s objection to the affordability fee is not necessarily indicative of any concession by the City that sales, such as Petitioner’s, were not subject to the City UT as the affordability fee would have been added to the transportation fees charged by BUG and would not have been paid to the City in lieu of the City UT. NYPSC March 28 1996 Order, 38.

The State Department of Taxation and Finance (the "State DTF") conducted an income tax audit of Castle Oil Corporation covering the years 1998 through 2000 in which one of the issues was whether Petitioner's sales to end users located in the State should be subject to the State UT. Tr. at 384-85. The State auditor concluded that the State UT did not apply and that the State GIT had been properly collected from Petitioner's end users.[61] Tr. at 385-86.

The State enacted a use tax on natural gas purchased outside the State effective June 2000.[62] Petitioner collected this tax from its end users. Tr. at 426.[63]

Orlando M. Magnani testified on Petitioner's behalf. Mr. Magnani has worked in various capacities in the natural gas industry since 1971. From 1971 to 1996 he worked for BUG in various capacities, including representing BUG at hearings before the Federal Power Commission and then FERC in negotiating sessions with pipeline suppliers. From 1996 to 1998, Mr. Magnani was the President and Chief Operating Officer of KeySpan Energy Services Inc., an affiliate of BUG, which was a gas marketer that sold gas primarily to retail end users in groups, primarily in the Utilities' territories. He participated in the meetings held among marketers, NYPSC staff, end user advocates and large industrial end users in connection with the State Restructuring. Based on his extensive professional experience, the ALJ qualified Mr. Magnani as an expert in industry practices in the gas marketing industry including, but not limited to, the development of that industry, related regulatory matters and industry contracting practices.

[61] If the State UT is applicable, then the State GIT does not apply.

[62] Laws of New York 2000, ch. 63, Pt Y §§28; *See* TSB-M-00(4)S (June 9, 2000).

[63] *See* C Ex. 22, invoices dated 5/8/02 and 6/7/02.

Mr. Magnani testified that in his expert opinion the provisions in the Sales Contracts transferring title and risk of loss at the "sales point," designating the seller as the buyer's agent to arrange and administer related third-party transportation services on the buyer's behalf, providing discretion to the seller to select the precise "sales point" and providing for adjustment of the billing quantity to include gas retained by the Utilities for fuel and line loss, were consistent with widespread, and in most cases, long-standing industry practice and usage. Mr. Magnani further testified that it was his opinion that Petitioner's administration of the Sales Contracts also was consistent with widespread, and in most cases, longstanding industry practice and usage. Tr. at 522-526.[64]

On June 29, 2004, the Department issued the Notice to Petitioner asserting a deficiency of City UT, penalties[65] and interest calculated to September 16, 2004, for the Tax Periods as follows:

TAX PERIOD(S)	**PRINCIPAL**	**INTEREST**	**PENALTY**	**DEFICIENCY**
01/01/98 - 12/31/98	$ 118,404.59	$ 66,660.15	$ 80,691.92	$ 265,756.66
01/01/99 - 12/31/99	208,655.28	93,208.27	130,066.25	431,929.80
01/01/00 - 12/31/00	345,059.08	114,363.90	195,205.58	654,628.56
01/01/01 - 12/31/01	924,796.06	205,019.11	472,427.99	1,602,243.16
01/01/02 - 12/31/02	611,180.27	88,957.67	288,950.95	989,088.89
Total	**$2,208,095.28**	**$568,209.10**	**$1,167,342.69**	**$3,943,647.07**

[64] Petitioner requested that the recitation of Mr. Magnani's qualifications and expertise contained in the ALJ's Finding of Fact 36 be expanded. We have abbreviated the recitation of his qualifications for purposes of this Decision but find that the ALJ's Finding of Fact 36 properly reflects the Record. Respondent takes exception to the ALJ's qualification of Mr. Magnani as an expert and the ALJ's statement that his testimony was entitled to great weight. We agree with the ALJ's conclusion that his testimony was consistent with other evidence contained in the Record. Respondent did not assert or introduce evidence that the Sales Contracts or Petitioner's administration of them were not typical in the industry in contravention of Mr. Magnani's testimony. Because his testimony regarding the Sales Contracts was consistent with, and duplicated, material otherwise contained in the Record, any bias on his part due to his affiliation with an entity that has an interest in the outcome of this matter does not require us to exclude his testimony.

[65] *See supra* note 1.

The deficiency relates to Petitioner's revenues from end users of natural gas who owned or occupied premises located in the City.

For its tax years including the Tax Periods, Castle Oil Corporation, Petitioner's affiliate, filed combined City General Corporation Tax ("GCT") returns that included the results of Petitioner's operations.[66] The Parties have stipulated that Petitioner will be entitled to apply against any City UT deficiency finally determined pursuant to these proceedings for each of the Tax Periods the amount of GCT assessed against the combined reports including Petitioner for the tax years including those Tax Periods, but only to the extent of the GCT attributable to Petitioner.

The ALJ concluded that Petitioner's sales took place outside the City and, therefore, were not subject to the City UT. However, the ALJ concluded that Petitioner was not entitled to recover its costs of contesting this matter.

In her Exception, Respondent asserts that Petitioner's sales of gas took place in the City at the end users' premises and were, thus, subject to the City UT because under the Sales Contracts, Petitioner undertook to sell the end users' gas requirements and the end users were obligated to pay only for the gas used by them as measured by the Utilities. Specifically, Respondent takes exception to the ALJ's conclusion that the tariffs required Petitioner's gas sales to be structured as provided in the Sales Contracts and her conclusion that, under the facts presented, the risk of loss of gas was not indicative of whether Petitioner or the end user owned the gas during transit. Respondent also takes exception to the ALJ's statement that

[66] According to a letter to the Department dated February 24, 2003, from Petitioner's then representative, Petitioner was treated as a division of Castle Oil Corporation for income tax purposes. C Ex. 24 Exhibit B, at 1.

Respondent's position is inconsistent with the City's efforts to enact a gas importation tax comparable to the State GIT.

In its Exception, Petitioner asserts that the ALJ correctly concluded that Petitioner's sales of gas took place outside the City and were, therefore, not subject to the City UT but that the ALJ erred in refusing to award Petitioner costs in this matter.

For the reasons set forth below, we affirm the ALJ Determination dismissing the Notice and denying Petitioner costs.

Every utility regulated by the NYPSC is obligated to pay the City UT on its "gross income", as defined, and every "vendor of utility services" is obligated to pay the City UT on its "gross operating income." New York City Administrative Code (the "Code") § 11-1102.a. "Gross operating income" is defined as including "receipts received in or by reason of any sale made . . . in the [C]ity" of certain specified commodities or services, including gas. Code § 11-1101.5. A "vendor of utility services" is defined as including "every person not subject to the supervision of the [NYPSC] who furnishes or sells gas . . . or furnishes or sells gas . . . service. . . ." Code § 11-1101.7. Because Petitioner sold gas but was not regulated by the NYPSC during the Tax Periods, it was a vendor of utility services for purposes of the City UT. Therefore, if Petitioner's sales of gas occurred in the City, Petitioner's gross receipts from those gas sales were subject to the City UT. Petitioner asserts that all of its sales to its end users took place outside the City because under the Sales Contracts, as between Petitioner and its end users, title and risk of loss of the gas commodity was transferred to the end users outside the City at the Transfer Points and Petitioner merely arranged transportation of the gas to the city gates as the agent of its end users.

General City Law section 20-b applicable to the City UT precludes the taxation of "any transaction originating or consummated outside of the territorial limits of [the City], notwithstanding that some act be necessarily performed with respect to such transaction within such limits." If the structure of the transactions as set forth in the Sales Contracts is respected, Petitioner's sales of gas would not be subject to the City UT notwithstanding the fact that some acts related to those sales took place in the City, such as the Utilities' transportation of the gas to the end users, balancing or meter readings.[67]

Respondent cites a number of cases in support of her assertion that notwithstanding the terms of the Sales Contract, title to the gas was transferred to the end users at the meters located at their premises. However, we find those cases to be distinguishable from the present case and, therefore, unpersuasive. With the exception of Rio Grande Valley Gas Co. v. City of Edinburg, 59 S.W.3d 199 (Tex. App. 2000), *aff'd in part rev'd in part sub. nom.* Southern Union Co. v. City of Edinburg, 129 S.W.3d 74 (Tex. 2003), discussed below, the location of the point of sale of gas was not an issue in the cases cited by Respondent.[68] In Rio Grande Valley Gas Co. v. City of Edinburg, 59 S.W.3d 199 (Tex. App. 2000), the Texas Court of Appeals relied on expert testimony in concluding: (i) that contracts calling for the transfer of title outside the city of Edinburg, Texas, were sham transactions where the seller of the gas and the transporter were affiliated entities and (ii) that the sales of natural gas must have taken place at the customer's premises because that was where the quantity of gas sold

[67] For purposes of General City Law section 20-b, if the sales of gas took place within the City, the sales are considered to have originated and been consummated within the City and if the sales took place outside the City, the sales are considered to have originated and been consummated outside the City. The fact that, in either case, the gas in question is transported by third-party-owned pipelines from points outside the City to points within the City is irrelevant.

[68] Dept. of Revenue v. Natural Gas Service, Inc., 415 S.W.2d 113 (Ky. Ct. App. 1967) (sales in question were sales by LDC); Alabama-Tennessee Natural Gas Co. v. City of Huntsville, 153 So.2d 619 (Ala. 1963) (sales at issue not covered by contract); Alabama Gas Co. v. City of Montgomery, 30 So.2d 651 (Ala. 1947) (sales at issue not covered by applicable statute); Mid-Continent Petroleum Corp. v. Blackwell Oil & Gas Co., 15 P.2d 1028 (Okla. 1932) (gasoline sales at issue not covered by contract).

was measured. However, where the transporter was unrelated to the seller, that court respected the contract provisions calling for title to the gas to pass outside the city. On appeal, in Southern Union Co. v. City of Edinburg, 129 S.W.3d 74 (Tex. 2003), the Texas Supreme Court rejected the lower court's distinction between affiliated and unaffiliated sellers and transporters and overturned the lower court's conclusion that the sales of gas transported by an affiliate of the seller occurred in the city, stating:

> The quantity of gas transported and sold to a consumer can only be accurately measured by metering the volume of gas received by the consumer. The gas entering [the transporter's] pipeline system was also metered upstream of that delivery point, and allocations were made between that point and the various delivery points. . . .
>
> It does not matter whether the company that supplies the gas to consumers . . . is affiliated with [the transporter] as long as the supplier is a separate corporate entity, and there is no basis for disregarding the separate corporate identities.

129 S.W.3d 74, 88-89. Thus, these cases do not support Respondent's position.

Petitioner has presented authorities that it argues require us to conclude that the City UT does not apply to the sales in question. However, we find those authorities also not to be persuasive. The New York State Tax Appeals Tribunal decision in Matter of Penn York Energy Corp., New York State Tax Appeals Tribunal (October 1, 1992) involved sales of gas delivered outside the State to an entity that transported the gas into the State through its own pipelines and, therefore, is distinguishable from the case at bar. Petitioner also cites several advisory opinions issued by the State DTF. At the outset, we note that such advisory opinions are binding on the State DTF only with respect to the person to whom the opinion is issued and are not binding precedent in this Tribunal.[69] In the earliest of the advisory opinions, TSB-A-91(11)C (April 29, 1991), the State DTF concluded that the State UT applied where the point of sale of the natural gas was in the State. The person requesting the opinion presented six factual scenarios in each of which the point of sale was specified. Because the State DTF relied on the facts as stated, it was not called on to determine the location of the point of sale. In the three subsequent advisory opinions, the State DTF stated that the determination of where the sale of natural gas occurs for purposes of section 186-a or 189 of the Tax Law "is a factual matter *not susceptible of determination in an advisory opinion. . . .*" [Emphasis added.][70] Consequently, none of the advisory opinions represents a determination by the State DTF as to where sales of gas occurred for purposes of the State UT.[71] Petitioner takes exception to the ALJ's conclusion that the present case is a case of first impression. We agree with the ALJ that the authorities cited by Petitioner do not address the type of transaction at issue and, therefore, agree with the ALJ that this is a case of first impression.

The ALJ correctly noted that in the transactions at issue, risk of loss as an indicator of the point of sale is problematic. While the Sales Contracts provided that the end user bore the risk of loss once the gas was delivered to the Pipelines at the Transfer Points, as a practical matter, neither party to the Sales Contracts bore the risk of loss on the gas while it was in transit. Force majeure provisions in the Sales Contracts protected both parties from liability under the Sales Contracts arising out of events beyond their control, such as disruptions in the pipelines. Petitioner's witnesses testified that as between Petitioner and

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[69] 20 NYCRR §§ 2375.5, 2376.4(a). *See also* section 170.d of the New York City Charter, which does not include advisory opinions of the State DTF as precedent to be followed by the Tribunal.

[70] TSB-A-95(8)C (April 20, 1995); TSB-A-96(13)C, 96(29)S (May 8, 1996); TSB-A-96(85)S, 96(28)C (December 26, 1996).

[71] We further note that any decision of the State DTF in its audit of Castle Oil Corporation not to impose State UT on any of Petitioner's sales during the State audit periods was not binding on Respondent.

the Pipelines, the Pipelines bore the risk of loss once the gas was delivered to the Transfer Points and, as between Petitioner and the Utilities, the Utilities bore the risk of loss once they took possession of the gas at the city gates. Tr. at 42, 62.

We similarly conclude that because the tariffs required both Petitioner and the end users to warrant title to the gas when it was delivered to the Utilities at the city gates, the warranties of title also are not conclusive in determining the point of sale.[72]

Citing various provisions in the tariffs, Respondent argues that because the end user pays Petitioner only for gas actually consumed by it as measured at the meter located at the end user's premises, the package of services received by firm transportation customers of Petitioner is equivalent to those received by Bundled Sales Customers. We disagree. Petitioner does not guarantee delivery of the gas from the city gates to the end user's premises under the Sales Contracts. While two of the sample Sales Contracts provide that Petitioner will arrange for transportation of the gas to the end user's premises as agent of the end user, the remaining three sample Sales Contracts make no provision for transportation of the gas from the city gates other than to indicate that the end user will be billed separately by the LDC for those transportation services.

End users purchasing unbundled gas and transportation services under the transactions in question are not in the same position as Bundled Sales Customers. While they may not bear a meaningful risk of loss on the gas commodity while it is in the pipelines, the end users do bear the risk that the Seller will not meet its obligations to deliver the requisite quantity

[72] We further conclude that the provisions of Con Ed SCs 9 and 20 regarding possession and control of the gas are similarly not conclusive. In any event, Petitioner's warranty of title to, or possession and control of, the gas at the city gates under the tariffs is insufficient to conclude that Petitioner had title to the gas until it was delivered to the end users' premises. Respondent has not argued that the sales took place at the city gates.

of gas to the Pipeline at the Transfer Point or to the LDC at the city gate. The tariffs minimize that risk through several mechanisms, *e.g.,* the assignment of pipeline capacity owned by the LDC to customers to provide firm transportation to the city gates and the availability of standby service to guarantee that end users will receive gas in the event that the Seller fails to meet its obligations.[73] The Record is silent as to whether Petitioner arranged for standby service for any of its end users. In any event, those services are separate services offered by the Utilities and are separately charged for.[74]

Both Parties have devoted considerable attention to the issue of Petitioner's status as agent for the end users. Our review of the Record indicates that the tariffs are not consistent in this regard. Con Ed SC 9 provides that the customers may designate an agent to arrange for delivery of gas to the city gates and for dealing with Con Edison, and require such a designation for a Group. Under the Con Ed service classifications, Con Edison can bill the customers for Imbalance Charges not paid by the Seller.[75] In contrast, the BUG service classifications make no reference to the Seller as agent for the customers. Rather, BUG SCs

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[73] *See, e.g.,* T Ex 7A, First Revised Leaf 48-E-1 (effective May 9, 1997); T Ex. 7D, Fifth Revised Leaf 102 (effective October 1, 1997). The tariffs require human needs customers to take standby service. There is no indication in the Record as to whether any of Petitioner's end users were human needs customers.

[74] Under Con Ed SC 9, the charge for standby service appears to be added to the balancing charges, T Ex. 7A, First Revised Leaf 48-E-1 (effective May 9, 1997), and capacity release charges are required to be paid directly to the Pipelines. *Id.* at First Revised Leaf 49-A-1 (effective June 13, 1997). Under BUG SC 16, BUG will provide standby service for up to forty-five days after which, if the Seller does not provide sufficient gas, the end user is automatically switched to a sales customer. T Ex. 7C, Second Revised Leaf 82 (effective July 1, 1996). *See also* T Ex. 7D, Fifth Revised Leaf 104 (effective May 29, 1998) Standby Gas Service; T Ex. 7E, Second Revised Leaf 127 (effective October 1, 1997) Standby Gas Service. Under the BUG tariffs, charges for standby service appear to be included as part of the transportation charge payable by the end user and are not one of the obligations shifted to the Seller in the case of pooled customers. *See* T Ex. 7C, Sixth Revised Leaf 79 (effective May 29, 1998); T Ex. 7D, Fifth Revised Leaf 102 (effective October 1, 1997); T Ex. 7E, Original Leaf 125 (effective May 1, 1996); T Ex. 7F, Original Leaf 147 (effective May 1, 1996), Fourth Revised Leaf 149 (effective February 21, 1997), Second Revised Leaf 151 (effective November 21, 1996).

[75] Con Ed SC 20 also provides that Con Edison can bill the Seller for transportation charges not paid by the customers. T Ex. 7B, Second Revised Leaf 104 (effective December 1, 1997) subsection B.

16, 17, 18 and 19 clearly provide that the Seller, and not the customer, is responsible for Imbalance Charges and charges for Pipeline capacity release charges.

Consistent with the NYPSC Sample Contract, the Sales Contracts all provide that the end user is appointing Petitioner as its agent for purposes of arranging for transportation of the gas from the Transfer Points to the city gates. But only certain of the Sales Contracts contained in the Record also provide that the end user is designating Petitioner as its agent for purposes of arranging for transportation of the gas from the city gates to the end user's premises. This discrepancy exists in Sales Contracts both where Con Edison and where BUG is the designated LDC.

Whether Petitioner was responsible for Imbalance Charges in its own right or as agent for its end users is not relevant in determining whether Petitioner's sales of gas took place in the City at the end users' premises. Both BUG SC 19 and Con Ed SC 20 generally provide that gas provided by the Utility to make up shortfalls is treated as gas sold by the Utility to the Seller and excess deliveries are treated as gas purchased by the Utility from the Seller.[76] However, the treatment of the imbalance quantities as having been sold by the Utility to the Seller is not evidence that Petitioner's sales to its end users took place in the City. The Imbalance Charges, regardless of whether they were characterized by the tariffs as sales of gas to Petitioner, were not separately passed through to Petitioner's end users. Rather, they remained a financial cost reflected in Petitioner's sales price in the same manner as the cost of transporting the gas from the Transfer Points to the city gates.

[76] T Ex. 7B, Second Revised Leaf 100 (effective May 9, 1997) subsection D(1); T Ex 7F, Fourth Revised Leaf 149 (effective February 21, 1997) Daily Swing Service Imbalance Charge, Second Revised Leaf 151 (effective November 21, 1996) Monthly Balancing Charge.

The Federal Restructuring and State Restructuring of the gas industry unbundled the various components of gas services sold by the Pipelines and the LDCs. To make the benefits of market pricing of the gas commodity available to all gas customers, FERC contemplated that smaller customers would participate in the marketplace through agents, either the Pipelines themselves, or non-Pipeline marketers, such as Petitioner. Similarly, in the State Restructuring, the NYPSC provided for pooling of small customers represented by agents who would arrange for all of the ancillary services necessary to get the gas to the customer. However, under both the Federal Restructuring and State Restructuring, those services had to be separately contracted for and priced so that customers, whether large or pooled, would be free to purchase only those services they required. The fact that marketers, such as Petitioner, absorbed the cost of some of those ancillary services, such as Imbalance Charges and pipeline transportation, in offering gas to pooled customers does not transform their commodity gas sales into the equivalent of sales to Bundled Sales Customers. In the transactions at issue, the essential service of transporting the gas from the city gates to the end users' premises was provided by an unrelated party, a Utility, and was not included in the commodity price fixed by Petitioner. Nor did Petitioner provide any guaranty with respect to the Utilities' transportation services.

We view as significant the fact that, notwithstanding the differences between the BUG and Con Edison tariffs with regard to agency and cross liability for various charges, both tariffs clearly provide that the gas delivered to the city gates and transported to the end users by the Utilities is owned by the end user and not the Seller.[77] In this regard, Respondent has argued that for a Pool, the Seller is the "customer" owning the gas.[78] We disagree. The tariffs applicable to Pools make it clear that the gas transported is owned by the Pool and not

[77] *See supra* notes 47, 49.

[78] Respondent's Brief in Support of Exception, 2.

by the Seller.[79] Thus, the provisions in the Sales Contracts regarding the transfer of title to the gas at the Transfer Point are consistent with the Utilities' tariffs.

While the transactions involved in the case at bar resemble transactions with Bundled Sales Customers in that the end users' obligation to pay for the gas commodity applies only to the gas consumed by them as measured at meters located at the end users' premises, this is not a situation where the "substance-over-form" doctrine should be invoked to recast the location of the point of sale. As we have previously noted, there are substantive differences between the risks undertaken by end users in the transactions involved in the present case and the risks, or lack thereof, borne by Bundled Sales Customers of the Utilities.

Moreover, these are transactions structured by unrelated parties dealing at arm's length and are not structured around tax considerations. In Frank Lyon Co. v. United States, 435 U.S. 561, 583 (1978) the Supreme Court stated:

> where . . . there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax avoidance features that have meaningless labels attached, the Government should honor the allocation or rights and duties effectuated by the parties.

The structure of the transactions at issue was effectively compelled by the Federal Restructuring and the State Restructuring, both of which were the product of governmental

[79] T Ex. 7B, Second Revised Leaf 104 (effective December 1, 1997); T Ex. 7F, Original Leaf 144 (effective May 1, 1996) definition of "Transporter", Original Leaf 146 (effective May 1, 1996) Character of Service. The Con Ed tariffs make it clear that a Group generally is treated as a single customer. T Ex. 7A, Original Leaf 48-A-1 (effective December 1, 1997) Definitions (17).

policymaking intended to balance competing interests. The Federal Restructuring converted the Pipelines from gas merchants to common carriers of gas purchased in the production areas by large industrial end users or LDCs. In the Federal Restructuring, FERC required the Pipelines to unbundle their sales and transportation services as far upstream as possible[80] even for small customers, for whom FERC anticipated that an agent would act on their behalf.[81] Under the Federal Restructuring, FERC envisioned

> the pipeline managing its unbundled system in a similar manner to its management of its bundled system, *except that the place where title to gas transfers will be upstream*. [Emphasis added.][82]

FERC denied one Pipeline permission to transfer title to gas to purchasers for whom it acts as agent at a pooling point downstream of the actual unbundling point, stating:

> It is not clear why Texas Gas needs to retain title to its gas beyond the point of unbundling. First, all agents (including the pipeline and other gas sellers) act on behalf of their principal, the gas purchaser. It is the principal that holds title to the gas and holds the right to use the pipeline capacity. Hence, all agents are similarly situated.[83]

The State Restructuring started where the Federal Restructuring left off and, similarly, was the product of the NYPSC's efforts to balance competing interests. In the NYPSC Discussion Paper, the NYPSC staff stated:

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[80] Order 636, 57 Fed. Reg. 13,267, 13,279.

[81] *Id.* at 13,280.

[82] *Id.* at 13,286.

[83] FERC Order 636-A, 57 Fed. Reg. 36,128, 36,140.

> Order 636 separates the gas supply and gas transportation functions of the [P]ipelines and essentially bars the [P]ipelines from the merchant function, while allowing LDCs and end users open access to the interstate pipeline system for the purpose of shipping *customer owned gas* from the producing gas areas to the city gate. [Emphasis added.][84]

Thus, the State Restructuring also presumed that the gas being transported by the LDCs was owned by the end user and not by the seller of the gas. The NYPSC Orders made it clear that under the State Restructuring, the LDCs were to be transporting gas owned by the end user rather than the marketers. As described by the NYPSC, the gas marketers:

> simply arrange for the purchase of the commodity in a competitive market and the transportation of that commodity from the wellhead to the customer. *Indeed, end users remain the customers of the utility for transportation . . . and thus the marketers are not, for instance, analogous to resellers in the telecommunications area*. [Emphasis added.][85]

While it is possible that the State Restructuring could have adopted a different approach under which title to the gas stayed with the marketers until the gas was delivered to the end users' premises, that would not have been consistent with the established treatment of large end users and LDCs under the Federal Restructuring.

The title transfer provisions of the Sales Contracts were consistent with the structure of gas commodity sales by marketers as contemplated by the Federal Restructuring and the State Restructuring. Moreover, those provisions were consistent with the NYPSC Sample Contract. As noted above, in the course of the State Restructuring, BUG expressed strong

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[84] NYPSC Discussion Paper, 1.

[85] NYPSC September 17, 1996 Order, 33-34.

concern about the tax advantage to marketers due to their ability to transfer title outside the State. Presumably, had BUG been able to do so to eliminate that advantage, BUG would have provided in its tariffs that the Seller, rather than the customer, was the owner of the gas in BUG's pipelines. However, the BUG tariffs provide that BUG is transporting from the city gates gas owned by the customer and not the Seller. Thus, we conclude, as did the ALJ, that the title transfer provisions of the Sales Contracts should be respected for City UT purposes.

Respondent further argues that under the Uniform Commercial Code ("UCC"), sales of gas could not have taken place before the gas reached the meters at the end users' premises in the City. UCC section 2-401(1) states: "[t]itle to goods cannot pass . . . prior to their identification to the contract. . . ." Further, UCC section 2-105(2) provides that: "[g]oods must be both existing and identified before any interest in them can pass." Relying on these provisions, Respondent claims that the UCC requires that either an exact quantity of gas or a specific portion of the gas in a given quantity must be identified before title can pass. However, UCC section 2-105(4) provides that:

> [a]n undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

The Utilities' tariffs require end users and Sellers, such as Petitioner, to deliver to the city gate a specified amount of gas determined by the Utility for transportation to the end user's premises. Where a Seller is arranging for transportation on behalf of a Pool, the Seller is required to deliver to the city gate a specified amount of gas for the Pool. Petitioner asserts that it is unclear that the UCC applies to these transactions. Regardless of whether Petitioner is correct, if the UCC does apply, we believe that under the tariffs, an amount of gas is sufficiently identified at the city gate, if not at the Transfer Point where the gas is nominated, to satisfy this requirement. Moreover, the Official Comment notes that UCC section 2-105 merely defines "goods" subject to a sale and that it is UCC section 2-501 that governs when goods are identified.[86] That section provides that goods can be identified "at any time and in any manner explicitly agreed to by the parties." UCC § 2-501(1).

UCC section 2-401 governs the passage of title. That section provides that title cannot pass before the goods are identified but, generally, "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties." The Official Comment to UCC section 2-101 states:

> [t]he legal consequences are stated as following directly from the contract and actions taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

Thus, the UCC does not purport to supercede explicit contract provisions regarding the passage of title such as those contained in the Sales Contracts.

Respondent takes exception to the ALJ's statement that Respondent's position in this case is inconsistent with Respondent's efforts to enact a gas importation tax comparable to the State GIT. While it does not appear that the ALJ's determination depended on this

[86] UCC Official Comment, § 2-105, point 5.

statement, we will address Respondent's exception. The Memorandum in Support of S4780, which would have enacted a City gas importation tax, justifies the bill as follows:

> The [City UT] was intended to be imposed on all sales of energy for use in the [C]ity, unless expressly exempted by law. Following New York's deregulation of the natural gas market, *out-of-state suppliers of local gas service have asserted that they are not liable for the [City UT]. The City asserts that such sales are subject to the [City UT], and that, as before deregulation, the sale of metered gas service takes place at the time such service is performed, when the gas registers on the customer's meter*. [Emphasis added.]

The above language merely recites the differing positions taken by Respondent and Petitioner in this case. The City's attempt to enact a gas importation tax was not an admission that Petitioner's position was correct. At most, it acknowledged the arguments put forth by Petitioner. A taxing authority should not be precluded from simultaneously pursuing alternative strategies to counter a tax position that it views as either an incorrect interpretation of existing law or bad policy. Regardless of the perceived strength of the government's position in any given case, there is always the possibility that the courts will disagree. Moreover, litigation can take years to resolve a particular issue leaving both the taxpayer involved and other similarly situated taxpayers in a state of uncertainty as to the correct reporting position. Thus, a taxing authority should be able to seek a legislative solution to a problem that is also the subject of litigation without being viewed as conceding the issue. Moreover, a loss in court may be necessary to persuade the legislature to act. While we agree with Respondent that the City's efforts to enact a gas importation tax were not inconsistent with her position, that does not alter our conclusion that Petitioner's sales of gas took place outside the City and were not subject to the City UT.

Petitioner claims that it is entitled to recover its cost of challenging the proposed assessment pursuant to Tax Law section 3030, commonly referred to as the Taxpayers' Bill of Rights. However, Tax Law section 3030 provides a remedy only with respect to proceedings against the State Commissioner of Taxation and Finance. It provides no remedy with respect to proceedings against Respondent.

Alternatively, Petitioner argues that section 1-15 of the Rules of Practice and Procedure of the Tribunal authorize the Tribunal to award Petitioner costs in this matter. 20 RCNY §1-15. That section is based on section 172.b of the New York City Charter (the "Charter"), which provides:

> The signing of any paper *submitted to the tribunal* constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information and belief formed after reasonable inquiry, the paper is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that the paper is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of the proceedings. If a paper is signed in violation of this section, the tribunal . . . shall impose upon the person who signed the paper, a represented party, or both, an appropriate sanction. . . . The amount of any sanction shall be related to the amount of reasonable expenses, including a reasonable attorney's fee, incurred by the other party or parties *because of the serving or filing of the paper*. [Emphasis added.]

The above provision is modeled after Rule 33(b) of the United States Tax Court Rules of Practice and Procedure. The Tax Court has concluded that sovereign immunity protects the Internal Revenue Service (the "IRS") from liability under that Rule and that a taxpayer can be awarded costs in litigation against the IRS only to the extent that the IRS has waived immunity under section 7430 of the Internal Revenue Code.[87] That section is comparable to Tax Law section 3030, which we have already concluded has no application to Respondent. As a municipality possesses no sovereign immunity,[88] none of the authorities under Rule section 33(b) apply here.

Petitioner argues that Respondent acted in bad faith in asserting the City UT deficiency at issue in this matter because Respondent's position is not warranted by existing law and that Respondent's audit was intended to induce Petitioner to support Respondent's legislative initiative to enact a gas importation tax. As Charter section 172.b is limited to a consideration of a party's motives in submitting "a paper" to this Tribunal, none of Respondent's actions prior to the filing of the Petition in this case are relevant to our consideration of Petitioner's request for the imposition of sanctions against Respondent. In any event, as we have concluded that this is a case of first impression, it cannot be said that Respondent's position is contrary to existing law or that it is asserted in bad faith.

Petitioner further asserts that following the filing of Petitioner's Petition, Respondent engaged in delaying tactics intended to "'punish' [Petitioner] for not acquiescing in the City's plan to obtain enactment of a . . . City gas import tax. . . ."[89] Petitioner filed its Petition on September 20, 2004. The Record indicates that between that date and the date the Hearing began, December 12, 2005, approximately nineteen telephone conferences were held by the Parties with the ALJ and extensive discovery was conducted. Respondent requested only two postponements during that period. The first was for an extension from July 28 to August 5 to complete an exchange of documents and the second was for a thirty-day continuance due

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[87] Bayer v. Commissioner of Internal Revenue, 61 T.C.M. (CCH) 2980 (1991), *reaffirmed* 98 T.C. 19 (1992).

[88] R.J. Reynolds Tobacco Co. v. City of New York Dept. of Finance, 169 Misc.2d 674 (1995), *aff'd* 237 A.D.2d 6 (1st Dept. 1997).

[89] Petitioner's Exception, 7.

to the hospitalization of the father of one of Respondent's representatives. The Record contains no evidence that the ALJ considered any of Respondent's actions during that period to have been undertaken for the purpose of delaying the Hearing or for any other improper purpose. Subsequent to Respondent's filing of her Exception, Respondent's representatives requested only a single thirty-day extension of time to file their brief due in part to the departure of one of Respondent's representatives. At no time during the course of these proceedings did Respondent file any papers after the applicable deadline. This Tribunal has previously stated that the doctrine of laches does not apply to a governmental agency in the execution of its statutory function. Matter of U.S. Life Realty Corp., TAT (E) 93-134 (GC), *et al* (April 23, 1996); Matter of Reiss, TAT NO: 91-0515, *et al* (March 19, 1993). Based on our review of the Record, we conclude that Respondent has not violated Charter section 172.b and is not subject to sanctions thereunder.[90]

Accordingly, the ALJ Determination is affirmed.

Dated: December 5, 2007
New York, New York

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GLENN NEWMAN
President and Commissioner

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ELLEN E. HOFFMAN
Commissioner

[90] We have considered all of the other arguments raised by Respondent and Petitioner and find them unpersuasive.