

# WILL NEW YORK “TAKE BACK” THE FUNCTION OF ENSURING ELECTRICITY RESOURCE ADEQUACY?

*Hodgson Russ Renewable Energy Alert*  
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New York State is in the midst of assessing how it can achieve the ambitious renewable energy targets of the 2019 Climate Leadership and Community Protection Act (CLCPA) – notably, 70% renewable energy by 2030, 100% clean energy by 2040, and three gigawatts (GWs) of energy storage by 2025 – while also ensuring the reliability of the State’s electricity system. In essence, the State is grappling with the question of how to keep the lights on with a lot more green electrons. Complicating the process, while the State has broad discretion to set policies around the resource mix it wants to power its grid, other actors are currently charged with managing the playing field and approving the rules. The nuances in these rules present challenges for renewable resources seeking to play in the State’s capacity market.

Chief among the players is the New York State Independent System Operator (NYISO), a non-profit entity to which the State delegated this function in 1999 upon “deregulating” the electric system. The NYISO, which is regulated by the Federal Energy Regulatory Commission (FERC), is primarily responsible for resource adequacy, *i.e.*, ensuring that enough capacity is available to sufficiently power the grid during the hottest summer days and coldest winter days, plus an extra safety margin (the installed reserve margin). The NYISO does this by obtaining commitments from resources, through capacity market and day-ahead auctions, to be available in the future. The NYISO solidifies these commitments based on the price of bids; it does not determine whether the resources seeking to participate in the capacity market are the types of resources the State wants to power the grid. This disconnect is exacerbated by the FERC’s recent approval of rules making it significantly more difficult for battery storage and offshore wind resources, particularly in the southern part of the state, to participate in its capacity auctions.

[1]

Last summer, recognizing that the rules required by the FERC for the NYISO’s markets were not consistent with the state’s CLCPA targets and other policies, the Public Service Commission (PSC) initiated a proceeding to assess the range of options, including whether “alternative approaches [should] be considered to ensure [that] the procurement of generation sources is aligned with state policy goals.”

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With the PSC’s public comment period now closed, and additional Orders from the FERC continuing to widen the gap between the NYISO’s auction designs and State policy, eyes have now turned to the PSC. Will the PSC, indeed, “take back” from the NYISO, and remove from the FERC’s purview, the State’s function of ensuring that our lights stay on?

### I. New York’s Resource Adequacy Proceeding

#### A. *Responsibility for Ensuring Reliability*

On August 8, 2019, the PSC issued an order initiating the resource adequacy proceeding. The purpose of the proceeding is to examine “how to reconcile resource adequacy programs and the State’s renewable energy and environmental emission reduction goals.” [2]

As we described briefly above, the NYISO plays a role in ensuring resource adequacy through its capacity market, but they do not bear that responsibility alone. The amount of capacity the NYISO must procure is determined in consultation with the New York State Reliability Council (NYSRC) and approved by the PSC. The NYISO passes that responsibility on to utilities and energy service companies (ESCOs), collectively referred to as Load Serving Entities (LSEs). The NYISO requires that LSEs procure the requisite capacity to serve their retail customers. LSEs can meet that requirement by purchasing capacity from the NYISO-administered and FERC-regulated wholesale market, through bilateral contracts, or through self-supply. Unlike the NYISO markets, the terms of bilateral contracts and self-supply are governed by the PSC.

#### B. *Impact of Recent FERC Rulings*

The FERC’s February 2020 rulings will make it significantly more difficult for renewable energy resources in the Lower Hudson Valley and New York City to participate in the wholesale capacity market – putting more pressure on the PSC to take action in support of the State’s renewable energy and energy storage goals. Renewable energy resources often receive “state subsidies” in the form of renewable energy credit (REC) payments or other incentives that compensate them for their renewable attributes. As a result of FERC’s ruling, the NYISO will apply buyer side mitigation (BSM) measures to those resources seeking to provide capacity to the Lower Hudson Valley and New York City. BSM rules require that these resources bid into the NYISO capacity auction at a price at or above a certain offer floor (often higher than they otherwise would), and continue to offer those prices until their capacity clears 12 monthly auctions. If a project fails to clear the auction because other capacity resources (e.g., natural gas) submit lower bids, that project does not receive capacity revenues. [3]

As a result, renewables and energy storage resources in these mitigated capacity zones risk being completely shut out of the capacity market, with BSM rules hitting battery storage and offshore wind resources the hardest. Unless FERC reverses course, the courts step in, or the State provides a different market opportunity for those resources, they will need to find alternative sources of revenue to make their projects pencil. For many projects, revenues from the energy and ancillary services wholesale markets (not currently subject to BSM) and RECs would be insufficient. Hence, renewables will face significant deployment barriers in these regions of the state. And it is expected that requests will be made to expand these rules to other NYISO load zones, such as Long Island where large amounts of offshore wind capacity are expected to connect to the grid.

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In its comments in the resource adequacy proceeding, Potomac Economics Ltd., the NYISO’s Market Monitoring Unit, expressed concern over how the existing capacity market rules may work against State policy goals: “we are concerned that the current [Buyer-Side Mitigation] BSM rules might allow new conventional resources to enter [the capacity market] and thereby preempt capacity sales from new resources that are subsidized for legitimate State policy reasons. This highlights a circumstance where the current BSM rules would impede State policy goals even where the subsidized resources would not suppress capacity prices.” [4]

### *C. Issues Raised by Stakeholders – Markets v. Contracts*

The PSC posed several questions about how to consider resource adequacy in light of a transitioning electric grid. [5] The PSC accepted responses through November 8, 2019, and reply comments through January 31, 2020. Broadly speaking, commenters presented the PSC with two categories of options: (1) urge the NYISO and/or FERC to enact reforms to ensure the State’s policy goals can be met cost-effectively; or (2) effectively “take back” the capacity markets from the NYISO.

Commenters urging that the PSC take more drastic action did not suggest that the PSC or Department of Public Service administer a capacity market. Rather, commenters proposed that the PSC exercise its authority over resource adequacy by overseeing the NYISO capacity markets and requiring that utilities satisfy their resource adequacy obligations by procuring capacity through bilateral contracts with resource providers – namely generators and energy storage services. The NYISO would still run a voluntary capacity market, but it would be “residual,” and utilities would meet their NYISO-determined reliability requirements through long-term contracts without the threat of BSM. Commenters point out that this is similar to how the California Public Utilities Commission (CPUC) administers its resource adequacy program in conjunction with the California Independent System Operator (CAISO).

In a joint comment to the PSC, the Advanced Energy Economic Institute, Advanced Energy Economy, Alliance for Clean Energy New York (ACE-NY), the American Wind Energy Association (AWEA), and the Solar Energy Industries Associated (SEIA) advanced a range of options for the State to play a larger role in ensuring resource adequacy. One way would be for the PSC to conduct a resource planning procurement through which utilities could procure the resources needed to meet their NYISO-determined reliability obligations. Utilities could then use a centralized NYISO-run capacity market to procure any additional capacity needed to meet their obligations. This residual market model is similar to that used by the Midcontinent Independent System Operator (MISO).

Environmental groups like the Natural Resource Defense Council (NRDC) supported the shift from a mandatory capacity market to a bilateral contracting mechanism. [6] These groups added that improvements to the energy and ancillary services markets could further incent renewable resources. “The need for the capacity market can be reduced by developing more robust energy and ancillary services markets that provide critical reliability services.” These reforms can “create more tailored incentives for resources capable of provid[ing] needed services. This leads to a better tailored resource mix.” [7] This point highlights the interrelated nature of markets – as more intermittent renewables come online, energy markets should be dynamic and send the correct price signals when additional power is needed; ancillary services should be designed to meet the needs of a grid that is dominated by resources with variable outputs.

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Clean energy advocates also noted that the incorporation of a carbon price into the NYISO energy markets would enable “cost-effective attainment of the state’s policy goals while also maintaining reliability and resource adequacy.” [8] However, the parties noted that the improved price signals provided by a carbon price would be diminished if renewable resources were subject to BSM. “Carbon pricing alone will not provide sufficient incentive for the resource deployment needed to reach New York’s ambitious environmental and energy goals in the long-term. This is especially the case for technologies such as energy storage that have lower MWh output than renewables and will therefore receive a lower financial signal from a policy rewarding production of clean MWh.” [9]

Each of these suggestions raises the question of the FERC’s purview of State decision-making regarding its resource adequacy. While resource adequacy has long been deemed the purview of State regulators, FERC has nevertheless reserved under the Federal Power Act the ability to approve actions that affect FERC-regulated interstate wholesale electricity markets. The PSC’s docket includes various views in this regard, including suggestions for the PSC to adopt either the CPUC or MISO model it would need to seek approval from FERC. Such a request would benefit from the support of the NYISO, but the NYISO has raised concerns with a contract-based approach cautioning that procuring capacity through long-term contracts could result in higher costs for electricity customers, and questioning whether a contract-based approach could sufficiently incentivize efficiency and innovation. [10]

### II. What Happens Next?

The PSC will consider the comments filed by stakeholders and may at any time issue an order presenting its findings. In the meantime, discussions continue between market participants, State policymakers, the NYISO and the FERC with respect to a broad set of solutions. The progress of those discussions are all within the context of, among other factors, the federal election cycle, which could result in a change of FERC composition and thus a more State policy-friendly set of NYISO market rules in 2021, and the legal and operational risks and complexities of a bold State move to “take back” from federal jurisdiction its resource adequacy function. But the PSC has now provided itself a heavy hammer to swing, if it so chooses, in support of its goals.

To learn more about resource adequacy, please contact either Dan Spitzer (716.848.1420) or Noah Shaw (518.736.2924).

If you received this alert from a third party or from visiting our website, and would like to be added to our Renewable Energy mailing list, or any other mailing list, please visit us at: <https://contact.hodgsonruss.net/signup/BrandedFormNew.aspx>.

[1] For more on the FERC’s rulings, including treatment of Buyer Side Mitigation (BSM) in the NYISO capacity market, see our recent Client Alert: *FERC Orders Deal Blow to Downstate New York Renewables*, available at: <https://www.hodgsonruss.com/newsroom-publications-11554.html>.

[2] Case 19-E-0530, *Order Initiating Proceeding and Soliciting Comments* (Issued and Effective August 8, 2019), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b1D25F4BE-9A05-463F-A953-790D36E318BC%7d>.

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[3] This policy is consistent with FERC’s recent imposition of minimum offer price rules in neighboring PJM markets, which similarly favored incumbent generators by creating market barriers to new renewable resources.

[4] Case 19-E-0530, Initial Comments of Potomac Economics, Ltd. (November 8, 2019), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bACAA1552-C59E-4F19-8F31-AF5B9B251AF8%7d>.

[5] See Case 19-E-0530, *Order Initiating Proceeding and Soliciting Comments* (Issued and Effective August 8, 2019).

[6] See Case 19-E-0530, Comments of Natural Resources Defense Council, Sustainable FERC Project, Sierra Club, New Yorkers for Clean Power, Environmental Advocates of New York, and Vote Solar (November 8, 2019), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bDF5785BF-00B2-4CAD-90D2-F5D5484E34A4%7d>.

[7] *Id.*

[8] See Case 19-E-0530, Comments of the Advanced Energy Economy Institute, et al. (November 8, 2019), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b11CB8E22-5C0A-4D31-80A7-00C3F67C7ABF%7d>. For more on the carbon pricing proceeding, see our Client Alert: *ACE-NY Releases Report on Carbon Pricing in Latest Push for NYISO Wholesale Market Reform*, available at: <https://www.hodgsonruss.com/newsroom-publications-11449.html>.

[9] Case 19-E-0530, Comments of the Advanced Energy Economy Institute, et al. (November 8, 2019), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b11CB8E22-5C0A-4D31-80A7-00C3F67C7ABF%7d>.

[10] See Case 19-E-0530, Initial Comments of the New York Independent System Operator, Inc. on Resource Adequacy Matters (November 8, 2019), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bE266151E-7D44-46CB-8E78-AEAA46F37643%7d>.