

# FERC TO HEAR NEW YORK'S ARGUMENTS AGAINST MITIGATION OF RENEWABLES

*Hodgson Russ Renewable Energy Alert*  
April 21, 2020

On April 20, 2020, the Federal Energy Regulatory Commission (“FERC”) granted rehearing on three recently issued Orders significantly impacting renewable energy resource participation in New York State’s wholesale energy markets.<sup>[1]</sup> Most notably, in February 2020 the FERC took three important actions with respect to the New York Independent Service Operator’s (“NYISO”) administration of its markets: (1) it reversed an exemption from Buyer-Side Mitigation (BSM) it had previously granted to certain resources; (2) it initiated a paper hearing to determine if certain demand response programs should be excluded from those resources’ bid calculations; and (3) it rejected a 1000 MW renewables exemption from BSM. According to the New York Battery and Energy Storage Technology Consortium (“NY BEST”), the BSM rules affirmed in these orders “effectively block one of the most lucrative markets” in the country.<sup>[2]</sup> In its challenges, the New York State Public Service Commission, the New York State Energy Resource and Development Authority, the New York Power Authority, the Long Island Power Authority, and the City of New York<sup>[3]</sup> (collectively, “State Complainants”) argued that FERC erred in reaching its decisions and should grant a rehearing to reevaluate its findings.

## I. Reversal of the Special Case Resource Exemption

The New York Independent Service Operator (“NYISO”)’s Special Case Resource (SCR) Program permits local generators and demand response resources to receive payments through the Installed Capacity (ICAP) Market. Demand response is a voluntary program that provides incentives for utility customers to control their demand on the grid during periods of high-demand. Demand response programs exist at the state and federal level, but the programs at issue before FERC involved the ability of utilities’ retail-level demand response programs to affect prices in the NYISO-run wholesale market.

Since 2008, FERC has maintained the position that, due to the interruptible nature of these resources and a federal policy in favor of promoting demand response, these resources do not have a perverse incentive to suppress capacity market prices – the exact anticompetitive perverse incentive that BSM is designed to avoid. In 2017, after reviewing testimony from the NYISO, generator stakeholders, and the State, FERC granted a blanket exemption for SCRs from BSM because it found that the NYISO’s BSM rules were over-mitigating SCRs and creating a barrier to demand

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response participation in the wholesale market. Then, on February 20, 2020, FERC came to a different conclusion: “we find that a blanket exemption does not appropriately recognize that certain payments to SCRs outside of the ICAP market *could* provide SCRs with the ability to suppress ICAP market prices below competitive levels” (emphasis added).<sup>[4]</sup> In so finding, FERC reversed the blanket exemption from BSM.

State Complainants challenged this determination and asked FERC to take another look. In their petition for rehearing, State Complainants argued that this change in course amounts to a do-over without explanation. While agencies are free to change their mind from past decisions, they must provide at least a minimal level of analysis. State Complainants cited numerous occasions in FERC’s 2017 decision where the Commission affirmatively agreed with the NYISO that demand response resources lacked the incentive and ability to suppress wholesale market prices below competitive levels. State Complainants also pointed to out the FERC’s reversal broadened the standard for mitigating resources by assessing whether their bids *could* suppress market prices, as opposed to the long-held standard that such resources *must* possess both incentive *and* ability to do so. In addition, State Complainants argued that FERC did not even attempt to evaluate what the cost impact of this change would be on customers. In fact, according to the record before FERC, applying BSM rules to utility demand response providers would deter enrollment in demand response programs, thereby stifling potential reliability benefits those programs provide, and resulting in inefficient use of those resources.<sup>[5]</sup>

### II. What’s a Paper Hearing and Why Does it Matter?

In addition to pulling back the blanket exemption for SCRs, FERC initiated a paper hearing to evaluate whether payments to SCRs from retail-level demand response programs should be excluded from the SCR’s offer floor calculations. A paper hearing means that the Commission will only consider written evidence on the question presented. In other words, because FERC is now requiring SCRs to go through the BSM test, it is seeking written responses to the question of whether it should count payments from utility demand response programs towards the offer price those resources must meet to participate in the capacity market. If utility payments for demand response do *not* count in these resources offers, demand response resources will have a harder time meeting the offer floor and thus, a much greater challenge to participating in the capacity market.

State Complainants again reminded FERC of its 2017 decision that SCR resources should be entirely exempt from BSM and the extensive record supporting that decision. In fact, between then and now, no new evidence was entered into the record that would explain FERC’s reversal. Rather, in its February 2020 decision, FERC said that the information informing its prior position became “stale” in the three years that the Commission sat on the docket. State Complainants challenged the notion that factual evidence could become stale, while the Commission chose not to act, without the submission of new evidence to show that such evidence could no longer be relied upon.

### III. Reversal of the 1000 MW Renewables Exemption

In another about-face in February 2020, FERC rejected a 1000 MW exemption from BSM for renewables – an exemption it ordered the NYISO to implement in 2015.<sup>[6]</sup> In 2016, in response to that directive, the NYISO submitted a compliance filing explaining how it would implement the exemption. After failing to act for almost four years – leaving many wholesale renewable resources to question whether or not an exemption was available – FERC rejected the NYISO’s filing and sent it back to the drawing board to narrow the exemption.

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In 2015, FERC determined that an exemption cap was appropriate for intermittent resources like wind and solar because they have “limited or no incentive an ability to exercise buyer-side market power to artificially suppress ICAP market prices.”<sup>[7]</sup> Worse than the lack of rationale from FERC for changing course, State Complainants argued that this policy reversal interferes with the state’s authority to promote renewables. States have authority under the Federal Power Act to set policies around their preferred resource mix, to make generating siting determinations, and regulate the environmental aspects of electricity generation. An exemption smaller than 1000 MW would, State Complainants argued, needlessly constrain the entry of renewable resources into the NYISO’s capacity market and in effect, hinder the state’s ability to meet its Climate Leadership and Community Protection Act (CLCPA) renewable energy goals. By limiting the ability of the State to shift its generation mix to more environmentally-efficient resources, State Complainants further argued that customers would bear the cost of maintaining older, less efficient fossil-fueled generation. In his dissenting opinion, Commissioner Glick agreed with the position taken by State Complainants, stating that the Commission perverted the BSM test “in order to prop up prices, lock in the current resource mix, and attack state polices that promote clean energy.” Environmental advocates comprising the Natural Resources Defense Council (NRDC) and Earthjustice harkened these arguments in their own request for rehearing.<sup>[8]</sup>

Despite the State challenge, on April 7, the NYISO filed proposed compliance tariff revisions addressing the Commission’s February Order. In its tariff revisions, the NYISO proposed to establish a formula to calculate “Renewable Exemption Limits” for each mitigated capacity zone, rather than define a single static MW cap. This approach, according to the NYISO, “will allow intermittent renewable resources that lack the incentive and ability to suppress capacity market prices to qualify for the Renewable Exemption up until the point, based on evolving market and system conditions, that their entry would significantly impact capacity prices...[and] better balance the risks of over- and under-mitigation than a static cap.”<sup>[9]</sup> The Renewable Exemption Limits would vary over time as the inputs to the formula change, but the NYISO has aimed to design a formula that produces a value that avoids significant price impacts.

### IV. What’s Next?

FERC granted rehearing for the limited purpose of considering the arguments raised for rehearing. This means that the Commission will not accept additional filings or answers to the rehearing requests. The Commission is now free to proceed on its own timeline for issuing an order. The NYISO requested that the Commission issue an order accepting its proposed tariff revisions establishing a formula for determining the renewables exemption by June 8, 2020.<sup>[10]</sup> If FERC agrees that the NYISO’s Class Year process would benefit from a decision by that time, we may see an order on the renewables exemption in the beginning of June. The FERC will likely review the State Complainant’s request for rehearing in light of the NYISO’s subsequently filed tariff revisions. Once a final order is issued, Complainants could then file a petition for review of FERC’s decisions in federal court, or wait to see how the State takes up matters relating to the capacity markets in its resource adequacy proceeding before the Public Service Commission.<sup>[11]</sup>

To learn more about the Federal Energy Regulatory Commission's decisions and how they may affect your business, please contact Noah Shaw (518.736.2924) or Dan Spitzer (716.848.1420) in Hodgson Russ’s Renewable Energy Practice at <https://www.hodgsonruss.com/practices-renewable-energy.html>.

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<sup>[1]</sup> See *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, Order Granting Rehearings for Further Consideration, Docket Nos. EL16-92-003, ER17-996-002 (not consolidated) (April 20, 2020), available at <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15513662>. See *N.Y. Indep. Sys. Operator, Inc.*, Order Granting Rehearings for Further Consideration, Docket Nos. ER16-1404-001 (April 20, 2020), available at <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15513608>.

<sup>[2]</sup> See Utility Dive, *NYC storage 'most adversely impacted' by FERC Orders: NYISO CEO* (Feb. 28, 2020), <https://www.utilitydive.com/news/nyc-storage-most-adversely-impacted-by-ferc-orders-nyiso-ceo/573216/>.

<sup>[3]</sup> The City of New York joined in the State challenge of the FERC's decision in Dockets No. EL19-92-001 and ER17-996,000, but not ER16-1404-001.

<sup>[4]</sup> *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 16,120 (2020).

<sup>[5]</sup> *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, Request for Rehearing of New York State Public Service Commission, et al., Docket Nos. EL16-92-001, ER17-996-000 (not consolidated) available at: <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15489752>

<sup>[6]</sup> *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, Request for Rehearing of New York State Public Service Commission, et al., Docket No. ER16-1404-001, available at: <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15490310>

<sup>[7]</sup> *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 16,121 (2020).

<sup>[8]</sup> *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, Request for Rehearing of the Natural Resources Defense Council, Docket Nos. EL16-92-001, ER17-996-000 (not consolidated) available at: <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15490035>

<sup>[9]</sup> New York Independent System Operator, Inc. Compliance Filing and Request for Commission Action, Docket No. ER16-1404-002, available at <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15505442>.

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<sup>[10]</sup> The renewables exemption issues pertain to compliance filings and associated challenges in Docket No. ER16-1404-000.

<sup>[11]</sup> See Case 19-E-0530.

