

# FERC REJECTS ARGUMENTS FROM NEW YORK STATE ENTITIES AND FURTHER NARROWS PARTICIPATION OF RENEWABLES IN NYISO CAPACITY MARKET

*Hodgson Russ Renewable Energy Alert*  
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On July 17, 2020, the Federal Energy Regulatory Commission (“FERC”) stood its ground on buyer-side mitigation (“BSM”) rules in the New York Independent System Operator (“NYISO”)-run capacity market.[1] By Order, FERC addressed the arguments raised by the New York State Public Service Commission (“PSC”), the New York Power Authority (“NYPA”), the New York Energy Research and Development Authority (“NYSERDA”), the Long Island Power Authority (“LIPA”), and the City of New York (collectively, “State Petitioners”) in challenges to a series of February 20, 2020 FERC Orders that rejected two exemptions to BSM – a 1000 MW renewables exemption and a self-supply exemption.[2] In the end, FERC rejected State Petitioners’ arguments that: (1) renewables and self-supply resources lack the incentive and ability to distort capacity market prices, and (2) the February 2020 decisions were an overstep that impinged New York State’s power and ability to shape its resource mix.[3] FERC accepted, with modification, the NYISO’s response to FERC’s February Orders, which proposed a new, narrowly-crafted formula for determining whether renewable resources in mitigated capacity zones (Zones G-J – lower Hudson Valley and New York City) are exempt from BSM based in part on the rate of resource retirements.

## I. Background on Buyer-Side Mitigation: A Long, Contentious History

In 2015 the PSC, NYPA, and NYSERDA filed a complaint with FERC alleging that the NYISO’s BSM rules resulted in over-mitigation of renewable resources in the NYISO’s capacity market. The BSM rules provide that, unless exempt from mitigation, new capacity resources in mitigated capacity zones must enter the capacity market at a price at or above an offer floor and continue to bid that price until their capacity clears 12 monthly auctions. Resources are exempt from mitigation if they pass one of two narrow economic tests.

In 2016, FERC *agreed* with the State and ordered the NYISO to revise its BSM rules to exempt certain renewable and self-supply resources from BSM. Such exemptions, FERC decided, should apply only to resources that lack the incentive and ability to exercise buyer-side market power to artificially suppress capacity (“ICAP”) market

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prices – the very market distortion that BSM was designed to protect against. FERC even went so far as to say that intermittent renewables lacked the incentive and ability to exercise price-discriminatory market power. In response to that directive from FERC, the NYISO proposed on April 13, 2016 to exempt 1000 MW of renewables from BSM. But FERC sat on that proposal. Then, in February 2020, in an about-face policy decision, FERC ordered the NYISO to *further* limit the BSM exemption for renewables and *exclude* New York State generation and transmission owners from the self-supply exemption. In effect, FERC erected a barrier to the participation of renewable energy resources and NYPA-owned assets located downstate in the NYISO capacity market.

In response to FERC's February decisions, the State Petitioners filed a request for rehearing urging FERC to reconsider. How, they asked, could FERC change its mind over the course of four years without new information in the record to inform a different approach to the mitigation of renewables? FERC didn't have much to say for itself in that regard, but stood firm that the NYISO should mitigate renewables in Zones G-J that fail the BSM test if such resources exceed a capped amount of MW. While only renewables in mitigated capacity zones are subject to BSM to begin with, FERC rejected the 1000 MW exemption because the calculation the NYISO used to reach that cap factored in resources throughout the New York Control Area. Thus, FERC ordered the NYISO to go back to the drawing board and come back with a narrower test that only accounted for resources in mitigated capacity zones. In April 2020, the NYISO proposed a new test for determining the "Renewable Exemption Limit."

### II. A New Cap on Exempt Renewables

Rather than a static MW cap, in April 2020 the NYISO proposed to calculate the cap on the renewables exemption in each mitigated capacity zone. The formula is based in large part on what the NYISO calls "Incremental Regulatory Retirements." This would allow the renewables exemption to offset only those retirements of resources that are substantially caused by "new or amended" laws, regulations, or "related action" that targets a generator's emissions, operating permits, fuel supply, property taxes, retirement compensation, or other incentives outside of the NYISO markets.

The State Petitioners and Clean Energy Advocates comprising the American Wind Energy Association, the Alliance for Clean Energy – New York ("ACE-NY"), the Natural Resources Defense Council ("NRDC"), the Sustainable FERC Project, and the Solar Council – argued that that this test is "ambiguous and unworkable," in part because nearly all retirement decisions are economic decisions. By setting a discretionary standard for the NYISO to determine what causes a resource to retire, FERC created unnecessary uncertainty and risk that the NYISO would apply preferential treatment to this process.<sup>[4]</sup> What's more, Clean Energy Advocates explained that "much of the electric industry restructuring that has occurred in New York took place through orders of the [PSC], and not through regulations or statutes," and suggested that the NYISO amend the definition to provide certainty to renewable generators. In keeping with its recent expansion of minimum offer price floors in PJM and ISO-NE, FERC rejected these arguments and found that the NYISO "appropriately recognize[d] that out-of-market actions that reduce the supply of renewable resources in the capacity market offset the effects of renewable resource policies that increase supply of renewable resources in capacity markets."<sup>[5]</sup> If you're confused, you're not alone. In his strongly worded dissenting opinion, Commissioner Glick, conceded that, "quite honestly, I have no idea what this means."

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What's more, the new rules allow the NYISO to revoke an exemption previously granted to a qualifying renewable resource. If there's any glimmer of hope for renewables in Zones G-J, before the NYISO may revoke an exemption, the exemption holder has the opportunity to explain to the NYISO why it should not revoke the exemption. The NYISO asked that FERC be an arbiter of disputes that arise over revocation decisions, but FERC declined, saying that the NYISO is the final voice on such decisions, unless a party files a Section 206 Complaint with FERC.

### III. Where Does New York State Go From Here?

The FERC's recent decision turns heads back towards the PSC. In August 2019, the PSC initiated a Resource Adequacy proceeding to evaluate its options for 'taking back' the function of ensuring resource adequacy from the NYISO – as we summarized in a prior alert here. The proceeding was the State's direct response to the proposition that the NYISO's market rules were inconsistent with the State's Climate Leadership and Community Protection Act ("CLCPA") targets and other State policies favoring a cleaner resource mix. The PSC has not yet acted in that proceeding, the comment period for which closed in February, 2020, though it has been presented with a qualitative and quantitative analysis of the various options it could consider.[6] The State's clean energy stakeholders have long urged the State to act before the FERC's decisions impede the State's ability to meet its CLCPA goals. FERC's actions over the last six months "result in many renewable resources not qualifying to receive capacity payments in the NYISO markets," and now, makes the financial viability of those resources even more difficult.[7] In addition to Equinor's Offshore Empire Wind Project interconnecting into New York City, there are ten utility-scale solar projects requesting a renewable resource exemption in Class Year 2019.

On Friday, FERC directed the NYISO to submit another compliance filing addressing the areas FERC noted for modification. The filing is due by August 31, 2020. If FERC finds that the compliance filing adequately addresses all points in the July 17, 2020 Order, the tariff revisions will be implemented by the NYISO. The NYISO intends to apply these revised BSM rules to the 2019 Class Year.

While rehearing requests sat with FERC, the State Petitioners filed a petition for review in the D.C. Circuit Court of appeals on June 18, 2020 challenging FERC's February decisions. Shortly thereafter, the NRDC also filed a petition for review. This litigation is in very early stages. It is unknown when the Court may schedule oral arguments and a resolution of the issues is even less certain. The parties were directed to file issue statements by July 23, 2020. These filings should set the stage for motion practice. In the interim, stakeholders may also seek to challenge FERC's July 17, 2020 Order in the D.C. Circuit. If the State declines to "take back" the capacity market from the NYISO, the future of downstate renewables could be left in either the Court's hands or to the whims of this November's election, the result of which will likely dictate the 2021 make-up and decisions of the FERC.

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.

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[1] *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (July 17, 2020), Docket Nos. ER16-1404-001, ER16-1404-002, available at <https://www.ferc.gov/sites/default/files/2020-07/07-2020-E-37.pdf>.

[2] We analyzed the February 20, 2020 FERC Orders in a previous client alert. See <https://www.hodgsonruss.com/newsroom-publications-11554.html>.

[3] We discussed the State Petitioner's challenge in a previous client. See <https://www.hodgsonruss.com/newsroom-publications-12015.html>.

[4] *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (July 17, 2020), at 18-19.

[5] *Id.* at 27.

[6] See Case 19-E-0530, Proceeding on Motion of the Commission to Consider Resource Adequacy Matters, *Brattle Quantitative Analysis* (updated July 1, 2020), *Brattle Qualitative Analysis* (May 15, 2020).

[7] Statement from Alliance for Clean Energy NY: FERC Decisions Negative for NY Clean Energy Resources, [https://static1.squarespace.com/static/5c34c6b685ede137995b2e5d/t/5e4f06dc563ccb53b0a02ca3/1582237405086/Statement+Letter+from+ACE+NY+re+FERC\\_final.pdf](https://static1.squarespace.com/static/5c34c6b685ede137995b2e5d/t/5e4f06dc563ccb53b0a02ca3/1582237405086/Statement+Letter+from+ACE+NY+re+FERC_final.pdf) (Feb. 20, 2020).

