Energy Siting and Regulatory Concerns

Peter S. Ross
Hodgson Russ LLP
January 23, 2020
Presentation Overview

- Introduction
- New York’s Renewable Energy Goals
- New York’s Current Deployment & Technology Costs
- Incentives for Renewable Energy
- Concerns (Opportunities and Challenges)
Hodgson Russ LLP
Renewable Energy Practice

Broad-Ranged, Full Service Firm with Deep Capabilities

- More than 200 attorneys practicing in all major areas of U.S. law
- Offices in New York City, Albany, Buffalo, Saratoga Springs, Rochester, Palm Beach and Toronto
- Provides high quality, cost-effective representation with personal attention to our clients’ needs
- Founded in 1817, with deep roots in New York State, Hodgson Russ has experience in markets from Europe to the U.S. to Asia

Hodgson Russ Office, The Guaranty Building, Buffalo, NY
Hodgson Russ LLP
Renewable Energy Practice

Practice Areas

- Multidisciplinary team guides clients through virtually every aspect of a project’s lifecycle:
  - Strategic Planning
  - Zoning and State Permitting
  - State and Federal Regulatory
  - Environmental Review
  - Financing
  - Lease and Easement Agreements
  - Title Insurance and Curatives
  - Supply Contracts and Construction Agreements
  - Taxation
  - Litigation
  - Insurance and Warranties
  - Corporate Structuring and Collaborations
  - Labor and Employment

- Projects: Experienced in wind, solar, energy storage, landfill gas-to-energy, bioenergy projects, energy efficiency and decarbonization strategies

- Clients: Developers, lenders, land owners, permitting agencies, development agencies, parts and service suppliers, manufacturers, contractors and investors
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New York’s Ambitious Renewable Energy Development Goals

**Climate Leadership and Community Protection Act** (July 2019)
- Statewide GHG reductions from 1990 levels of 40% by 2030 & 85% by 2050.
- 70% of New York’s electricity must come from renewable energy by 2030.
- 100% percent of the state’s electricity supply must be emissions free by 2040.
- Sector-Specific Deployment Goals
  - 6,000 MWs of Distributed Solar by 2025
  - 3,000 MWs of Energy Storage by 2030
  - 9,000 MWs of Offshore Wind by 2035
  - Reducing energy consumption by 185 trillion BTUs from the State’s 2025 forecast through energy efficiency improvements
How much is one megawatt?

1 MW of solar powers ~170 NY homes

Source: SEIA
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## Goals vs. Current Deployment

<table>
<thead>
<tr>
<th>CLCPA Goal</th>
<th>Current Deployment</th>
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<tbody>
<tr>
<td>6,000 MWs of Distributed Solar by 2025</td>
<td>~2,000 MWs of Distributed Solar</td>
</tr>
<tr>
<td>9,000 MWs of Offshore Wind by 2035</td>
<td>0 MWs (~1,700 MWs contracted)</td>
</tr>
<tr>
<td>3,000 MWs Energy Storage by 2030</td>
<td>~1,460 MW of energy storage is deployed in New York (June 2018, NYSERDA Storage Roadmap). 97% is pumped hydro at two NYPA-owned facilities</td>
</tr>
<tr>
<td>70% Renewable Energy by 2030</td>
<td>In 2018, 20% of the state’s consumers’ demand (80% hydro); 26% of total in-state generation.</td>
</tr>
</tbody>
</table>

**Takeaway**: New York will see a significant amount of development over the next 5, 10, and 15 years.
New York’s Peak Power Demand

Source: NYISO Power Trends 2019
New York’s Peak Energy Demand

![Figure 2: Annual Electric Energy Usage by Region: 2017-2018]

<table>
<thead>
<tr>
<th>REGION</th>
<th>2017 GWh</th>
<th>2018 GWh</th>
<th>% CHANGE</th>
</tr>
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<tbody>
<tr>
<td>New York State (NYCA)</td>
<td>156,370</td>
<td>161,114</td>
<td>3.03%</td>
</tr>
<tr>
<td>Upstate (zones A-E)</td>
<td>52,938</td>
<td>55,211</td>
<td>4.29%</td>
</tr>
<tr>
<td>Downstate (zones F-I)</td>
<td>30,351</td>
<td>31,218</td>
<td>2.86%</td>
</tr>
<tr>
<td>New York City (zone J)</td>
<td>52,266</td>
<td>53,360</td>
<td>2.09%</td>
</tr>
<tr>
<td>Long Island (zone K)</td>
<td>20,815</td>
<td>21,326</td>
<td>2.46%</td>
</tr>
</tbody>
</table>

Source: NYISO Power Trends 2019
New York’s Energy Supply Mix

Source: NYISO Power Trends 2019
New York’s Energy Supply Mix

Source: NYISO Power Trends 2019
Current Deployment of Distributed Energy Resources

Source: NYSERDA
Declining Costs of Solar

Source: NREL
Declining Costs of Energy Storage

Global benchmarks - PV, wind and batteries

Source: BNEF

Note: The global benchmark is a country weighted-average using the latest annual capacity additions. The storage LCOE is reflective of a utility-scale Li-ion battery storage system running at a daily cycle and includes charging costs assumed to be 60% of whole sale base power price in each country.
Declining Costs of Onshore Wind

Source: BNEF
Declining Costs of Offshore Wind

Source: LIPA South Fork Wind Farm Fact Sheet
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Federal Incentives

- **Investment Tax Credit** for residential (under Section 25D) and commercial and utility (under Section 48) investors in solar energy property
- **Production Tax Credit** (extended for wind resources for one-year at the end of 2019)

### Solar ITC Schedule

<table>
<thead>
<tr>
<th>Year</th>
<th>Commercial &amp; Utility-Scale</th>
<th>Residential</th>
</tr>
</thead>
<tbody>
<tr>
<td>2019</td>
<td>30%</td>
<td></td>
</tr>
<tr>
<td>2020</td>
<td>26%</td>
<td></td>
</tr>
<tr>
<td>2021</td>
<td>22%</td>
<td></td>
</tr>
<tr>
<td>2022</td>
<td>10%</td>
<td>0</td>
</tr>
</tbody>
</table>

*Source: SEIA*
New York State Incentives

- **Renewable Energy Credits (RECs)**
  - Utilities must purchase RECs or make alternative compliance payment under the Clean Energy Standard.
  - REC = one MWh for electricity produced by an eligible renewable energy resource
  - NYSERDA holds auctions for 20-year contracts for large-scale renewables
- **Offshore Renewable Energy Credits (O-RECs)**
  - 25-year contract; indexed to wholesale markets.
- **NYSERDA’s NY-Sun MW Block Program**
  - Performance-based $/Watt incentive for residential, C&I and community solar
- **RPTL Sec. 487 Property Tax Exemption for Renewable Energy Systems**
Rates & Compensation

Wholesale Compensation
- Typically larger, transmission level-connected resources
- NYISO-administered energy, capacity, and ancillary service markets

Retail Compensation (<5MWac)
- Valuation of Credits: Net energy metering & Value of Distributed Energy Resources (VDER) tariff
- Credit Application Rules: Community Distributed Generation (community solar) & Remote Net Metering
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Stages of a Renewable Energy Project

- Development: Site Control, Interconnection, Non-ministerial Permitting, PILOT negotiation
- Offtake
- Financing
- Engineering, Procurement & Construction
- Operation & Maintenance
- Decommissioning
Concern #1: Article 10 Reform

- Provides a unified review and approval process for major electric generating facilities in New York State
- Applies to generating facilities of 25 megawatts or more
  - Replaces State Environmental Quality Review Act (SEQRA) review
- Application requires
  - environmental and public health impact analyses
  - studies regarding environmental justice and public safety
  - a utility security plan reviewed by NYS Division of Homeland Security and Emergency Services
- Intervenor Funds: Applicants must provide funds to local parties and municipalities so that they can participate in the review of the application and for legal fees (but not for judicial challenges)
- DPS public information coordinator assists interested parties and members of the public in participating in the siting process.
Concern #1: Article 10 Reform

- Article 10 of the New York Public Service Law (enabling legislation passed in 2011)
  - No expiration date/sunset provision
- Siting Board Regulations (July 17, 2012)
- DEC Regulations (July 12, 2012)
Concern #1: Article 10 Reform

- The New York State Board on Electric Generation Siting and the Environment (the “Siting Board”)
- Oversees Article 10 Process
- Five Commissioners (or their designees)
  1. Chair of the Department of Public Service (Head)
  2. Commissioner of NYS Department of Environmental Conservation
  3. Commissioner of NYS Department of Health
  4. Chair of NYSERDA
  5. Commissioner of Economic Development
- Two ad hoc public members who reside within the municipality in which the facility is proposed to be located
  - One appointed by President Pro Tem of Senate
  - One appointed by Speaker of the Assembly

John B. Rhodes, DPS Chair, Head of the Siting Board
Concern #1: Article 10 Reform

Article 10 Steps

- Step 1: Public Involvement Program (“PIP”)
- Step 2: Preliminary Scoping Statement
- Step 3: Formal Application
- Step 4: Siting Board Decision
- Step 5: Compliance
Concern #1: Article 10 Reform

**Problems:** As of January 2020, the Siting Board has approved only five applications:
- Bluestone Wind (Dec. 16, 2019); Number Three Wind (Nov. 12, 2019); Baron Winds (Sept. 12, 2019); Eight Point Wind (Aug. 20, 2019); Cassadaga Wind (Jan. 17, 2018) (filed PIP in Nov. 2014)
- Large Pipeline of Projects
  - Dozens of projects undergoing Article 10 process
  - NYSERDA has awarded REC contracts to 46 projects for a total of 2,747 MWs; awaiting results for 2019 solicitation.
  - NYISO Interconnection Queue: ~10 GWs solar; ~7.6 GWs energy storage; 18 GWs of wind.
- Lengthy, resource-intensive application process
- Lack of certainty
  - Lack of agreed-upon standards for study methodologies/scopes
- Lack of streamlined permitting
  - Uncertainty surrounding what counts as an “unreasonably burdensome” local restriction
  - Key stakeholders engaged late in the process
Concern #1: Article 10 Reform


- Calling on DPS to audit Article 10 regulations and make updates that streamline and improve the process.
- Ensuring local appointments are made to Siting Board by enabling the local executive or supervisor to make them if the Governor and the Legislature fail to act.
- Establishing a fund or bank to mitigate or otherwise offset any impact a project might have on a threatened or endangered species or sensitive habitat.
- Offering more incentives to local communities to host renewable energy projects.

Concern #1: Article 10 Reform


- Dedicating $1 million in funding for staff at the state’s nine regional planning boards to assist municipalities with planning.

- Adding more staffing at the state Department of Public Service (DPS), the Department of Environmental Conservation (DEC), and the Department of Agriculture and Markets (DAM) to account for the increase in Article 10 applications, including adding a staff member dedicated to ensuring the agencies are communicating and coordinating efficiently.

Concern #2: Agriculture and Markets Law Reform

- **NYSERDA Notice of Intent**: Under Section 305 of the Agriculture & Markets Law, all NYSERDA-funded projects in Agricultural Districts must submit a notice of intent to the Commissioner of Agriculture and Markets and the County Agricultural and Farmland Protection Board.

- **Determination of Adverse Impact**: The Commissioner of Ag. & Mkts., in consultation with the Commissioner of Environmental Conservation and the Advisory Council on Agriculture, initially determines whether such action would have “an unreasonably adverse effect on the continuing viability of a farm enterprise . . . within the district, or state environmental plans, policies and objectives.” (within 45 days)

- If so, Commissioner may order NYSERDA not to take action for 60 days and review the proposed action to determine whether any practicable alternatives exist which would minimize adverse impacts.

- The Commissioner may request the Attorney General to enjoin NYSERDA from “violating any of the provisions of [AML Sec. 305(4)]” and prevent or delay the disbursal of NYSERDA funds.
Concern #2: Agriculture and Markets Law Reform

Map of 2019 Agriculture Districts in New York

Source: CUGIR
Concern #2: Agriculture and Markets Law Reform

- **Concern**: Creates regulatory uncertainty for renewable energy projects
- Small-scale Projects:
  - Lack of streamlined permitting
  - Commissioner can require mitigation measures late in the process upon request of NYSERDA funds, post-SEQRA approval.
- Large-scale projects bids
  - Ag. & Mkts-mandated mitigation measures could make bids into NYSERDA Large Scale Renewable auctions unviable
  - Need for regulatory coordination between NYSERDA and Ag. & Mkts
Concern #3: PILOT Standardization

- Real Property Tax Law Section 487
  - Provides a 15-year real property tax exemption for properties located in New York State with renewable energy systems
  - Only applies to the value that a renewable energy system adds to the overall value of the property
  - Local governments may opt-out of the exemption, but must do so for all systems
  - A local government that does not opt out can still benefit financially through payment-in-lieu-of-taxes (PILOT) agreements
Concern # 3: PILOT Standardization

**Problems:**
1. PILOTs negotiated on a Project-by-Project Basis
2. Difficult to assess ad valorem value of solar project
3. No standard methodology in place statewide

Pending appeal of recent New York Supreme Court case holding that a third-party owned solar energy system at Cornell University was not real property and thus not subject to real property tax.

Nascent movement within industry to have standardized PILOT amounts.
Concern #4: Incentives to Site on Developed Land

- **Problem**: Greenfield development is often cheaper and more productive
  - Need to minimize environmental impact, conserve wilderness and prime agriculture areas

- **Current Incentives**
  - NYSERDA currently has an $0.10/W adder as part of its MW Block program for distributed solar systems sited on parking canopies, rooftop canopies (upt 25kW), affordable housing (up to 50kW) and Brownfield/Landfill
Thank You!