New York City Bar Association
Committee on Energy

Report of the Committee on Energy on Energy Planning

I. Committee Recommendations

The role of electricity in contemporary society is increasingly important and supplying it reliably and economically is crucial to the economy. Moreover, current developments mandate that the State examine whether the framework within which energy needs are being met is adequate. The cost of energy fuels has risen, making the goal of supplying electricity efficiently even more important. International geopolitical concerns have led to a national call for increased energy independence. The "environmental footprint" of energy production and use and its impact on global warming is of paramount significance today. Conflicting policy objectives among different agencies, including the Federal Energy Regulatory Commission ("FERC"), the New York Public Service Commission ("Commission"), the Department of Environmental Conservation ("DEC") and other state and local agencies can impede efficient development of new energy infrastructure to serve New York. Rapidly evolving federal energy policies could have a material impact in the State. In light of these developments it is no longer prudent for the State to abstain from coordinated energy planning. The Committee on Energy recommends that New York establish an Energy Policy Board to establish State policy on key energy issues.

The Energy Policy Board would include the chairs of the Public Service Commission, the Department of Environmental Conservation, the New York State Energy Research and Development Authority ("NYSERDA")[1] and the Empire State Development Corporation. The Board would prepare a biennial statement of State energy policy recommendations, addressing the (1) risks, benefits and uncertainties of energy supply sources, (2) emerging energy trends, (3) energy policies and long-range planning objectives and strategies, (4) administrative and legislative actions needed to implement energy plans and objectives and (5) impact of the energy policy statement's recommendations on economic development.[2] The energy policy statement would provide the framework for coordinated actions and decisions by State agencies.

The Committee further recommends that the State not adopt integrated resource planning, as proposed in a proceeding currently before the Commission. Such an

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[1] For a further discussion of NYSERDA's participation on the Board see below at Section IV.C.

[2] The new Board and these five elements are discussed in Section IV of this Report.

approach to energy planning would risk involving the State in the business of directing which new energy supply facilities should be built and where they should be built.[3] Care must be taken so that such involvement of the State does not undercut the viability of the existing competitive wholesale electric markets. Finally, the Committee recommends that the State not adopt a proposal included in legislation proposed in the current legislative session that the energy planning process which existed prior to 1996 be re-instated. That process would both conflict with and significantly duplicate energy planning currently carried out by the operator of the State's wholesale electric transmission system.

The bases for these recommendations are discussed in this Report.

II. Introduction

In 1996, the Commission announced that it would restructure the State's electric power industry.[4] The Commission called for the establishment of an independent system operator; for regulated electric utilities to divest ownership and operation of their generating facilities; and for the creation of competitive wholesale and retail markets. Since then, the New York Independent System Operator ("NYISO") was established;[5] the regulated electric utilities have divested substantially all of their electric generating facilities; the NYISO commenced operating competitive wholesale markets and the State's bulk power electric transmission system; and competitive retail marketers commenced supplying retail electricity and natural gas to customers.[6] Significantly, energy planning as it was conducted by the State prior to 1996 was ended. The statutory authorization for the State Energy Office was repealed and authorization

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[3] *See* Section III.B below and the accompanying text for a discussion of how utility regulation prior to 1996 led to unsatisfactory results.

[4] Competitive Opportunities Regarding Electric Service, No. 94-E-0952, slip op. (N.Y. Pub. Serv. Comm'n, Mar. 6, 1996).

[5] In addition to the Commission's initiative, the NYISO was formed in response to Order 888 issued by Federal Energy Regulatory Commission ("FERC"), which required open access to the State's electric transmission facilities.

[6] The Commission's website indicates that 43.5% of total statewide electric load is now served by competitive retail suppliers, including 73% of large non-residential time of use customers' load (these customers are either industrial or large commercial organizations), 50.5% of smaller non-residential load and 13% of residential load. June 2007 Electric Retail Access Migration Reports, *available at* http://www.dps.state.ny.us/Electric_RA_Migration_06_07.htm.

for preparation of State-administered energy plans[7] under Article 6 of the Energy Law expired.[8] As a result, the State government does not now conduct energy planning.

The State's electric power system faces a number of challenges. The demand for electricity is growing, particularly in metropolitan New York City. The NYISO's 2008 Reliability Needs Assessment ("RNA") indicates that the growth of electric demand has exceeded two per cent annually in metropolitan New York City over the last several years.[9] It is expected that by 2012 approximately 52 percent of the State's electric demand will be located in southeastern New York, including Long Island, and that the NYISO's RNA for 2008 will forecast that new energy supply capacity will be required to meet this growing demand by 2012.[10] The New York Power Authority, however, is seeking to procure additional supply for the New York City area through two requests for proposals, each in the amount of 500 MW. One was issued in 2005 and was awarded to a transmission project from New Jersey into New York City and a second, which was issued in November 2007, is pending responses. The NYISO reports in the 2008 RNA that if an additional 500 MW comes on line by 2011, the projected date for additional supply needs will be 2013.[11]

In metropolitan New York City, merchant power producers have not built new capacity to meet the growing load. For example, in metropolitan New York City, most recently-completed capacity (86 percent or 1,700 MW) was built by the New York Power Authority, Consolidated Edison Company of New York, Inc., or under contract to them.[12] Generators and load serving entities are taking significantly different

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[7] The use of the term "State-administered energy planning" in this Report is meant to describe establishing State energy policy. While utilities and the NYISO already conduct energy planning, they do not establish State energy policy.

[8] *See* N.Y.L.1995, ch. 83, §§ 43-46 (repealing authorization for State Energy Office, effective June 20, 1995): N.Y.L.1992, ch. 519, § 16 (repealing earlier authorization for State-administered energy planning and enacting new energy planning legislation). *See* discussion in the Appendix.

[9] NYISO Comprehensive Reliability Planning Process, 2008 Reliability Needs Assessment I-12 (December 10, 2007).

[10] *Id.*

[11] *Id.* at I-29-30. This does not take into account the Governor's plan to reduce electricity consumption 15% from the level that is currently projected for 2015, which if achieved by that year would also result in peak demand reductions, and further postpone the need date beyond 2017. *Id.* at 27-28.

[12] Initial Comments of the City of New York, Policies, Practices and Procedures for Utility Commodity Supply Service to Residential and Small Commercial and Industrial Customers, Phase II, No. 06-M-1017 (N.Y. Pub. Serv. Comm'n, Apr. 19, 2007), at 7. Phase II of this proceeding is referred to as the "Energy Planning Proceeding" in this Report. While the Committee has not prepared this Report as a comment to be submitted to the Commission in that proceeding, the Commission's April 19, 2007 decision and the

positions in an investigation of New York City's generating capacity markets before the FERC about the ability of merchant suppliers to build new energy supply facilities.[13] Some merchant generators consider that the revenue available through the NYISO's current markets is inadequate to support investment in new generating capacity and that future capacity markets are unpredictable and unreliable.[14]

In addition to the increased electrical demand in metropolitan New York City, the State is encouraging development of new electrical supply facilities using renewable resources, particularly wind and biomass facilities.[15] Most of these facilities will be located upstate because of the location of the necessary wind conditions and the availability of biomass sources. The concentration of this potentially substantial amount of new energy supply capacity in a region remote from where the electrical demand is growing will lead to increased use of the State's electric transmission system and could require additional transmission capacity. It is also unclear what the total cost of increased use of wind-generated electricity will be if additional conventional generation facilities will be needed to backup wind generation facilities.

The Regional Greenhouse Gas Initiative ("RGGI") may also have a significant impact on the electric power system.[16] Under RGGI, operators of electric generating

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parties' filings in the proceeding are an important source for this Report, and are available at http://www.dps.state.ny.us/Case_06M1017.htm.

[13] Initial Comments of The NRG Companies, Energy Planning Proceeding, *supra* note 12, at 3 (discussing a FERC proceeding, FERC Doc. No. EL07-39-000).

[14] *Id*. *See* the 2006 State of the Market Report for the New York ISO 110, prepared by Potomac Economics, Ltd., the Independent Market Advisor to the NYISO, and released in July 2007. In addition, certain merchant generators consider the lack of an Article X siting process and the existence of potentially discriminatory NYISO interconnection rules as barriers to entry into the NYISO's competitive wholesale markets.

[15] In September 2004, the Commission adopted a renewable portfolio standard ("RPS") with the goal of obtaining 25 percent of the State's electric energy from renewable resources by 2013. Renewable resources, which include wind, biomass and small hydroelectric facilities, cannot necessarily be sited near the electric power demand, but must be sited where the renewable resource is located. The NYISO reports that there are approximately 6,000 MW of proposed wind generation in the NYISO's interconnection queue. NYISO *Power Trends 2007* 12 (2007).

[16] RGGI involves a memorandum of understanding to limit greenhouse gases, executed by New York and nine other states in the Northeast and Mid-Atlantic regions. *Available at* http://www.rggi.org/agreement.htm. Other states and certain Canadian provinces are observers. In October 2007, the DEC issued proposed regulations for the CO2 Carbon Budget Trading Program, 6 NYCRR Part 242, and revisions to 6 NYCRR 200, *available at* www.dec.ny.gov/regulations/38974.htm. NYSERDA proposed regulations to administer auction allowances, 21 NYCRR 507, *available at* www.nyserda.org/RGGI/default.asp. Public hearings were held in December 2007. *See generally* http://www.rggi.org/.

facilities will be required to acquire allowances for their carbon dioxide emissions. The generators with lower greenhouse gas emissions are expected to have an advantage over plants with higher emissions as such plants will need to acquire fewer emission allowances for a given electric output. This could, potentially, lead the operators of the less efficient facilities to have to upgrade their plants or to consider closing them. While such changes will reduce the discharge of greenhouse gases to the atmosphere, they also will constitute a challenge to the electric power system in that there may be significant shifts in where energy supply capacity is located.[17] Moreover, operators of electric generators in states and Canadian provinces not participating in RGGI may increase their exports of electric power to New York as a result of RGGI.[18] The resulting changes in the composition of the State's electric power supply sources may lead to further changes in the way the transmission system is used.

Resolving these challenges to the State's electric power system is important. A reliable supply of reasonably-priced electric energy is critical to New York's economy and to maintaining the quality of everyday life. The cost of electric energy throughout New York is higher than in other states, which has a deleterious impact on the State's economy. In part, the higher cost of energy results from the fact that natural gas costs, which are particularly important to the cost of electricity in the State, have risen significantly over the past ten years.[19] While forecasts of future prices of petroleum and natural gas differ, it is certainly possible that the price of one or both of these fuels will continue to increase, driven by continuing growth in world demand for oil and natural gas coupled with constrained supply. The higher cost of energy also results from past State regulatory decisions concerning new capacity and from the unique conditions in metropolitan New York City with respect to both the cost and siting implications of building new energy supply facilities.[20]

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[17] The NYISO's 2008 RNA addresses potential reliability issues resulting from RGGI on Pages I-25—I-26 and I-31—I-32. The near-term impacts may be mitigated depending on the number of emission allowances initially granted.

[18] To the extent that such out-of-state producers do not have to purchase carbon dioxide emissions allowances, they can expect to gain a price advantage over in-State producers.

[19] *See* Energy Information Administration, Natural Gas Prices, *available at* http://tonto.eia.doe.gov/dnav/ng/ng_pri_sum_dcu_nus_m.htm. *See also* Energy Information Administration, U.S. FOB Costs of Crude Oil (Dollars per Barrel), *available at* http://tonto.eia.doe.gov/dnav/pet/hist/i000000004a.htm and James Kanter, *Rise in World Oil Use and a Possible Shortage of Supplies Are Seen in the Next 5 Years*, N.Y. Times, July 10, 2007, at C4 concerning petroleum prices.

[20] *See* below at Section III.B concerning past regulatory decisions. A combination of limited building sites, high cost of property, construction, environmental considerations and the higher cost of interconnecting new plants make metropolitan New York City a high cost area in which to site new energy supply facilities.

National and international energy challenges and opportunities may also affect the State's electric power system. In addition to the increased cost of petroleum and natural gas, the United States may act to reduce imports of petroleum as a matter of national security. Federal legislation addressing greenhouse gas emissions is pending and the increasing public acceptance of the need to address global warming may lead to such legislation being enacted in the foreseeable future. Energy may thus become even more strategically important. Changes in the way the State uses energy, however, are not just challenges, but they may also be opportunities to develop new technologies and industries. In particular, can the State leverage its environmental leadership to build a position in industries that are leaders in environmental technology?[21] Energy planning is relevant, therefore, not just to the reliable supply of reasonably-priced electric power, but also with respect to the State's achievement of its economic development goals. In short, consideration of the energy challenges and opportunities facing the State is important to maintaining and improving our quality of life.

The Commission has suggested that re-establishment of State-administered energy planning may be needed to resolve these issues.[22] The Commission appears to consider that such State-administered energy planning would complement, but not conflict with, the NYISO's existing planning process.[23] On the other hand, certain observers of the State's electric power industry argue that re-establishment of an integrated resource planning process, that is, energy planning which goes beyond simply identifying needed goods and services, would be inconsistent with the existence of the existing competitive energy markets.[24] Competitive wholesale energy markets, however, are subject to significant constraints apart from the re-establishment of energy planning, including (1) the system operator's actions to assure a high level of reliability, (2) price caps on power suppliers' bids and mitigation of power suppliers' bids to limit the exercise of market power and (3) regulatorily-imposed demand curves, which are intended to establish a more orderly market for the provision of installed capacity. Competitive electric markets, therefore, already co-exist with price regulation and an essential question is what form of re-established State-administered energy planning is

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[21] One model for such an initiative is the State's support for the development of nanotechnology in the Albany region.

[22] Energy Planning Proceeding, *supra note* 12; *Order Requiring Development of Utility-Specific Guidelines for Electric Commodity Supply Portfolios and Instituting a Phase II to Address Longer-Term Issues*, slip op. 32 – 33, No. 06-M-1017 (N.Y. Pub. Serv. Comm'n, Apr. 19, 2007) [hereinafter April 19th Planning Order].

[23] *Id.* at 33. A draft order in this proceeding establishing how the Commission would consider energy planning issues was discussed at the Commission meeting on December 12, 2007.

[24] *See, e.g.*, Initial Comments of Independent Power Producers of New York, Inc., Energy Planning Proceeding, *supra* note 12, at 6.

most compatible with the competitive markets. The Committee suggests that re-establishing energy planning in the State must be designed so that critical public policy goals are met and so that the NYISO-administered competitive wholesale markets are not undermined.

This Report is prepared to assist policy makers to consider whether – and if so how – to re-establish State-administered energy planning. In this Report, the Committee first asks five questions concerning energy planning that illuminate key issues. (See Section III.) Second, the Committee suggests that State-administered energy planning can be effectively undertaken by a State energy policy board which addresses important public policy issues, rather than attempting to mandate the types and locations of new energy supply facilities. (See Section IV.) In addition, the Committee includes an appendix which addresses how energy planning has been effected in New York.

III. Five Questions Which Define Energy Planning

A. Is Energy Planning Consistent With a Competitive Market Environment?

While it is sometimes claimed that energy planning is inconsistent with the existence of robust competitive energy markets, there is evidence in other states of the co-existence of energy planning and competitive wholesale energy markets. In each of the four examples below, active regional transmission organizations and competitive wholesale markets co-exist with energy planning. These states' experience indicates that energy planning can be consistent with the operation of a competitive wholesale market. The energy planning described in these states, however, does not appear to involve a detailed set of regulatory interventions such as was the case in New York prior to 1996. Rather, these examples suggest possible alternative models for the State to consider.

In Maine, an Energy Resources Council has been established to, among other matters, recommend coordinated state policy regarding major programs that affect energy use; provide an energy resources information base; provide direction to the State's energy planning and regulatory programs; evaluate the State's regulatory systems as they affect the generation, transmission, delivery or use of energy; and study specific energy issues and problems of state-level significance.[25]

[25] Me. Rev. Stat. Ann. tit. 5, §313-A.

In New England, six states[26] have agreed to form a regional committee which will advance policies to facilitate the efficient development of power generation, demand management and transmission resources needed to reliably serve customers. The regional committee will act in two areas, resource adequacy and system planning and expansion. With respect to resource adequacy, the committee will (1) recommend policies and comment on proposed market rule and tariff changes and (2) work with state policy makers and legislatures to encourage the use of diverse fuels, customer participation in demand response programs, implementation of cost-effective energy efficiency programs and appropriate retail pricing. In the area of system planning, the regional committee will recommend policies supporting reliability and to eliminate persistent and costly transmission congestion. The regional committee will evaluate siting of interstate transmission lines.[27]

In Pennsylvania, the Bureau of Conservation, Economics and Energy Planning conducts studies and research and performs policy and planning functions; develops energy, water, and telecommunications policy; disseminates information and analysis on utility operational aspects; and researches a broad range of utility policy issues, including potential impacts of utility restructuring activities, market power, energy strategies, mandatory water conservation plans and appropriate technologies; resource planning, competitive bidding and rate design.[28]

Finally, California has adopted an Energy Action Plan. This plan describes a coordinated implementation plan for state energy policies, including the Governor's Executive Orders; the California Energy Commission's Integrated Energy Policy Report;[29] the California Public Utility Commission's processes; other agencies' policy

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[26] Maine, Connecticut, Rhode Island, New Hampshire, Massachusetts and Vermont.

[27] Term Sheet for New England States Committee on Electricity, approved at the NEPOOL Participants Committee meeting on September 8, 2006, *available at* http://www.iso-ne.com/committees/comm_wkgrps/prtcpnts_comm/prtcpnts/mtrls/2006/sep82006/supplemental_notice_sept8.pdf.

[28] *See* Pennsylvania Public Utility Commission, Bureau of Conservation, Economics and Energy Planning, http://www.puc.state.pa.us/general/com_org/bur_cons_eco_ener_plan.aspx.

[29] California Energy Commission, *2006 Integrated Energy Policy Report Update* (Jan. 2007), *available at* http://www.energy.ca.gov/2006publications/CEC-100-2006-001/CEC-100-2006-001-CMF.PDF. The abstract indicates that the report provides a midcourse review of two areas: Renewable Portfolio Standard activities and the potential relationship between sustainable land use planning, also called "smart growth," and energy saving opportunities. The report discusses why California has made only minimal progress to date in meeting Renewable Portfolio Standard goals, identifies challenges the state faces in achieving those goals, and offers recommendations. It also details the lack of relationship between land use planning activities and energy concerns and offers recommendations for taking

forums; and legislative direction.[30] The plan continues the energy priorities for actions to address energy needs: energy efficiency and demand response as California's preferred means of meeting growing energy needs. In addition, California expects to rely on renewable sources of power and distributed generation, such as combined heat and power applications, and then clean and efficient fossil-fired generation. Concurrently, the bulk electricity transmission grid and distribution facility infrastructure must be improved to support growing demand centers and the interconnection of new generation, both on the utility and customer side of the meter.

While these four examples of energy planning in states with competitive wholesale markets don't constitute a comprehensive catalogue of the states' approaches to energy planning, none of them appears to parallel the energy planning model proposed by the Commission Staff[31] nor the New York State Assembly.[32] Each of these examples focuses on establishing state energy policy – not making regulatory decisions as to specific resource acquisitions. These states' provide evidence that some form of energy planning can co-exist with competitive wholesale markets and independent system operators.

B. Should an Energy Plan Focus on Regulatory Mandates?

Prior to the restructuring of the State's electric power system, including the restructuring of the State's electric utilities, which began in 1996, electric utilities prepared integrated resource plans ("IRP") which were submitted to the Commission for review and approval. An IRP is not just limited to reliability-oriented considerations but introduces public policy considerations into energy planning. An IRP is sometimes described as a planning process to satisfy multiple objectives for resource use. These objectives can include:

> Maintaining reliability of supply.
> Minimizing the short-term or long-term economic cost of delivering electricity services.
> Minimizing the environmental impacts of electricity supply and use.

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advantage of potential energy efficiencies that smart growth would offer. http://www.energy.ca.gov/2006publications/CEC-100-2006-001/CEC-100-2006-001-CMF.PDF.

[30] *See* California Energy Commission and California Public Utility Commission, *State of California Energy Action Plan II: Implementation Roadmap for Energy Policies* (Oct. 2005), *available at* http://www.cpuc.ca.gov/PUBLISHED/REPORT/51604.htm.

[31] *See* below at Section III.B.

[32] *See* below at Section III.E.

Enhancing energy security by minimizing the use of external resources.
Providing local economic benefits.

This form of energy planning provides the State with significant regulatory control over utilities' decisions on resource acquisition.

In its April 19th Planning Order, the Commission posed questions concerning the reinstitution of IRP.[33] The Commission Staff responded to these questions by proposing the formation of a long-term resource acquisition plan, which would be approved by the Commission. Utilities would annually submit resource procurement proposals to the Commission, which would address the cost-effectiveness of projects proposed by the utilities and address public policy issues. The specific strategic goals would be developed in a process that involved affected stakeholders and would be directed by the Commission Staff.[34] Utilities' annual resource plans would be compared against a long-term resource acquisition plan which would have been approved by the Commission.[35] The Commission would thus have an active regulatory role in the approval of specific utility resource acquisition plans.

A significant reason for the Commission's decision in 1996 to restructure the New York electric power system was public dissatisfaction with the level of electric rates during the two decades in which the State conducted energy planning under Article 6 of the Energy Law. One need look no further than recent energy history in New York State to find examples. Shoreham and other nuclear plant construction, overbuilding, cost over-runs, erroneous load forecasts, and state implementation of PURPA with long-term power purchase agreements at rates far above market were all contributing factors to the push for deregulation. This recent history should not be forgotten or it will be repeated.[36]

There is no assurance that regulation of centralized resource acquisition will be more successful now than it was prior to 1996. One commenter has seen regulatory planning working effectively earlier, when "the choices facing utilities were limited, and were broadly aligned with the interests of consumers," but not working well now

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[33] April 19th Planning Order, *supra* note 22, at 36.
[34] Initial Comments of Commission Staff, Energy Planning Proceeding, *supra* note 12, at 5-7.
[35] *Id.* at 7.
[36] To the extent capital investments are made by participants in the competitive market -- and not pursuant to regulation, customers are not, as they have been in the past, left paying for both failed investments and increasing energy prices for replacement power. Under competitive markets, builders, not consumers, bear the risk of higher construction costs and changes in market conditions.

because the "economics of scale have been exhausted, new environmental risks have been recognized, and the costs of fuel and other inputs have become volatile and expensive."[37] Thus, changes during the two decades when New York engaged in energy planning with increasing energy prices, new technology and changing industry structures may have contributed to the growth in electric rates which led to the Commission's decision in 1996 to restructure the electric power industry.

These conditions continue today and are likely to produce the same unsatisfactory results as earlier. Indeed, it appears that we are heading into an era in which capital-intensive investments in new or updated technologies which entail long lead times are being considered to meet future needs. Such new sources include wind, solar, distributed generation, demand reduction mechanisms, coal generation with carbon sequestration, the latest generation nuclear power plants or off-shore LNG import terminals. In this context, the danger of increased rates resulting from a reversion to a regulatory, prescriptive environment must be recognized and avoided. While economic and political conditions in other parts of the country, such as the Southeast and the Northwest where traditional regulatory models continue to be popular, are different from the conditions existing in the State, policy makers in New York must confront the conditions in this region.

Would energy planning based on utilities' IRPs and involving the active participation of the Commission in the approval of the electric utilities' resource planning undercut the restructured wholesale market? A number of commenters in the Energy Planning Proceeding argue that acquisition of new energy supply resources at prices not consistent with the competitive market's clearing prices would distort the competitive market.[38] Regulatorily-mandated purchases of capacity might well have a similar effect on the markets.

Extensive regulatory intervention in the markets would appear to limit the practical ability of market participants to propose new energy supply projects to the NYISO's markets with the expectation of recovering their investment with a reasonable profit. The adverse impact on the robustness of the NYISO's markets may start subtly, but grow in significance as the market is bypassed by regulatory action, to such a point that the market has been significantly damaged.

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[37] Nancy Brockway, *Delaware's Electricity Future: Re-regulation Options and Impacts, A Report Pursuant to SS1 of SJR3 of the 143rd General Assembly* 4-5 (May 2007).

[38] If a supply contract reflecting new capacity does not accurately reflect the cost of the new capacity, it may artificially suppress the capacity prices in the NYISO's markets. Initial Comments of Independent Power Producers of New York, Inc., Energy Planning Proceeding *supra* note 12, at 15.

While the NYISO's existing energy planning process provides a basis on which to build State-administered energy planning, to the extent that there is poor coordination between the State-administered energy planning and the NYISO planning process, it appears likely that there will be extra costs for market participants and government agencies and inconsistent planning conclusions. Although the Commission Staff indicated that under its proposal it would work in harmony with the NYISO energy planning process, the creation of an energy plan that provides for Commission approval of new energy supply resources may be significantly inconsistent with the operation of competitive markets. If new capacity additions are dictated by regulatory decisions, without consideration of the economic cost of the new capacity, the vitality and robustness of the competitive markets will be diminished.

Energy planning, of course, need not be based on mandates to utilities based on their IRPs to build specific energy resources. An important result of energy planning would be to allow State agencies to identify key energy policies and priorities and to resolve conflicting positions on energy issues. It is not unreasonable for agencies with different mandates and constituencies to pursue policies which have, either expressly or by implication, different impacts on energy issues. Thus, energy planning, to the extent it requires agencies to work together on common energy policies, would be valuable to the State by creating a collaborative process under which key public policy goals could be identified. If made binding on the agencies, such planning would assure implementation of a unified policy by all agencies.

The State, under this approach, would not specify which new energy supply or transmission facilities should be constructed, but would focus on key policy issues, such as the following:

> Should the State act to encourage new energy supply facilities that provide economic benefits to electric consumers?
> Can the State improve its support for renewable resources and energy efficiency resources?
> What actions should the State take regarding fuel diversity?
> Should the State encourage the increase of transmission capacity to allow more efficient use of the transmission system and delivery of additional renewable resource generation?
> Should the Commission continue its policy presumption against a regulated utility company constructing a new energy supply facility in its own service territory?

As is discussed below, it is important, however, that the State's energy planning effort not simply be a statement of energy aspirations disconnected from the supply and delivery of energy.[39]

It should be noted that it may be necessary for energy planning to be used to prescribe specific energy supply resources in specific, limited cases. The Commission's Energy Planning Proceeding is addressing whether utilities should be encouraged to enter into long-term supply contracts with operators of energy supply facilities. Because such contracts involve the risk of making an incorrect decision about the future of the market, it would appear that the Commission will be asked to provide utilities with some form of assurance that they will be able to recover the costs of the long-term power contracts. The Commission could restrict its grants of such assurance to situations in which the competitive market is not leading to new plants or transmission projects being constructed and there is a significant need for new sources or types of energy to meet reliability requirements. Moreover, the reasons the market did not solve for these needs should be evaluated in the planning process and in consultation with the NYISO so that impediments to market solutions can be considered and addressed as appropriate.

The NYISO's 2008 RNA indicates a potential need for new energy supply by 2012 to 2013 in metropolitan New York City.[40] While some generators are proposing new projects, it is not clear whether the competitive market will produce sufficient new generation facilities. The difficulty of identifying reasonable sites (in terms of sufficient space, access to fuel supplies and electrical transmission facilities), the difficulty of obtaining approval for such units and the high cost of constructing generation in New York combine to make it difficult to commit to building such a unit. In such limited cases, the Commission might well engage in regulatory approvals of energy supply facilities in connection with providing some form of assurance to parties to a long-term power purchase agreement. This practice may very well be limited to areas of the State where new entry is difficult and the prices are rising, reflecting the growing shortage of power.

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[39] *See* discussion below in Section IV.

[40] *See supra* note 9.

C. What Is the Appropriate Scope of Energy Planning?

Under the now-repealed Article 6 of the Energy Law, the State energy plan covered the supply and demand for natural gas, coal and petroleum products, used for heating and transportation, as well as electric energy. While fuels used for transportation and heating play an important part in energy usage – particularly the environmental impact of energy usage, the Committee suggests that the production and delivery of electricity are of such importance to the economy and contemporary life that there should be a dedicated focus on electricity as a companion to any more encompassing State-administered energy planning. The renewable portfolio standard, RGGI and the energy efficiency portfolio, for example, all address the electricity markets. Examination of other energy markets and the role that energy use plays in meeting other goals, such as mitigating greenhouse gas emissions and improving energy security, could be addressed in a separate undertaking. That effort would include analysis of complex issues not directly related to electric generation and transmission.[41] The simultaneous resolution of those issues in a single planning process also including electric energy generation and transmission would likely delay the necessary periodic development of an energy policy statement focused on electricity. Moreover, the collection and analysis of significant amounts of data on various energy markets is costly and time consuming. Thus, an energy policy statement, which seeks to report on numerous energy sources and usages, may be dated by the time it is published.

The suggested focus on electricity should not preclude an analysis of the potential tradeoffs between different energy sources. For example, while conservation of the use of electric energy is a worthwhile goal, the introduction of plug-in hybrid vehicles offers the potential for significant reductions in vehicular emissions. If small buses powered by electricity were available for use as a substitute for traditional diesel-powered buses, there would be a considerable change in the emissions profile.

As noted above, fuel diversity is an issue of growing importance. There is a potential tradeoff between natural gas and other fuel sources such as oil, coal and intermittent sources of energy such as wind power. Natural gas has a significant impact on the cost and availability of electricity in the State, as well as on the overall environmental impact of power production facilities. Most new power plants have

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[41] These issues include smart growth, road pricing, zoning ordinances, building codes, and building and funding additional mass transit infrastructure. *See* Governor Eliot Spitzer's announcement on December 10, 2007 of a Smart Growth Cabinet which will promote Smart Growth as an economic and environmental tool, *available at* http://www.state.ny.us/governor/press/1210073.html.

been built to use natural gas. Natural gas, however, is not just a fuel for electric generation plants, as it also serves as a major home heating fuel and a key component of numerous industrial operations. In cold weather, natural gas supplies for the generation of electric energy may be curtailed. Moreover, just as the world supply of petroleum at today's prices now appears finite and even possibly on the decline, we may discover that natural gas supplies are similarly finite and possibly declining. The choice of fuel is an issue that may not be effectively addressed by the market. The underlying price signals and market rules may not be strong enough to instill investor confidence to undertake some longer term investments with high capital costs such as would be required for coal-fired and nuclear generating stations and major transmission reinforcements. Energy planning can serve as a vehicle to identify any obstacles to market solutions and evaluate how to facilitate the development of such longer term investments to the extent required.

The NYISO does not presently act to identify new energy supply facilities proposed for the purpose of reducing the cost of electric energy delivered to customers. While the NYISO's response to FERC Order 890 will include the establishment of an economic planning process, it is unclear that this will sufficiently address the need for improved economic efficiency. Improving the economic efficiency of the State's bulk electric power system is a key issue for energy planning.

D. Who Are Energy Planning's "Customers?"

How to re-establish energy planning turns, at least in part, on who are perceived to be the customers for energy planning. That is, for whom is energy planning undertaken and who benefits from energy planning? At least three different sets of customers for energy planning can be identified: (1) the State's agencies and public authorities that address energy-related issues, (2) participants in the wholesale and retail energy markets and (3) the public generally. While all three sets of such customers benefit from energy planning, the nature of these customers' interests seems likely to differ from one group to another. For example, energy planning guides State agencies in the execution of their responsibilities. Such agencies may well be more interested in addressing policy issues with fewer – if any – specifics about what energy supply facilities should be built and where. Participants in energy markets, on the other hand, may be more interested in specific applications with a detailed factual presentation of the energy facts. The general public seeks low energy costs and strengthened environmental controls on energy facilities.

There is, in short, a nexus between energy planning and the assumed target audience. While energy planning may be conducted in a manner to address any one of

these customer groups' concerns, it seems appropriate to undertake energy planning for all three customer groups. In particular, all three groups must have effective means of participating in energy planning.[42]

E. Is a New Energy Planning Agency Required?

Prior to 1996, the State Energy Office employed numerous professionals to prepare periodic energy plans. That agency no longer exists. Is there a need to establish a new agency to conduct energy planning and how would such a new agency interact with the NYISO's efforts in energy planning?

The answer to these questions may turn on whether the energy plan is likely to be a resumption of energy planning along the lines of the pre-1996 format. If energy planning takes the form represented by legislation passed earlier this year by the New York State Assembly, it is likely that a new agency would be required. Energy planning, as contemplated in the Assembly Bill, would include:

- demand forecasts for 5-10-20 years for electricity, natural gas, coal, petroleum products and alternative fuels,
- projection of energy supply requirements needed to satisfy the demand forecasts,
- assessment of the ability of existing supply sources and existing transmission to satisfy such energy supply requirements,
- projection of needed additional energy supply capacity,
- forecasts of energy prices and
- specification of comparative advantages of available locations for energy.[43]

The approach adopted in the Assembly Bill would direct the collection of substantial data from utilities. In addition, the Assembly bill expressly provides for the

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[42] *See* Section IV below, in which the Committee suggests that a draft energy policy statement be released to the public with a period for public comment on the draft statement.

[43] Assembly Bill A8940, 2007 Leg., Reg. Sess. (N.Y. 2007). Other planning elements set forth in the legislation include:

- analysis of the costs and risks of energy supply alternatives,
- analysis of emerging trends ,
- analysis of security and environmental justice issues,
- recommended administrative and legislative actions and
- probable impact of the energy plan on consumers, specifically low-income consumers.

The energy plan contemplated in the legislation would provide guidance for energy-related decisions of both the public and private sectors and any energy-related actions of State agencies. While A8940 was passed by the Assembly earlier this year, there is not a comparable Senate bill.

re-establishment of a State Energy Office. Similarly, the Commission Staff has proposed a planning process under the Commission's regulatory authority which would parallel the planning process included in the Assembly Bill. While this planning group might be housed in the Commission, as opposed to a new agency, it would nonetheless require the substantial resources of a new agency.[44]

By contrast, if energy planning is focused on establishing State energy policies and goals, there would be no need to create a new bureaucracy. Such a focused approach to energy planning could be carried out by an energy policy board, comprised of key State agency heads, supported by a small staff supplied by the Commission and other relevant State agencies and public authorities. There may be no reason for the submission of data to such a board beyond that required by the NYISO to be requested from market participants. The NYISO, however, must be able to share the data it receives from market participants with a State entity conducting energy planning.

IV. A New Energy Policy Board

A. What the Energy Policy Board Would Do

Prior to 2003, energy planning was carried out by the Energy Planning Board authorized by the then-existing Energy Law. Under the approach prescribed in the Energy Law, the Energy Planning Board produced an Energy Plan every four years, which addressed (1) reliability-related issues for the electricity, natural gas, coal and petroleum products sectors of the economy, (2) identification of risks, benefits and uncertainties of energy supply sources, (3) identification of emerging energy trends, (4) energy policies and long-range planning objectives and strategies, (5) recommendations of administrative and legislative actions to implement energy plans and objectives and (6) analysis of the impact on economic development of such implementation of the Energy Planning Board's plan. The first of these six provisions duplicates, insofar as regards electricity, what the NYISO already undertakes in its annual reliability needs assessment.[45] For that reason, it seems duplicative and potentially conflicting for the State to also address the need to add new energy facilities to meet reliability requirements.

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[44] Assemblyman Richard L. Brodsky has announced legislation to amend the Public Authorities and Public Service Laws, Assembly Bill A09611, which seeks to reverse much of the restructuring of the electric industry since 1996.

[45] *See* Appendix.

The remaining five of the six provisions identified in then-existing Section 6-104, however, provide a basis for a different approach to State-administered energy planning. These provisions address (1) critical areas of energy information, (2) policies and (3) recommendations which will affect the supply and delivery of energy over a number of years, rather than a detailed plan for new energy supply facilities needed to meet reliability. These provisions will provide a reasoned basis for participants in the competitive markets to plan on making investments in new energy supply or delivery facilities. The Committee recognizes that the scope of responsibilities of the new entity would have to be carefully crafted so as to also include consideration of the impacts of the plan on competitive markets and of any potential for negative ratepayer impacts and to assure that it not conflict with the NYISO's reliability planning, nor with the existing market-oriented approach to adding new energy supply facilities.

A State-administered assessment of energy policy, based on these five provisions, would not require market participants to submit the voluminous data submitted under the prior approach to energy plans. Such an assessment might, as a result, be prepared more frequently than the four-year cycle adopted under the earlier energy planning process. The Committee suggests that a new Energy Policy Board ("Board") be formed to oversee the regular issuance of an energy policy statement. The change in name of the board issuing the statement would highlight the change in focus from the earlier Energy Planning Board. Such a new entity would create the means for coordinating the policies of the State agencies involved in energy-related actions so that they are consistent and support the Governor's agenda. The Board could make recommendations for legislative action and could also consider the perspectives of a number of different parties.

While the earlier Energy Planning Board prepared its energy plan under the prior law following an involved public proceeding, which included detailed filings by energy suppliers, preparation and issuance of a draft plan addressing each issue contained in the Energy Law, public comment hearings and even evidentiary hearings, the Committee suggests that the narrowed focus of a new Board's energy policy statement, compared with the approach enacted in 1992, permits a simplified process. Essential components of a new process leading to the policy statement would involve (1) public notice of the Board's intent to issue a statement of energy policy and solicitation of comments thereon from stakeholder groups, including load serving entities, independent generators, environmental groups and citizen groups, (2) the promulgation of a draft policy statement and (3) an opportunity for public comment on the draft policy statement. As indicated above, the focused approach suggested in this Report would permit the energy plan to be prepared biennially.

B. How Would the Board's Recommendations Be Carried Out?

Of course, the practical effect of an energy policy statement issued by the new Board will depend on whether the policy statement has a practical impact on the decision making of participants in the energy markets, State agencies and the public generally. The recommendations of the Board would be the result of a deliberative process which will require the sharing of information and the exchange of perspectives by the agencies most directly involved in energy issues. Policy conclusions reached by the Board would serve the critical purpose of informing state agencies in a manner not now possible with the current absence of any coordinating body. Given the composition of the Board, all sectors of government can be expected to follow the direction provided.[46] State agencies could be expected to take actions consistent with the policies recommended by the Board.

Alternatively, consideration can be given to affording the Board more authority to affect State energy policy. Under the Energy Law as amended in 1992, energy-related actions and decisions of State agencies had to be "reasonably consistent" with the forecasts, policies and long-range energy planning objectives and strategies contained in the energy plan. This method of making the energy plan a practical and important part of State operations, however, was limited in several ways. First, a State agency could argue that a provision of the energy plan was "no longer reasonable or probable based on a material and substantial change in fact or circumstance."[47] Second, agencies were given an opportunity to contest in judicial proceedings any determination that an agency action or decision was "unreasonably inconsistent" with the energy plan.[48] Third, agencies were authorized to grant applications to construct or operate energy facilities if it was necessary on environmental, public health or safety grounds.[49] These three limitations on the binding effect of the energy plan seem likely to have undercut the practical effect of energy plans produced under the Energy Law.

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[46] *See* Section IV.C, below.

[47] Prior Energy Law Section 6-104(3)(b).

[48] *Id.*

[49] Prior Energy Law Section 6-104(3)(c).

The context of a State-administered energy policy statement, focused on the critical information areas, policies and recommendations covered in the five provisions identified above in Section IV.A, would be quite different from the prior approach to energy planning. If the energy policy statement does not specify types or locations of energy supply or delivery facilities, the potential for conflict between the energy policy statement and a regulatory action by an agency seems limited. Moreover, if an energy policy statement were issued more frequently than every four years, i.e., biennially, the assertion that a policy or strategy was out of date would be less plausible. Thus, the first and second limitations in the prior law (allowing an agency to claim a material and substantive change in fact or circumstance and allowing an agency to contest the applicability of the energy plan in litigation) would be eliminated. Such a restriction on agencies' ability to "escape" from the energy policies will strengthen the effectiveness of the policy statement.[50] The energy policy decisions made by the Board could, under this approach, be binding on State agencies to the extent that their energy-related actions and decisions must be reasonably consistent with the policy statement.

Actions taken at the local level can also have a significant impact on the viability and successful implementation of energy-related projects. In light of "home rule" and other statutory divisions of authority, the policy statement recommended in this Report would likely not have a binding affect on local government. However, the development of a comprehensive energy policy statement could diminish the efficacy of NIMBY efforts often found at the local level and facilitate the development of energy initiatives consistent with the policy statement.

C. Who Would Be On the Energy Policy Board?

The composition of the new Board is another key aspect of establishing a State-administered energy policy assessment process. The Committee believes that a small board with the ability to make tough decisions is advisable. The Board would, of course, solicit the input necessary to inform their decision making and to facilitate implementation. Furthermore, the Committee believes that the Board can only function effectively if certain entities are included as central participants in the process of developing the policies.

[50] Of course, consideration could be given to allowing an agency to grant applications to construct or operate a facility if it was necessary on environmental, public health or safety grounds (the third of the limitations identified above on the authority of the energy plan).

The Board established in 1992 had three agency members: the Commission, the State Energy Office and the DEC. The Commission and the DEC are essential to the Board and their role must be continued. New membership on the Board, however, is also necessary. The Energy Office does not exist today, and NYSERDA could be added to replace that agency.[51] The Committee understands that NYSERDA's Energy Analysis Program, in particular, focuses on energy policy questions similar those that a new Board might examine and the information and experience NYSERDA can bring to the discussion would be essential. Moreover, the impact of energy issues on the economy suggests that the Empire State Development Corporation should be added to the new Board. In addition, there must be an exchange of information between the NYISO and the Board, as the NYISO will be carrying out reliability planning. While it is likely that the NYISO and the market participants would object to its direct participation in the formation and approval of the new Board's recommendations, the NYISO should be included as an active advisor to the new Board so that the workings and needs of the competitive market are taken into account in the Board's deliberations.

Alternatively, NYSERDA's growing role in awarding incentive awards to renewable energy projects and its possible role in managing an expanded State energy efficiency program might argue that it also not be a decision-making participant in the deliberations of the proposed Board. NYSERDA thus might be a cooperating member of the Board, which would allow it to participate in the work of the new Board, without having a formal decision-making role in determining the energy policy statement.

V. Conclusion

The importance of a robust, reliable and reasonably-priced supply of energy to the State's economy and citizens raises the question whether it is prudent for the State not to play a significant role in energy planning.[52] The Committee suggests that the State establish a Board to develop State energy policy so that (1) there is an adequate means of identifying the essential issues which are likely to affect the supply and distribution of electric power and (2) the most effective means for the State to meet these challenging issues are analyzed and calibrated. The State's vehicle for energy

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[51] NYSERDA is not a "market participant" in the NYISO-administered markets, but as NYSERDA's role in renewable energy, administration of greenhouse gas revenues and energy efficiency grants grows NYSERDA is becoming an important player in energy transactions, which could compromise its ability to engage in a neutral study of energy markets.

[52] This paper focuses on the importance of electricity planning. As noted above, transportation, smart growth and other energy issues are equally important in addressing environmental impacts and imported fuels.

policy development should be established with sufficient authority to create a policy framework under which State agencies would act and establish a framework for action by local government entities.

While the State might simply re-establish the pre-1996 form of energy planning and arrange for it to be administered by the Commission, other State agencies are also central to energy planning in today's environment. In particular, environmental and economic development goals are affected by energy planning. Moreover, the value of the competitive markets established since 1996 appears to be real. As in the case of other markets, the NYISO-administered markets are subject to being undermined by the re-establishment of a form of energy planning which seeks to regulate which new power plants will be built. The Committee suggests that the State not simply assume that the traditional form of energy planning with pervasive regulatory mandates (*i.e.*, the form of energy planning in effect in the State prior to 1996) will produce a better result now than it did in the past. The regulatory control of resource selection and the regulatory establishment of rates for long-term power purchases under PURPA in the recent past have had some very negative results which should be avoided.

In specific, limited cases, where the competitive market does not appear likely to supply sufficient new energy supply facilities at reasonable cost, however, it may be that long-term energy contracts with credit-worthy purchasers (e.g., a utility) will be necessary to allow the financing of the project. This approach is comparable to the NYISO's present planning process under which utilities regulated by the Commission are required to sponsor new projects needed to meet reliability rules as a "backstop." While this approach to energy planning would not be limited to cases involving reliability-based needs for new energy supply, it would provide a potential means for assuring that new energy supply projects will be developed.[53]

Finally, the Committee suggests that energy planning in the contemporary period of increasing interest in new environmentally-responsible technologies be considered not simply as a means to encourage traditional responses to power needs, but as a means for the State to encourage development of new technologies and industries. New York is a leader in the application of environmental values to the economy. This is not simply a matter of mandating behavior, but encouraging the competitive markets to find better and more innovative technologies and processes to

[53] In a Report released earlier this year, the Committee suggested that the State consider the adoption of some improved form of a capacity market. *Electric Regulation in the State of New York*, 25 (Feb. 9, 2007), *available at* http://www.nycbar.org/pdf/report/Dereg_report.pdf. That suggestion seems equally appropriate at this point.

carry out the tasks of daily life. These better technologies and processes may well be the bases for new industries in the State.

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December 20, 2007

APPENDIX

How Is Energy Planning Conducted in New York?

The Commission has observed "that integrated planning for public policy purposes needs to be further considered in an expedited manner" and asked whether there should be statewide integrated resource planning to examine long term electricity resource needs.[54] Such an integrated resource planning process would represent a significant shift in how energy planning is conducted in the State. In this Appendix, the Committee seeks to provide context for the term "energy planning" by (1) reviewing how New York has conducted energy planning in the past and (2) describing the role of the NYISO in conducting energy planning, including the impact of FERC's Order No. 890.

A. Energy Planning in New York

In 1972, the Legislature determined that the State's continuing economic growth and development, combined with environmental, social and other economic issues, required a consolidated energy planning effort. A Legislative Commission on Energy Policy for the State of New York was established to develop and report on a comprehensive State energy policy.[55] In 1976, the Legislature established the State Energy Office to advise State government and the public on energy matters, promote and plan for energy conservation, coordinate State energy programs with federal programs, and develop and implement energy codes and standards.[56] In 1978, a state energy planning board was established to prepare energy plans.[57] The chairs of the Commission and the DEC, together with the Temporary President of the Senate and the Speaker of the Assembly, or their designees, made up this energy planning board. This board prepared an energy master plan.

!n 1992, the Legislature repealed the 1978 energy planning legislation and replaced it with a new statute.[58] The newly-enacted energy planning board was made up of the chairs of the Commission, Energy Office and DEC. The statutory

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[54] April 19th Planning Order, *supra* note 22, at 32-33.
[55] N.Y.L. 1972, ch. 386.
[56] N.Y.L. 1976, ch. 819.
[57] N.Y.L. 1978, ch. 707,
[58] N.Y.L. 1992, ch. 519.

authorization for the Energy Office was repealed in 1995 and the authorization for conducting State-administered energy planning expired as of January 2003.[59]

For approximately two decades prior to 2003, New York's energy planning involved collection of a substantial amount of data from market participants, a number of public hearings and the preparation of a detailed energy plan.[60] Energy plans were produced every four years, following a series of public hearings. Energy plans included (1) a forecast of State energy requirements, (2) a forecast of State energy prices, (3) a summary of the plans of major energy suppliers for meeting forecasted energy requirements, (4) an identification of emerging trends related to energy supply, price and demand and (5) recommendations for specific energy policies.[61]

Since 2005, the NYISO has conducted comprehensive reliability planning which focuses on reliability.[62] In addition, the Committee understands that the Commission monitors electric power industry developments as an aid to the Commission's regulatory activities. Some, and possibly all, of the regulated electric utilities conduct planning pertinent to their specific service territories. None of these planning efforts, however, appear to be comprehensive and none seek to establish State policy on energy issues.

B. The NYISO and Energy Planning

Regulation of the electric power system is shared by the state and Federal governments. Certain regulatory authority is reserved to the states while other authority is allocated to the Federal government. Generally, regulation of the production, delivery and sale of electric power for end-use customers is subject to state regulation, while regulation of the wholesale electric power markets and interstate transmission is subject to Federal regulation. In New York, the NYISO operates the

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[59] *See supra* note 8 and accompanying text.

[60] See 9 NYCRR § 7840 et seq.; Plans for Meeting Future Electricity Needs, Opinion No. 88-20, *Opinion and Order Concerning Integrated Planning and Ratemaking Issues*, No. 29409 (N.Y. Pub. Serv. Comm'n) 28 NY PSC 1177, 1988 N.Y. PUC Lexis 33 (July 26, 1988).

[61] N.Y.L. 1992, ch. 519 § 16 (adopting N.Y.Energy Law § 6-104). This provision was repealed in 2003. *See supra* note 7.

[62] The NYISO's Comprehensive Reliability Planning Process, however, is not a re-establishment of the State's prior energy planning, but is based on a FERC-approved tariff. *See* Section B, below, for more information on the NYISO's reliability planning process.

State's wholesale markets and the State's bulk power transmission grid and is, thus, subject to Federal jurisdiction.[63]

In 2005, the NYISO adopted an energy planning process, which is intended to ensure the future long-term reliability of the bulk power system.[64] The NYISO annually develops a Reliability Needs Assessment (the RNA), which covers a ten year study period. A key part of the RNA is the preparation of a load forecast. The RNA base case for the first five year period is based on other reliability studies the NYISO must furnish national and regional reliability monitors. After determining the State's reliability needs, based on transmission and resource adequacy criteria, the NYISO solicits market-based supply resource proposals from developers (e.g., independent generators) which respond on an entrepreneurial basis and regulatory solutions from electric utility companies as a "backstop." The NYISO does not conduct an economic evaluation of the proposed solutions. Nor does the NYISO plan for achievement of environmental and other public policy goals. The NYISO's RNA is reviewed by market participants and the NYISO's Operating and Management Committees and approved by the NYISO's Board.[65]

Following its analysis of the proposed solutions, the NYISO prepares a Comprehensive Reliability Plan, which identifies all of the proposed solutions which the NYISO determines capable of meeting the reliability needs. The NYISO indicates if the solutions proposed by developers are sufficient to meet reliability needs in a timely fashion. If not, the NYISO requests the appropriate regulated utility to secure regulatory approval and develop the backstop proposal. The NYISO also has the option of requesting the appropriate utility to develop a solution on an emergency basis to address an immediate threat to reliability.[66]

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[63] In particular, the NYISO's tariffs and actions are subject to regulatory oversight by FERC. The NYISO, however, may also be subject to certain State regulatory control. The Commission, for example, has asserted that the NYISO is an "electric corporation." Provision by The New York Independent System Operator, Inc., of Information and Data to Department Staff, *Order Directing Provision of Data and Information*, at note 1, No. 00-E-1380 (N.Y. Pub. Serv. Comm'n Aug. 14, 2000).

[64] NYISO, *NYISO Comprehensive Reliability Planning Process, 2007 Reliability Needs Assessment*, Attachment Y at 1 (Mar. 16, 2007).

[65] The NYISO's three governing committees are comprised of representatives of each entity participating in the NYISO, while the NYISO Board is a self-perpetuating ten-person body which sets policy and hears appeals from the committees' actions.

[66] This discussion reflects the summary of the NYISO's reliability planning process in its *NYISO Planning "Strawman" Proposal in Response to Order 890* 6-7, Attachment A (May 29, 2007), available at http://www.nyiso.com/public/webdocs/committees/bic_espwg/meeting_materials/2007-05-31/NYISO_PlanningStrawmanreOrder890FINALMay29.pdf (hereinafter "Planning Strawman").

The preparation of the NYISO's RNA would take place regardless of the re-establishment of State-administered energy planning, as it is a necessary part of the NYISO's responsibility for maintaining the reliability of the New York bulk power electric system. Specifically, transmission operators such as the NYISO are required to meet regional reliability standards. While the regional reliability requirements used to be established on a voluntary basis, the Federal Government has now made them mandatory in the Energy Policy Act of 2005.[67] To the extent that the State establishes an independent needs assessment effort, it would appear duplicative of the NYISO's planning process.

On February 16, 2007, FERC issued Order 890,[68] which is designed to: (1) ensure that FERC's pro forma open-access transmission tariff achieves its purpose of remedying undue discrimination, (2) reduce opportunities for undue discrimination, and (3) increase transparency in the rules applicable to planning and use of the transmission system. FERC's order directed that planning processes should address both reliability and economic needs.[69] Among other requirements, FERC stipulated that transmission providers, including independent system operators such as the NYISO, address nine energy planning principles, including cost allocation of new transmission facilities and economic needs.[70]

The NYISO's initial response to Order 890 discussed how the NYISO intended to allocate the costs of new transmission facilities and how the NYISO could identify system enhancements that could relieve significant and recurring transmission congestion.[71] While the NYISO pointed to the inclusion of the "beneficiaries pay" principle in its OATT,[72] the NYISO also noted that the criteria and methodologies "for cost allocation and cost recovery are pending further discussions among the [transmission owners], which have recently presented a revised proposal for cost allocation to the [NYISO system planning working group]."[73] Cost allocation decisions

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[67] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (H.R.6, 109th Congress) ("EPAct 2005"). EPAct 2005 added Section 215 to the Federal Power Act, which requires a FERC-certified Electric Reliability Organization ("ERO") to develop mandatory and enforceable reliability standards. The reliability standards may be enforced by the ERO, subject to FERC oversight.

[68] Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. 12,266 (Mar. 15, 2007) (eff. May 14, 2007).

[69] *Id*., at ¶¶ 542 -- 551 (discussing the need for transmission planning to address economic issues, such as congestion).

[70] *Id*. at ¶ 437.

[71] Planning Strawman, *supra* note 65 at 6-7 and Attachment A.

[72] NYISO, *NYISO Comprehensive Reliability Planning Process (CRPP) 2007 Reliability Needs Assessment*, Attachment Y, Section 10.2 (Mar. 16, 2007).

[73] Planning Strawman, *supra* note 65, at Section 7.

concerning new transmission facilities are contentious. Seven years after the NYISO's formation, the methodology of allocating and recovering the cost of new transmission remains under discussion.[74]

The NYISO does not currently address projects which are identified through economic study processes. The NYISO, however, has developed a "strawman" set of cost allocation principles for projects identified through economic planning.[75] The NYISO described its role "with regard to economic needs [as] primarily one of providing information in a transparent manner to the marketplace . . . ."[76] The NYISO indicated that it would not: (1) determine congestion thresholds to trigger project construction, (2) draw any conclusions pertaining to the potential economics of a proposed upgrade, (3) perform cost benefit analyses or impose an obligation to fund or (4) identify projects whose purpose is to meet economic needs.[77]

On September 14, 2007, the NYISO posted a draft of its proposed revisions to its planning process to address the requirements of FERC Order 890 on the NYISO's website.[78] The NYISO indicated in its comments accompanying its draft Attachment Y that it has been focusing on three principal planning issues in its continuing discussions with market participants: economic planning process, cost allocation and recovery and the local utility-level planning. The NYISO expects to submit a tariff amendment to FERC by early December 2007 responding to FERC's Order 890.

Even if the NYISO's "strawman" approach is formally adopted by the NYISO and approved by FERC, the NYISO will not address a number of important public policy issues, including fuel diversity, changing air emissions requirements and new technology, in its planning process. These planning issues are implicitly assigned to market participants to consider in their decision to propose new energy supply facilities. Moreover, as noted above, the NYISO expects to exclude other significant issues from its planning effort. In addition, the NYISO does not currently address the

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[74] Cost recovery for generation or demand side backstop projects, if needed, is a matter for State jurisdiction and a process to develop rules for recovery of these solutions is being developed. The NYISO has requested an extension of time to address these issues.

[75] The NYISO's "Strawman Proposal" is Attachment A to the NYISO's response to FERC's Order No. 890. A large majority of the NYISO's stakeholders supported this "strawman" in planning working group meetings and sector meetings in 2007. Planning Strawman, *supra* note 63, at 10.

[76] *Id.*

[77] *Id*. at 13.

[78] NYISO, *NYISO Posting for FERC Order 890 Describing the NYISO Planning Process* (Sep. 14, 2007), *available at* http://www.nyiso.com/public/webdocs/services/planning/FERC_Order_890_091707final.pdf.

need for new transmission capacity to improve the system's efficiency.[79] Finally, while participants in the NYISO's wholesale markets are members of the NYISO, other entities interested in energy planning issues may not be members of the NYISO and thus lack an opportunity to make their positions known on the pertinent issues.

[79] The NYISO does identify reliability issues, which might involve transmission expansion, and it does provide information about transmission congestion.