

Ontario's Capacity Auction: The Legal Perspective

Mindfirst Seminar
April 29, 2015

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The Legal Perspective

- **Capacity markets – a contested concept**

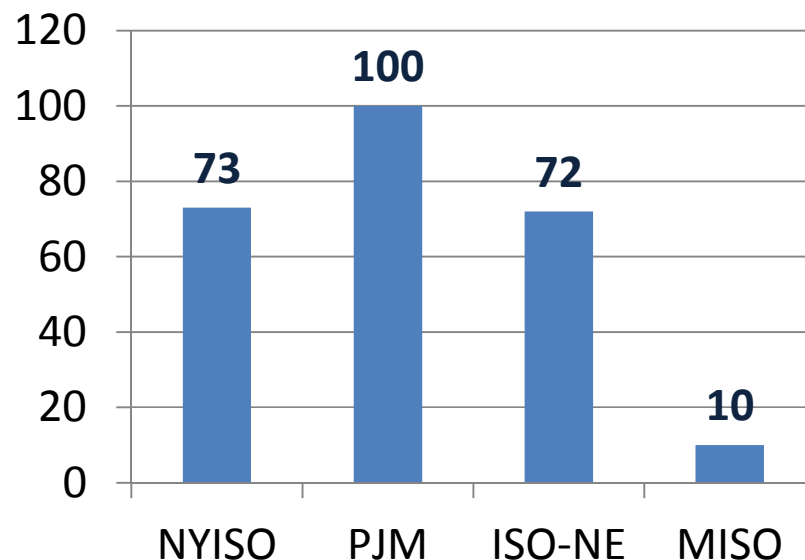
- **Frequent litigation**

- Reviewed 257 decisions:

- NYISO
 - PJM
 - ISO-NE, and
 - MISO*

(1999 – present)

of Decisions Considered



Context – New Generation Capacity?

- Analysis of data from US experience:
 - Only 6% of new generation capacity added in the US in 2013 was in RTOs with mandatory capacity markets. Those same RTOs accounted for approximately 25% of the population.
 - Only 2.4% of new capacity added in the US in 2013 was driven by market sales.
 - 66% due to long-term bilateral contracts, such as power purchase agreements.
 - The balance was utility owned.
 - Similar results reported in a 2011 analysis.

American Public Power Association (Nov. 2014)

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What did we find?

- US cases reflective of structural decisions made for US capacity markets
- Reliance on independent (FERC) oversight
 - Implicit recognition that ISOs do not have a monopoly on determining what is in the public interest
- In general, three categories of cases
- First - US cases involving disputes about federal vs. state jurisdictional authority
 - Not directly relevant in an Ontario only market context

What did we find?

- Second - Applications by the ISOs for FERC approvals
- Vast majority of cases - ISOs are able to discharge their burden of proof and obtain the relief requested
 - e.g. tariff approvals or amendments
 - ISOs have a chance to amend proposals through the hearing process after hearing stakeholder feedback
- But there are limited exceptions. For example:
 - *New York Independent System Operator, Inc.*, Docket ER07-360-000 (Issued 6 March 2007)
 - *New York Independent System Operator, Inc.*, Docket Nos. ER07-360-001, EL07-39-001 (Issued 28 March 2008)

What did we find?

- **Third – complaints process for market participants**
 - Provides market participants with an opportunity to be heard
- **Complaints not always successful. For example:**
 - *Exelon Corporation and Calpine Corporation v. ISO New England Inc.*, Docket No. EL15-23-000 (January 30, 2015)
 - *New England Power Generators Association, Inc. v. ISO New England Inc.*, Docket No. EL15-25-000 (January 30, 2015)
- **But some complaints are. For example:**
 - *KeySpan-Ravenswood, LLC v. Federal Energy Regulatory Commission (2007)*, U.S. App. D.C. 286. *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, Docket Nos. EL05-17-003, EL05-17-004, EL05-17-005, EL05-17-006 (Issued 24 April 2009). *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, 124 FERC 61,062 (Issued 18 July 2008).
 - *New England Power Generators Association, Inc. v. ISO New England Inc.*, Docket No. EL13-66-000 (27 August 2013); *New England Power Generators Association, Inc. v. ISO New England Inc.*, Docket No. EL13-66-001 (6 December 2013).

What did we find?

- **The matters in dispute are very technical**
 - Tendency to focus on the trees – not the forest
- **Two examples:**
- **Mandatory participation. For example:**
 - Mandatory or opt-out designs - additional complications. For example:
 - *ISO New England Inc. and New England Power Pool*, ER08-1209-001, ER08-1209-002, ER08-1209-004 (3 February 2010).
- **Market power mitigation measures. For example:**
 - *New York Independent System Operator, Inc.*, Docket No.: ER12-360-001 (Issued 6 June 2013).
 - *New York Independent System Operator, Inc.*, Docket No. ER14-1125-000 (Issued 21 February 2014).

Questions for an Ontario Design

- **Importance of providing market participants with an opportunity to be heard**
 - Robust stakeholder process
 - Clear milestones, with points for input
 - Opportunity for dialogue and debate
- **Role of independent oversight in Ontario?**
 - Increased administrative costs vs. benefits of independent oversight
- **Will there be a complaints process?**
 - Increased administrative costs vs. benefits of such a process