

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

George Berka

Complainant

v.

**Governor Andrew M. Cuomo, North American
Electric Reliability Corporation, Northeast Power
Power Coordinating Council, New York Independent
System Operator, Inc., New York Public Service
Commission, Entergy Corporation, Holtec
Decommissioning International,**

Respondents

Docket No. EL21-61-000

**MOTION TO DISMISS OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

In accordance with Rule 212 of the Commission’s Rules of Practice and Procedure,¹ the New York Independent System Operator, Inc. (“NYISO”) respectfully moves to dismiss the Complaint in the above-captioned docket (the “Complaint”) as it pertains to the NYISO. The Complaint fails to satisfy the Commission’s procedural requirements or the statutory burden of proof and is patently deficient. The NYISO anticipates that the Commission will deny the Complaint in its entirety after considering answers from all respondents. Nevertheless, it is already apparent from the face of the Complaint that it does not allege that the NYISO has violated any applicable statutory or regulatory requirement. The Complaint states no legally cognizable claim against the NYISO. Indeed, apart from the Complaint’s identification of the NYISO as one of seven separate respondents, it makes no remediable allegations at all with

¹ 18 C.F.R. § 385.212 (2020).

respect to the NYISO. The Complaint likewise does not seek any relief that, even if it were to be granted by the Commission, the NYISO would play any part in implementing. The Commission should therefore dismiss the Complaint with respect to the NYISO.

I. Background

The Complaint expresses a variety of high-level environmental policy and grid resilience concerns regarding the deactivation of the Indian Point nuclear generating station in Buchanan, New York. The Complaint asks the Commission to intervene by ordering “the continued operation of Indian Point until at least the year 2035, . . .”² but does not indicate what the legal basis for such an action by the Commission might be. The Complaint goes on to ask the Commission “to issue, if it is so able, three (3) immediate, temporary injunctions to, (1), enjoin Holtec, (the demolition contractor), from demolishing, damaging, disabling, or disturbing Unit 2 of Indian Point in any manner, to, (2), enjoin Entergy, (the current owner of Unit 3 of Indian Point), from surrendering its operating license to the N.R.C. for Unit 3, and from selling Unit 3 to any demolition contractor, and to (3), order Entergy to keep Unit 3 operational, on line, and producing full power, until the conclusion of this matter.”³

The main body of the Complaint does not mention the NYISO at all, apart from naming it, without explanation, as a respondent. The NYISO is referred to later in an appendix entitled “References and ‘Things to Consider’ in Them.” The references to the NYISO therein are limited to Complainant’s partial summaries of, and its framing of miscellaneous questions

² Complaint at 5.

³ *Id.*

regarding, certain documents. These include the NYISO's 2017 Indian Point Generator Deactivation Assessment.⁴

II. Motion to Dismiss

The Commission's procedural rules set forth the minimum standards that a complaint must satisfy. A complaint must "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements" and "[e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements."⁵ With respect to these requirements, the Commission has repeatedly held that "rather than bald allegations [a complainant] must make an adequate proffer of evidence including pertinent information and analysis to support its claims."⁶

In addition to identifying specific acts and omissions by the respondent that violate a statutory or regulatory requirement, a complainant must "[s]tate the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief[.]"⁷ Specifically, this means that a complainant must state a cognizable claim that is within the Commission's authority to address, and must identify relief that the respondent is capable of providing.⁸

⁴ The NYISO conducted that assessment consistent with the requirements of Section 38.3.4.3 of the NYISO's Open Access Transmission Tariff.

⁵ 18 C.F.R § 385.206(b)(1) and (2).

⁶ *Californians for Green Nuclear Power, Inc. v. Cal. Indep. Sys. Operator Corp.*, 174 FERC ¶ 61,203 at P 49 (2021) (citing *Ill. Mun. Elec. Agency v. Cent. Ill. Pub. Serv. Co.*, 76 FERC ¶ 61,084, at 61,482 (1996)).

⁷ 18 C.F.R § 385.206(b)(7).

⁸ See *Californians for Renewable Energy, Inc. v. Cal. Indep. Sys. Operator Corp.*, 117 FERC ¶ 61,072, at PP 8-11 (2006).

In this case, the Complaint is patently deficient because it fails to satisfy any of these fundamental requirements.⁹ As described above, the Complaint identifies the NYISO as a respondent, but fails to make any factual allegations at all against it. The Complaint does not identify any act or omission on the part of the NYISO that might be in violation of any provision of the Federal Power Act, of any NYISO tariff, or any of the other statutes or regulations administered by the Commission.¹⁰ The Complaint also asks the Commission to take action under procedural rules that have nothing to do with complaints.¹¹ The NYISO is left to speculate as to why it has even been identified as a respondent. This is precisely the circumstance that the Commission's complaint rules are meant to avoid.

Furthermore, the Complaint fails to state a claim for which the NYISO is capable of providing any kind of relief. The NYISO played no role in the decision to deactivate the Indian Point facility, apart from conducting the required 2017 Indian Point Generator Deactivation

⁹ The federal courts have long held that the Commission may reject a filing that “patently [is] either deficient in form or a substantive nullity.” *United Gas Pipe Line Co. v. FERC*, 707 F.2d 1507, 1511-12 (D.C. Cir. 1983) (quoting *Mun. Light Boards v. Fed. Power Comm’n*, 450 F.2d 1341, 1345 (D.C. Cir. 1971); accord, e.g., *S. Nat. Gas Co. v. FERC*, 813 F.2d 1111, 1112 (11th Cir. 1987) (“Summary rejection of a filing is appropriate when the filing is a nullity as a matter of law, or when the filing is patently deficient in form.”); *Miss. Valley Gas Co. v. FERC*, 659 F.2d 488, 501 (5th Cir. 1981) (“Clearly, summary rejection of a filing is appropriate where the filing is ‘patently . . . either deficient in form or a substantive nullity.’”) (citation omitted); *Papago Tribal Util. Auth. v. FERC*, 610 F.2d 914, 919 & nn. 39-40 (D.C. Cir. 1979); see also *Pankratz Lumber Co. v. FERC*, 824 F.2d 774, 779 (9th Cir. 1987) (discussing the difference between deficient filings that are curable and patently deficient filings that are incurable).

¹⁰ The Complaint at 11-12 makes an inaccurate and unsupported claim that the retirement of Indian Point will permit sellers of electricity and natural gas to exercise market power by raising their rates. The NYISO implements Commission-accepted market power mitigation measures to address the exercise of market power in the electricity markets. See NYISO Market Services Tariff Section 23.

¹¹ Specifically, the Complaint invokes Commission Rule 206 which pertains to complaints, but also Rule 212 which governs motions, and Rule 215 which has to do with amendments to pleadings, tariffs, and rate filings. See Complaint at 2. It is possible that Complainant may have meant to invoke Section 215 of the Federal Power Act, which involves mandatory reliability standards, instead. But to the extent that this was the Complainant's intention it has not made any cognizable claims under Section 215 or identified any alleged reliability standard violations.

Assessment. The NYISO would play no role if the Commission were to somehow decide that Indian Point should now run until 2035. The NYISO similarly has nothing to do with the demolition of Unit 2, Entergy Corporation's decisions regarding the disposition of its nuclear operating license, or Entergy Corporation's decisions regarding the possible sale, operation, or output level of Unit 3.

The Commission has repeatedly dismissed or denied complaints that fell short of the minimum requirements to identify, with some specificity, an act or omission that violated a relevant legal requirement, and for which the Commission or the respondent are able to provide the requested relief.¹² The Complaint in this proceeding has similar patent, incurable deficiencies with respect to the NYISO, and the Commission therefore should dismiss the Complaint as it pertains to the NYISO.

¹² See, e.g., *Californians for Green Nuclear Power, Inc. v. California Indep. Sys. Operator Corp.*, 174 FERC ¶ 61,203 at PP 50-51; *Californians for Renewable Energy, Inc. v. Pac. Gas & Elec. Co.*, 134 FERC ¶ 61,060, at PP 54-64, *reh'g denied*, 134 FERC ¶ 61,207, at PP 7-10 (2011); *Californians for Renewable Energy, Inc. v. Cal. Pub. Util. Comm'n*, 129 FERC ¶ 61,075, at PP 11-15 (2009).

III. Conclusion

For the reasons set forth above, the NYISO respectfully requests that the Commission dismiss the Complaint against the NYISO.

Respectfully submitted,

/s/ David Allen

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April 12, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Rensselaer, NY this 12th day of April 2021.

/s/ Joy A. Zimmerlin

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