IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NTE Connecticut, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 22-1027
	)	
Federal Energy Regulatory Commission,	)	
	)	
Respondent.	)	

REPLY OF ISO NEW ENGLAND INC.
IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW

Intervenor ISO New England Inc. (the "ISO"), pursuant to Rule 27(a)(4) of the Federal Rules of Appellate Procedure and Circuit Rule 27, submits this reply in support of the ISO's Motion to Dismiss filed on April 5, 2022. For the reasons explained below and in the Motion to Dismiss, the Court should dismiss the petition for review because Petitioner NTE Connecticut, LLC ("NTE") lacks standing or, alternatively, its claim for relief is moot.

I. BACKGROUND

The background of this case has been fully described in the parties' previous pleadings. *See, e.g.*, Motion to Dismiss at 3-6. Accordingly, the ISO will only summarize here.

NTE seeks the Court's review of orders of the Federal Energy Regulatory Commission ("FERC" or the "Commission")[1] that approve the termination of Killingly Energy Center's ("Killingly") Capacity Supply Obligations pursuant to the ISO New England Transmission, Markets, and Services Tariff ("Tariff"). NTE is the developer of the Killingly facility, a proposed new, natural gas-fired generating plant, construction of which has not commenced. Killingly was awarded a Capacity Supply Obligation through the ISO's Forward Capacity Auction in 2019. To meet that obligation, the Tariff required that NTE commence commercial operation of the Killingly plant by June 1, 2024. The ISO sought to terminate Killingly Capacity Supply Obligations when it concluded, after NTE repeatedly delayed Killingly's financial closing date and other development milestones, that Killingly would be unable to meet the commercial operation deadline.

After FERC agreed with the ISO's conclusion and issued its Termination Order on January 3, 2022, NTE sought and obtained from this Court under the All Writs Act a temporary stay of FERC's order. *See In re NTE Connecticut, LLC*, No. 22-1011 (D.C. Cir. Feb. 4, 2022) ("Stay Order"). NTE subsequently defaulted on its independent obligation under the Tariff, as a holder of a Capacity Supply Obligation, to maintain certain financial security with the ISO in accordance with

[1] *ISO New England Inc.*, 178 FERC ¶ 61,001 ("Termination Order"), *reh'g denied*, 178 FERC ¶ 61,130 (2022) ("Rehearing Order").

the Tariff's Financial Assurance Policy. After NTE failed to cure its default, the ISO moved in this Court for an order lifting the stay of the Termination Order. The Court granted that motion by order dated March 2, 2022, ruling that NTE's "default provides an independent ground for terminating the Killingly plant's capacity supply obligation." *In re NTE Connecticut, LLC*, No. 22-1011 (D.C. Cir. Mar. 2, 2022) (Attachment 1 to Motion to Dismiss).

The ISO filed its Motion to Dismiss on April 5, 2022. NTE lacks standing because its alleged injury arising from the FERC orders it challenges is not redressable. Alternatively, even if NTE has standing, its petition for review is now moot because Killingly's Capacity Supply Obligations have been terminated by operation of the Tariff and would not be restored even if NTE prevailed in this case.

II. ARGUMENT

A. NTE Fails to Establish that Its Claimed Injury Is Redressable

NTE's opposition to the Motion to Dismiss is based almost exclusively on its contention that, if it prevails on its petition for review, that will "make NTE significantly more likely to obtain . . . redress from the Commission." NTE Response at 6. According to NTE, this Court's decision in *National Parks Conservation Ass'n v. Manson*, 414 F.3d 1 (D.C. Cir. 2005) ("*National Parks*"), establishes that redressability is satisfied where "a challenged determination would

'significantly affect' a related, subsequent determination." NTE Response at 7. But *National Parks* is readily distinguishable from this case.

The plaintiffs in *National Parks* challenged the Department of the Interior's withdrawal of a finding of adverse impact from a new power plant to be located near Yellowstone National Park. Plaintiffs argued that Interior's action led a Montana agency to issue a permit for construction of the plant, which in turn injured plaintiffs' members. *National Parks* at 3-4. Addressing Interior's claim that plaintiffs' alleged injury was not redressable, this Court reasoned that "the question of standing must turn on the strength of the link between Interior's action and the ultimate permitting decision of the Montana DEQ." *Id.* at 5. The Court went on to find that "Interior's withdrawal of its impact letter was virtually dispositive of the state permitting decision," and, moreover, the federal law under which Interior took its action created a "formal legal relationship" under which Interior "exert[ed] legal authority over the Montana DEQ." *Id.* at 6. The Court concluded that "Montana DEQ is therefore not the sort of truly independent actor who could destroy the causation required for standing." *Id.* (citation omitted).

Here, however, there is no link—and certainly no "formal legal relationship"—between FERC's Termination Order and the termination of Killingly's Capacity Supply Obligations by operation of the Tariff after NTE's financial assurance default. Indeed, the Court has already recognized that NTE's financial assurance

default "provides an independent ground for terminating the Killingly plant's capacity supply obligation." *In re NTE Connecticut, LLC*, No. 22-1011 (D.C. Cir. Mar. 2, 2022).

National Parks also observed that standing is established in such cases when the agency intends its decision to influence the relevant third party. *National Parks* at 6-7. This case, however, involves two mutually exclusive actions, one by the agency in the Termination Order and the other the termination of Killingly's Capacity Supply Obligations by operation of the Tariff without any action or influence from FERC. Thus, even if the Court reversed FERC's orders, the termination of Killingly's Capacity Supply Obligations due to NTE's financial default would remain unchanged. NTE cannot establish standing solely in reliance "on little more than the remote possibility, unsubstantiated by allegations of fact, that [its] situation . . . might improve were the court to afford relief." *Warth v. Seldin*, 422 U.S. 490, 507 (1975). "When conjecture is necessary, redressability is lacking." *West v. Lynch*, 845 F.3d 1228, 1237 (D.C. Cir. 2017) (citation omitted).

NTE's argument that victory here would significantly increase its likelihood of obtaining further redress from FERC depends entirely on its claim that its financial assurance default was caused by the termination of its Capacity Supply Obligation. *See* NTE Response at 2, 8. But NTE fails to establish the link on which its position depends.

Even if, as NTE suggests, the Commission "could" waive NTE's default under the Financial Assurance Policy and reinstate Killingly's Capacity Supply Obligations prospectively, NTE's implicit suggestion that the agency would be likely to take such extraordinary steps is entirely speculative. NTE's burden of proof requires more. Each element of standing "is an indispensable part of the plaintiff's case, [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). NTE clearly falls short of that here.

NTE's declaration of Ms. Stephanie Clarkson fails to establish that its financial assurance default occurred because of the Termination Order. *See* Declaration of Stephanie Clarkson ¶ 6 ("Clarkson Decl."). First, NTE overlooks that, at all times, the Financial Assurance Policy itself informed NTE of what would follow if the Commission approved termination of Killingly's Capacity Supply Obligations. *ISO New England Financial Assurance Policy* (Exhibit 1A to Section I of the Tariff) at 69 (Section X.B) (Mar. 2022), https://www.iso-ne.com/static-assets/documents/2017/09/sect_i_ex_ia.pdf. Thus, to establish the causal link between FERC's action and NTE's financial assurance default, NTE should, but does not, address why it was unable from the time the ISO proposed termination on

November 4, 2021, until mid-February 2022 to take the steps necessary to remain in compliance with the Financial Assurance Policy.

On January 3, 2022, when the Commission issued the Termination Order, NTE knew then that its letter of credit had an expiration date of February 28, 2022. NTE therefore also knew then that the Financial Assurance Policy provided that, as of January 31, 2022 (the first business day within 30 days of the letter of credit's expiration), its letter of credit would be valued at zero. *See* Declaration of Robert C. Ludlow (Attachment 2 to Motion to Dismiss) ¶ 11 ("Ludlow Decl."). Ms. Clarkson's assertion that NTE first became aware of a need to renew or replace its letter of credit on February 6, 2022 (Clarkson Decl. ¶ 4) is inaccurate. NTE has provided no evidence that it took any steps during January 2022, while it pursued a stay of the Termination Order, first at the Commission and then at this Court (*see* NTE Response at 3), to ensure that it would remain in compliance with the Financial Assurance Policy in the event it succeeded in obtaining that relief.

When the Court stayed FERC's order on February 4, 2022, NTE already knew that the remaining value of its letter of credit[2] was insufficient to comply with the Financial Assurance Policy. The notice and cure provisions of the Financial

[2] In accordance with the Tariff, when FERC issued the Termination Order, NTE forfeited its financial assurance related to the terminated Capacity Supply Obligations. Accordingly, the ISO drew down a portion of NTE's letter of credit. Ludlow Decl. ¶ 9.

Assurance Policy provided NTE until the close of business on February 16, 2022, to provide a new or extended letter of credit (or other financial assurance). Ludlow Decl. ¶¶ 12-15. When NTE failed to cure its default, Killingly's Capacity Supply Obligations were terminated by operation of the Tariff. *Id.* ¶ 16.

Nor should the Court give weight to Ms. Clarkson's assertion that NTE would have been able to close financing for the Killingly plant by the end of 2021, had the ISO not proposed termination. *See* Clarkson Decl. ¶ 3. This is simply another in a long series of unsupported claims by NTE that Killingly could meet its financing milestone. These hollow claims began in August 2019 when NTE told FERC that "project financing has been secured,"[3] then continued through fourteen changes to the project's financial closing milestone date. *See ISO New England Inc.*, Docket No. ER22-355-000, Resource Termination Filing at 5-6 (Nov. 4, 2021). Finally, even after NTE obtained an extension of time from FERC for the expressed purpose of offering such evidence in response to the ISO's termination filing, NTE failed to

[3] *ISO New England, Inc.*, Motion for Leave to Intervene Out-of-Time, Objection to Deficiency Letters and to Disclosure of Confidential Information, and Comments of NTE Connecticut, LLC, Docket No. ER19-1166-000, at 3 (Aug. 15, 2019). NTE included with this filing an affidavit of the same Ms. Clarkson whose declaration has been submitted to the Court here. Ms. Clarkson then testified that "[p]roject financing for Killingly is in place." *Id.* at Affidavit of Stephanie Clarkson in Support of NTE Connecticut LLC's Motion to Intervene ¶ 8.

provide any supporting material from its purported financial backer. *See* Rehearing Order at P 30 n.61.

NTE thus has not established that its financial assurance default resulted from the Termination Order. In fact, the termination of Killingly's Capacity Supply Obligations under the Tariff is, as the Court discerned in its order dissolving the stay, independent from FERC's action. NTE's alleged injury from FERC's orders is not redressable, and NTE therefore lacks standing to pursue this case.

NTE cannot overcome this conclusion with its suggestion that FERC would grant the extraordinary, retroactive waiver of the Tariff that NTE acknowledges would be necessary to undo NTE's financial assurance default. *See* NTE Response at 9. Regardless of the scope of FERC's remedial authority under section 309 of the Federal Power Act, 16 U.S.C. § 825h, that provision does not modify or expand the substantive authority provided by the statute's other terms. *See New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974) (section 309 is "of an implementary rather than substantive character" and does not "confer independent authority to act"). Accordingly, any remedy FERC might provide must be consistent with the statute and the Commission's precedents. *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967). In this case, such consistency would be lacking because, as NTE itself notes (NTE Response at 9), the final prong of FERC's four-part test for tariff waivers forbids a

waiver when there will be undesirable consequences, such as harm to third parties. *See Ind. Power & Light Co. v. Midcontinent Indep. Sys. Operator, Inc.* 155 FERC ¶ 61,034, at P 27 (2016) (denying waiver request for likelihood of undesirable consequences); *Cal. Indep. Sys. Operator Corp.*, 161 FERC ¶ 61,088, at P 29 (2017) (same).

Here, the potential adverse consequences of a waiver of NTE's financial assurance default are manifest. The most obvious harm would be that reinstating Capacity Supply Obligations for Killingly, a non-existent resource, would result in decreased prices for existing suppliers in the New England capacity market. Reinstatement also would cause significant disruption of the market because, under the Tariff, completion of a Forward Capacity Auction almost immediately triggers the start of a complex string of actions and deadlines for market participants and the ISO in anticipation of the following year's auction. Putting Killingly back in the market midstream in this process would present a significant risk of undermining the decisions of other market participants that could not be redone or undone without even greater harm to the efficient functioning of the market. Again, NTE relies only on its own speculation that it could obtain the waivers that would be necessary to restore Killingly to the capacity market should the Court grant NTE's petition for review. In any event, a waiver of NTE's default would be insufficient to enable it to complete its decidedly optimistic, 30-month construction schedule (*see* Rehearing

Order at PP 17-19) before Killingly's June 1, 2024 Tariff deadline to achieve commercial operation.

B. Even Assuming NTE Could Establish Standing, Its Claim Is Moot

Even if NTE could establish standing, its petition to this Court is moot because NTE's default on its financial assurance obligations caused termination of Killingly's Capacity Supply Obligations independently of the FERC orders NTE would have the Court review. NTE responds that its claim is not moot because, according to NTE, its injury can be redressed by the Court. NTE Response at 10. NTE thus relies again solely on its claim that its financial assurance default was caused by FERC's orders. For the reasons the ISO has explained above, that claim has no merit.

III. CONCLUSION

For the reasons explained above and in the ISO's motion, the Court should dismiss NTE's petition for review with prejudice.

Respectfully submitted,

/s/ Michael J. Thompson

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1), the undersigned certifies that the foregoing reply complies with the applicable type-volume limitations. The reply was prepared using a proportionally spaced type (Times New Roman, 14 point) and contains 2,427 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word Standard 2016) used to prepare the reply.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April 2022, I have served the foregoing reply via the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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