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Berka (“Complainant”) on March 24, 2021 in the above-captioned docket (“Complaint”) and Motion to Dismiss.<sup>3</sup>

The Complaint alleges that Respondents Andrew M. Cuomo (“Governor Cuomo”), NERC, as the Electric Reliability Organization (“ERO”), NPCC, as a Regional Entity under the Federal Power Act (“FPA”),<sup>4</sup> New York Independent System Operator (“NYISO”), the New York Public Service Commission (“NYPSC”), Entergy Corporation (“Entergy”), and Holtec Decommissioning International (“Holtec”) plan to discontinue operation of Units 2 and 3 of the Indian Point Nuclear Power Plant without replacing them with a “low-carbon mix” of electric generators.<sup>5</sup>

As discussed below, the Commission should dismiss the Complaint against Respondents NERC and NPCC for the following reasons: (i) the Complaint fails to meet the minimum requirements of the Commission’s regulations by not specifying the basis in fact and law, the applicable law allegedly violated, or the action or inaction which led to the alleged violation; and (ii) the Complaint fails on any substantive grounds that could be inferred from the Complaint because NERC and NPCC have adhered to their regulatory and statutory obligations under the FPA and the Commission’s regulations.

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<sup>3</sup> NERC and NPCC have titled this document “Joint Answer to Complaint and Motion to Dismiss.” However, NERC’s and NPCC’s Answer is its Motion to Dismiss, because, as discussed below, Complainant has no legal basis to file with FERC a complaint against NERC and NPCC.

<sup>4</sup> 16 U.S.C. §§ 791-828c.

<sup>5</sup> Complaint at 5-6.

## **I. NOTICES AND COMMUNICATIONS**

Notices and communications with respect to this filing may be addressed to the following:<sup>6</sup>

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## **II. SUMMARY OF THE COMPLAINT**

Complainant is an individual that takes issue with the plan to retire Units 2 and 3 of the Indian Point Nuclear Plant.<sup>7</sup> While the Complaint mostly focuses on alleged actions or inactions of Governor Cuomo, and does not list specific allegations against NERC and NPCC, NPCC and NERC are included as Respondents.<sup>8</sup> The Complaint is noticed under the FERC Rules of Practice and Procedure Rules 206, 212, and 215(a)(1).<sup>9</sup>

The Complaint requests that the Commission:

- i. Order continued operation of the Indian Point Nuclear Power Plant until 2035;
- ii. Issue injunctions against Holtec (a demolition company) and Entergy to stop them from shutting down units; and

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<sup>6</sup> Persons to be included on the Commission's service list are identified by an asterisk. NERC and NPCC respectfully request a waiver of Rule 203 of the Commission's regulations, 18 C.F.R. § 385.203, to allow the inclusion of more than two persons on the service list in this proceeding.

<sup>7</sup> Complaint at 5.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 2-14.

- iii. Investigate, and preferably correct, the alleged “unfavorable situation” where a “reliable and carbon-free source is being replaced with less reliable, carbon-emitting sources.”<sup>10</sup>

### **III. ANSWER TO COMPLAINT AND MOTION TO DISMISS**

The Commission should dismiss the Complaint against Respondents NERC and NPCC and decline to provide the requested relief because: (i) it fails to meet the minimum requirements applicable to complaints under the Commission’s Rules of Practice and Procedure;<sup>11</sup> and (ii) NERC and NPCC have performed their statutory and regulatory duties under the Commission’s jurisdiction. As such, NERC and NPCC request the Commission grant the motion to dismiss the Complaint.

#### **A. The Complaint Should be Dismissed Because it Fails to Meet the Minimum Requirements of the Commission’s Regulations.**

The Commission should dismiss the Complaint because it fails to meet the minimum requirements of the Commission’s regulations with respect to the content of complaints. To facilitate proceedings, the Commission sets forth procedural rules that dictate requirements for the content of complaints.<sup>12</sup> The purpose of these requirements is to help ensure respondents understand the specific allegations made in the complaint. Rule 203, for example, requires pleadings to set forth the basis in fact and law for the positions taken.<sup>13</sup> Rule 206 provides that complaints must, among other elements, (i) clearly identify the action or inaction alleged to violate applicable statutory or regulatory requirements; (ii) explain how the action or inaction violates

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<sup>10</sup> *Id.* at 6.

<sup>11</sup> *See* 18 C.F.R. § 385.206.

<sup>12</sup> 18 C.F.R. § 385.

<sup>13</sup> *Id.* § 385.203(a)(7).

applicable statutory standards or regulatory requirements; and (iii) state the specific relief or remedy requested and the basis for that relief.

Long-standing Commission precedent provides that “rather than bald allegations, [a complainant] must make an adequate proffer of evidence including pertinent information and analysis to support its claims.”<sup>14</sup> Recently, in *Calif. For Green Nuclear Power, Inc. v. NERC, et al.*, the Commission denied a complaint against California Independent System Operator, Inc. (“CAISO”) regarding a future retirement of a nuclear plant because the complainant did not identify specific statutory or regulatory requirements applicable to CAISO or under the jurisdiction of the Commission.<sup>15</sup> Similarly, in the current proceeding, the Complaint failed to meet the necessary elements of Rules 203 and 206 and should therefore be dismissed for the following reasons.

The Complaint fails to “clearly identify the action or inaction” of NERC or NPCC that allegedly violated applicable statutory or regulatory requirements or “explain how the action or inaction” violated applicable law. In fact, the Complaint does not identify *any* NERC or NPCC action or inaction, whether allegedly wrong or not, let alone any applicable law that NERC or NPCC could have violated, aside from the Commission’s procedural rules that govern proceedings. Instead, the Complaint merely provides general, non-specific, and unsupported assertions that imply Respondents generally erred by permitting the Indian Point Nuclear Plant

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<sup>14</sup> *Ill. Muni. Elec. Agency v. Cent. Ill. Pub. Serv. Co.*, Order Dismissing Complaint Without Prejudice, 76 FERC ¶ 61,084 at 4 (1996); *Californians for Renewable Energy, Inc., (CARE) and Barbara Durkin v. Nat’l Grid, Cape Wind, and the Mass. Dep’t of Pub. Util.*, Order Dismissing Complaint, 137 FERC ¶ 61,113, at PP 2, 31-32 (2011); *Californians for Renewable Energy, Inc., Michael E. Boyd, and Robert M. Sarvey v. Pac. Gas and Elec. Co.*, Order Dismissing Complaint, 143 FERC ¶ 61,005 at P 2 (2013); and *Citizens Energy Task Force and Save Our Unique Lands v. Midwest Reliability Org., et al.*, Order Dismissing Complaint, 144 FERC ¶ 61,006 at P 38 (2013); *Calif. For Green Nuclear Power, Inc. v. NERC, et al.*, Order on Complaint, 174 FERC ¶ 61,203 at P 49 (2021).

<sup>15</sup> *Calif. For Green Nuclear Power, Inc. v. NERC, et al.*, 174 FERC ¶ 61,203 at P 50 (2021).

units to shut down prior to implementing a “low-carbon mix” of generation as replacement.<sup>16</sup> Without the specificity required by Rules 203 and 206 and the Commission’s precedent cited above, it is not possible for NERC and NPCC to determine what action or inaction is the subject of the Complaint. NERC and NPCC cannot even speculate at the type of violation or wrongdoing that is alleged.

Moreover, the Complaint fails to meet the basic requirements of a complaint under the Commission’s rules. Under Rule 206(a), “[a]ny person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.”<sup>17</sup> First, the Complaint did not allege that NERC or NPCC were in contravention or violation of any statute, rule, order, or other law administered by the Commission. By that definition, NERC and NPCC are not appropriate Respondents. Second, the Complaint did not describe an alleged wrong over which the Commission may have jurisdiction. NERC and NPCC note the licensing and relicensing of nuclear generation plants is outside the authority of the Commission, as is the approval of nuclear plant retirements. As such, the Complaint is not appropriate as defined under the Commission’s rules.

In conclusion, the Complaint fails to meet the minimum requirements of Rules 203 and 206. The Complaint did not set forth the basis in fact and law for the Complaint against NERC and NPCC. Furthermore, the Complaint did not clearly identify the NERC or NPCC action or inaction that allegedly violated applicable law or explain how that action or inaction allegedly violated

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<sup>16</sup> Complaint at 5.

<sup>17</sup> See 18 C.F.R. § 385.206(a).

applicable law. Therefore, the Commission should dismiss the Complaint against NERC and NPCC based on these deficiencies.

**B. NERC and NPCC have Performed their Statutory and Regulatory Obligations under the Commission’s Jurisdiction.**

NERC and NPCC deny any and all allegations against them that could reasonably be inferred from the nonspecific assertions in the Complaint and answer that they perform their duties as authorized and required by statute. By enacting the Energy Policy Act of 2005,<sup>18</sup> Congress entrusted the Commission with the duties of approving and enforcing rules to ensure the reliability of the Bulk-Power System, and with the duties of certifying an ERO that would be charged with developing and enforcing mandatory Reliability Standards, subject to Commission approval. The Commission certified NERC as the ERO in 2006.<sup>19</sup> Similarly, the Commission accepted the delegation agreement designating NPCC as a Regional Entity pursuant to FPA Section 215(e)(4).<sup>20</sup>

As the ERO, NERC is committed to assuring the reliability and security of the Bulk-Power System in North America.<sup>21</sup> Similarly, NPCC supports this goal as a Regional Entity.<sup>22</sup> Under the FERC-approved NERC Rules of Procedure (“ROP”), NERC and NPCC develop Reliability Standards in accordance with Section 300 (Reliability Standards Development) of the ROP, the

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<sup>18</sup> 16 U.S.C. § 824o.

<sup>19</sup> *N. Am. Elec. Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh’g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on compliance*, 118 FERC ¶ 61,190, *order on reh’g*, 119 FERC ¶ 61,046 (2007), *aff’d sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

<sup>20</sup> 16 U.S.C. § 824o(a)(7) and (e)(4). *See also N. Am. Elec. Reliability Corp.*, 119 FERC ¶ 61,060 (2006), *order on reh’g*, 120 FERC ¶ 61,260 (2007) (accepting a delegation agreement between NERC and NPCC in order to designate NPCC as a Regional Entity pursuant to Section 215(e)(4) of the FPA).

<sup>21</sup> *N. Am. Elec. Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh’g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on compliance*, 118 FERC ¶ 61,190, *order on reh’g*, 119 FERC ¶ 61,046 (2007), *aff’d sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

<sup>22</sup> *Id.*

NERC Standard Processes Manual, and the NPCC Regional Standard Processes Manual.<sup>23</sup> NERC and the Regional Entities, including NPCC, monitor, assess, and enforce compliance with Reliability Standards in the United States in accordance with Section 400 (Compliance Enforcement) of the ROP and the NERC Compliance Monitoring and Enforcement Program.<sup>24</sup> Further, NERC and NPCC perform assessments of the reliability and adequacy of the Bulk-Power System as required by Section 215(g) of the FPA<sup>25</sup> and Section 800 (Reliability Assessment and Performance Analysis) of the ROP.

Additionally, the Commission looks to ensure that NERC and NPCC continue to meet their statutory and regulatory obligations. Recently, the Commission found that, “NERC continues to satisfy the statutory and regulatory criteria for certification as the ERO” and found that “the Regional Entities [including NPCC] continue to satisfy applicable statutory and regulatory criteria.”<sup>26</sup> Therefore, to the extent that the Complaint can be inferred to allege that NERC and NPCC have failed to satisfy their statutory and regulatory obligations in any way, NERC and NPCC deny the allegations in their entirety and urge the Commission to dismiss the Complaint.

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<sup>23</sup> The NERC Rules of Procedure are available at <https://www.nerc.com/AboutNERC/Pages/Rules-ofProcedure.aspx>. The NERC Standard Processes Manual is available at [https://www.nerc.com/comm/SC/Documents/Appendix\\_3A\\_StandardsProcessesManual.pdf](https://www.nerc.com/comm/SC/Documents/Appendix_3A_StandardsProcessesManual.pdf). The NPCC Regional Standard Processes Manual is available at <https://www.npcc.org/content/docs/public/program-areas/standards-and-criteria/regional-standards/approved/npcc-regional-standard-processes-manual-version-2.pdf>.

<sup>24</sup> *Id.* The NERC Compliance Monitoring and Enforcement Program is available at [https://www.nerc.com/FilingsOrders/us/RuleOfProcedureDL/Appendix\\_4C\\_CMEP\\_06082018.pdf](https://www.nerc.com/FilingsOrders/us/RuleOfProcedureDL/Appendix_4C_CMEP_06082018.pdf).

<sup>25</sup> 16 U.S.C. § 824o(g).

<sup>26</sup> *N. Am. Elec. Reliability Corp.*, Order on Five-Year Performance Assessment, 170 FERC ¶ 61,029 at P 20 (2020).

**IV. CONCLUSION**

WHEREFORE, for the reasons stated above, NERC and NPCC respectfully request that the Commission dismiss the Complaint against NERC and NPCC, consistent with Rule 206 of the Commission's rules.

Respectfully submitted,

/s/ Marisa Hecht

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Date: April 13, 2021

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of this document upon all parties listed on the official service list compiled by the Secretary in the above-captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Washington, D.C., this 13<sup>th</sup> day of April 2021.

*/s/ Marisa Hecht* \_\_\_\_\_  
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