

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD JUDICIAL DEPARTMENT

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IN THE MATTER OF THE APPLICATION OF :
BOUNDLESS ENERGY NE, LLC, :

Petitioner, :

For a Judgment Pursuant to Article 78 of the N.Y. :
Civil Practice Law and Rules and Section 128 of the :
N.Y. Public Service Law, :

v. :

Appellate Division :
Docket No. 522738 :

PUBLIC SERVICE COMMISSION OF THE STATE OF :
NEW YORK, NEW YORK INDEPENDENT SYSTEM :
OPERATOR, INC., NORTH AMERICA TRANSMISSION :
CORPORATION, NORTH AMERICA TRANSMISSION, :
LLC, NEXTERA ENERGY TRANSMISSION NEW YORK, :
INC., CENTRAL HUDSON GAS & ELECTRIC :
CORPORATION, CONSOLIDATED EDISON COMPANY :
OF NEW YORK, INC., NIAGARA MOHAWK POWER :
CORPORATION D/B/A NATIONAL GRID, NEW YORK :
STATE ELECTRIC & GAS CORPORATION and NEW :
YORK TRANSCO LLC, :

Respondents. :
-----X

**REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.'S
OBJECTIONS IN POINT OF LAW AND MOTION TO DISMISS**

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Respondent, New York Independent System Operator, Inc. (“NYISO”), respectfully submits this Reply Memorandum of Law in further support of its objections in point of law and motion to dismiss Petitioner’s proceeding under Article 78 of the Civil Practice Law and Rules (“CPLR”) and Section 128 of the New York Public Service Law (“PSL”), as against NYISO, with prejudice, pursuant to Rules 3211(a)(4) and 3211(a)(7), and Section 7804(f), of the CPLR.

ARGUMENT

BOUNDLESS CONCEDES NYISO IS NOT
A PROPER PARTY TO THIS PROCEEDING

Boundless’ opposition to NYISO’s motion to dismiss, consisting solely of an affirmation from its counsel, concedes that the Verified Petition asserts neither a claim for damages against NYISO nor any form of cognizable Article 78 relief annulling or vacating “action” taken by NYISO. *See* Reply Affirmation of Charles M. Pratt, executed July 11, 2016 (“Pratt Aff.”), at ¶ 11. Nor does Boundless dispute that it does not, and cannot, assert any cognizable claim under Section 128 of the PSL against NYISO related to the alleged denial, by the PSC, of Boundless’ PSL Article VII siting application. *See id.*

Boundless presents no argument or facts in opposition to NYISO’s motion to dismiss the Verified Petition on the ground that NYISO is not a necessary party under CPLR § 1001. Boundless asserts instead that NYISO has been joined as a party because “it is *possible* that a party *may contend* that the NYISO is a necessary party.” Pratt Aff. at ¶ 11 (emphasis added). This is a palpably insufficient basis to maintain NYISO as a party, and particularly disingenuous since Boundless has agreed to dismiss the proceeding against all respondents other than the PSC and NYISO, *id.* at ¶ 10 & Ex. A,¹ and the PSC is not asserting that NYISO is a necessary party.

¹ *See also* Reply Affirmation of Joseph J. Saltarelli, executed July 15, 2016 (“Saltarelli Rep. Aff.”), Exs. A, B.

As noted in NYISO’s opening Memorandum of Law (pages 9-10), under CPLR § 1001(a), a person is subject to joinder as a necessary party only if its interests might be “inequitably affected by a judgment in the action” – indisputably inapplicable here – or if required to accord “complete relief” to the other parties. Boundless fails to allege, much less demonstrate that either prong is satisfied by NYISO’s putative joinder as a respondent, contending instead, in a wholly conclusory manner, that “the relief sought by Boundless in its Verified Petition, if granted, is likely to affect the NYISO’s transmission planning under its Open Access Transmission Tariff.” *See Pratt Aff.* at ¶ 11.

Unsupported by any facts or precedent, this bald assertion is an insufficient ground to maintain NYISO as a necessary party. There simply is no valid basis to require NYISO to participate in a proceeding under Article 78 and PSL § 128 in which no “action” by NYISO is being challenged and no affirmative relief, including interim relief, is being sought against it.

Moreover, there is no reason for the Court to keep NYISO in this case on the speculative basis that “if” the relief sought by Boundless *against the PSC* were to be granted, NYISO’s transmission planning under its OATT would “likely . . . [be] affect[ed].” *Pratt Aff.* at ¶ 11. Boundless fails to explain what it means by this phrase. As NYISO noted in its initial papers, if the PSC Orders are vacated, “NYISO would have no basis to proceed with [the planning process and] the selection of a project. The PSC would have to make a new determination of public policy transmission needs and issue a new order, and Boundless could submit a proposed project at that time.” NYISO Memorandum of Law at 10.

In other words, as a matter of federal law (*i.e.*, NYISO’s OATT), if the PSC Orders were to be vacated, NYISO would have to await a *new determination* by the PSC before proceeding with its planning process and selection of projects to address the PSC’s identified public policy transmission needs. Insofar as Boundless offers no reason why NYISO must remain a party in

this case solely to ensure that it follows the requirements of its own federal tariff, NYISO's participation is not required to accord "complete relief" to Boundless or the PSC. Boundless cites nothing which supports a contrary conclusion.

Significantly, Boundless also ignores, and therefore concedes, NYISO's remaining arguments in support of its motion to dismiss, including (i) that this proceeding should be dismissed pursuant to CPLR § 3211(a)(4) due to the pendency in Supreme Court, Albany County, of a wholly duplicative Article 78 proceeding against NYISO, (ii) that the Court lacks jurisdiction to stay NYISO's transmission planning process required by its federal tariff, and (iii) that, despite the opportunity to do so, Boundless has failed to move for a stay of the PSC Orders pursuant to CPLR § 7805, which would have been an appropriate course of action. *See* NYISO Memorandum of Law at 7-8, 11-14. Boundless' failure to address these arguments further supports dismissal of the Verified Petition as against NYISO.

Boundless concludes its opposition by asserting that it "does not object" to NYISO's motion to dismiss, subject only to a unique caveat that certain precatory language in a Stipulation of Partial Discontinuance between Boundless and the developer respondents in the Supreme Court proceeding, not be "altered." *See* Pratt Aff. at ¶ 18 & Ex. A. That stipulation has never been agreed to or signed by NYISO.

Of course, a stipulation filed in a Supreme Court proceeding, never signed by NYISO, binds neither the Appellate Division nor NYISO in this entirely separate proceeding. Boundless acknowledges that a similar stipulation dismissing the developer respondents (and also never agreed to by NYISO) awaits "additional process" in this Court. Boundless Mem. of Law at 4. Boundless fails to inform the Court that, by letter dated June 22, 2016, this Court rejected the stipulation and required Boundless, as petitioner, to submit a letter expressly requesting that the stipulation of partial discontinuance be submitted to the Court as an application to withdraw the

Article 78 proceeding as against those particular respondents. Saltarelli Rep. Aff. Ex. A.

Although Boundless says it “understood” that such “process was underway at the time the PSC and the NYISO served their motions to dismiss [on July 1, 2016],” Boundless Mem. of Law at 4, in fact, Boundless submitted its letter application to the Court only on July 12, 2016, Saltarelli Rep. Aff., Ex. B, and as of this date, the application does not appear to have been acted upon.

In all events, the language in the stipulation, regardless of whether Boundless relies upon the one filed in Supreme Court or the one newly filed in this Court, says that dismissal of the developer respondents will not preclude the court, assuming it grants vacatur of the PSC Orders, from directing NYISO to hold its planning process in abeyance until such time as the PSC has complied with its order. *See Pratt Aff., Ex. A at ¶ 5.* For the reasons addressed above and in NYISO’s initial Memorandum of Law, such relief is not within the jurisdiction of Supreme Court (or this Court) to grant, and nothing in the stipulation, which has not been agreed to by NYISO, can grant the Court power it does not have. *See Gullo v. Gullo*, 46 A.D.2d 991, 361 N.Y.S.2d 769, 770 (4th Dep’t 1974) (holding that a stipulation does not “confer subject matter jurisdiction on a court where none exists”).

But it is not even necessary for Boundless to seek such relief since vacatur of the PSC Orders would negate, until another public policy transmission need is identified by the PSC, the basis upon which NYISO could proceed with its planning process. Boundless’ improper request to enforce, as against NYISO, the terms of a stipulation of partial discontinuance entered into with other parties, which NYISO has never agreed to, provides no lawful basis to conclude that NYISO is a “necessary party” to this proceeding under the standard articulated in CPLR 1001.²

² Of course, if Boundless’ mere speculation about the potential effects that vacatur of the PSC Orders could have on NYISO’s transmission planning process were sufficient to transform NYISO into a necessary party, then, contrary to Boundless’ stipulation of partial discontinuance, the developer respondents are also necessary parties because each has participated in the process and submitted a

CONCLUSION

For the reasons set forth above and in the Memorandum of Law in Support of Respondent New York Independent System Operator, Inc.'s Objections in Point of Law and Motion to Dismiss, the Court should sustain NYISO's objections in point of law, grant NYISO's motion, and dismiss the Verified Petition as against NYISO, with prejudice, pursuant to Rules 3211(a)(4) and 3211(a)(7), and Section 7804(f), of the CPLR.

Dated: New York, New York
July 15, 2016

Respectfully Submitted,

HUNTON & WILLIAMS LLP

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proposed project to address needs identified in the PSC Orders being challenged. Although the developers and their proposed projects would clearly be affected by vacatur of the PSC Orders, Boundless has agreed that none of the developer respondents is a necessary party. *See* Pratt Aff., Ex. A, at ¶ 2 (“The undersigned parties acknowledge that none of the Dismissed Parties are necessary parties to this action.”). Indeed, Boundless acknowledges it was also prepared to agree that NYISO is not a necessary party, further undermining its current position. *See* Pratt Aff. at ¶ 13.

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**REPLY AFFIRMATION OF JOSEPH J. SALTARELLI IN SUPPORT OF
RESPONDENT NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.’S
OBJECTIONS IN POINT OF LAW AND MOTION TO DISMISS**

JOSEPH J. SALTARELLI, affirms the following under penalty of perjury:

1. I am counsel to Respondent, New York Independent System Operator, Inc. (“NYISO”) in this proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”) and Section 128 of the New York Public Service Law. I make this Reply Affirmation in further support of NYISO’s objections in point of law and motion to dismiss, as against

NYISO and with prejudice, the Verified Petition of Boundless Energy NE, LLC's ("Petitioner"). NYISO's motion is brought pursuant to CPLR §§ 3211(a)(4), 3211(a)(7) and 7804(f).

2. Attached as Exhibit A is a true and complete copy of a letter from Edward J. Carey, Chief Motion Attorney of the Appellate Division, Third Department, dated June 22, 2016, addressed to John J. Henry, Esq., counsel for certain respondents, and copied to counsel for all other respondents and the Petitioner.

3. Attached as Exhibit B is a true and complete copy of an email from Charlie Pratt, Esq., Petitioner's counsel, to all counsel in this proceeding, and a letter from Mr. Pratt to Mr. Carey, dated July 12, 2016, sent in response to Mr. Carey's June 22, 2016 letter.

Executed on July 15, 2016

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