

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

Constellation Mystic Power, LLC

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Docket Nos. ER18-1639-001
ER18-1639-002

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”), 18 C.F.R. §§ 385.212 and 385.213, the New England States Committee on Electricity (“NESCOE”) files this Motion for Leave to Answer and Answer in the above-captioned proceeding. On January 22, 2019, NESCOE filed a Request for Clarification or, in the Alternative, Rehearing of the Commission’s December 20, 2018 order in this proceeding¹ regarding the Commission’s directive to Mystic to include a clawback mechanism in the Mystic Agreement (“NESCOE Clarification Request”). NESCOE files this answer to clarify the record in response to the answer that Mystic filed in this proceeding on February 6, 2019 regarding the clawback mechanism (“Mystic Answer”).²

I. MOTION FOR LEAVE TO ANSWER

NESCOE seeks leave to answer the Mystic Answer. Although Rule 213 of the Commission’s Rules of Practice and Procedure generally prohibits an answer to an answer, the Commission has exercised discretion to accept answers where they provide information that

¹ *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) (“December 2018 Order”). The December 2018 Order related to the cost-of-service agreement among Constellation Mystic Power, LLC (“Mystic”), Exelon Generation Company, LLC (“ExGen”), and ISO New England Inc. (“ISO-NE”) (the “Mystic Agreement”). Mystic and ExGen are subsidiaries of Exelon Corporation (“Exelon”). For convenience, NESCOE will refer to Exelon in this answer as Mystic.

² NESCOE’s silence on other issues addressed in the Mystic Answer should not be construed as agreement with Mystic’s positions.

assists the Commission in its decision-making process.³ NESCOE’s response to the Mystic Answer meets this standard. It provides the Commission with a more complete and accurate record upon which to base its decision in this proceeding, including correcting Mystic’s misunderstanding of NESCOE’s position. Accordingly, there is good cause for the Commission to accept this answer.

II. ANSWER

The Commission should reject Mystic’s answer to the NESCOE Clarification Request.⁴ Mystic now asserts, for the first time in this proceeding, that a clawback mechanism cannot apply to the Everett Marine Terminal (“Everett”).⁵ The record is silent on this claim. Despite having participated in what Mystic describes as a “robust” hearing process that produced thousands of pages of witness testimony, discovery, and exhibits,⁶ Mystic never once contended that the clawback mechanism could only be applied to the Mystic 8 and 9 generating units (“Mystic 8 and 9” or “Mystic Units”) but not to Everett. Likewise, no party or participant in the proceeding expressed any opposition to this treatment of Everett. To the contrary, Mystic is on the record *confirming* “that it is willing to agree to a clawback process to refund certain capital expenditures if Everett continues in service after the Mystic Agreement terminates.”⁷ The hearing process provided the opportunity for Mystic to develop an evidentiary record on the

³ See, e.g., *ISO New England Inc.*, 161 FERC ¶ 61,123 at P 17 (2017); *HORUS Central Valley Solar 1, LLC, et al. v. California Independent System Operator Corp.*, 157 FERC ¶ 61,085 at P 29 (2016); *New England Power Generators Ass’n, Inc. v. ISO New England Inc.*, 146 FERC ¶ 61,039 at P 45 (2014).

⁴ Mystic Answer at 2, 14-15.

⁵ *Id.* at 14-15.

⁶ Initial Post-Hearing Brief of Constellation Mystic Power, LLC, Docket No. ER18-1639-000 (Nov. 2, 2018) (“Mystic Initial Brief”), at 3.

⁷ Exhibit NES-004 at 3, attached herein as Attachment A. In addition, as the NESCOE Clarification Request discussed, Mystic conditionally agreed to accept NESCOE’s clawback mechanism that applied both to the Mystic Units and to Everett. See NESCOE Clarification Request at 5, citing to Mystic Initial Brief at 163-164. Mystic never raised jurisdictional issues as impediment to such a clawback provision.

clawback mechanism for the Commission’s consideration. Mystic cannot rehabilitate its position through a pleading prohibited under the Commission’s rules.⁸ Had NESCOE been aware of Mystic’s position (or, more accurately, its changed position) regarding the clawback mechanism, NESCOE could have sponsored witness testimony responding to Mystic. That time has passed. Mystic submitted no evidence on this issue, and there is no evidentiary basis in the record for applying a clawback mechanism to the Mystic Units and not to Everett. Just as the Commission has consistently rejected attempts by parties to expand the scope of issues by submitting new evidence at the rehearing stage,⁹ or by raising new issues at the rehearing stage,¹⁰ the Commission should reject Mystic’s answer on the clawback as procedurally improper. Mystic had the opportunity to present evidence that the clawback provision should not apply to Everett, and it chose not to do so.

Mystic’s late attempt to re-write the clawback mechanism also fails on the merits. Its interest, of course, is in a one-way street: under Mystic’s narrative, consumer dollars can flow to Everett for capital expenditures and repairs but there is a jurisdictional dead-end for refunds to flow back to consumers.¹¹ The Commission should reject this blatant double-speak. If the Commission has jurisdiction, through Mystic’s rate, to impose Everett’s costs on consumers,

⁸ See Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.212(a)(2) (prohibiting an answer to a rehearing request unless ordered by the decisional authority).

⁹ See, e.g., *PJM Interconnection, LLC*, 108 FERC ¶ 61,187 at P 49 (2004) (“Parties seeking rehearing of Commission orders are not permitted to include additional evidence in support of their position, particularly when such evidence is available at the time of the initial filing...The rule limiting new matters raised on rehearing [is] particularly important, since answers to rehearing requests are not permitted and other parties, therefore, will not have an opportunity to respond to newly submitted information.”) (citations omitted).

¹⁰ See e.g., *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, at P 40 (2017) (“As a rule, we reject requests for rehearing that raise a novel issue, unless we find that the issue could not have been previously presented.”) (citing *Algonquin Gas Transmission LLC*, 154 FERC ¶ 61,048, at P 250 (2016) (“novel issues raised on rehearing are rejected ‘because our regulations preclude other parties from responding to a request for rehearing and such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision’”)) (additional citation omitted).

¹¹ Mystic Answer at 14.

then it likewise must have jurisdiction to order Mystic to refund Everett costs to consumers if the clawback is triggered.

Mystic's confusion is grounded in its misplaced focus on whether the Commission has authority over Everett.¹² This is, to borrow a phrase Mystic uses elsewhere in its answer, a "category mistake."¹³ NESCOE is not asking the Commission to regulate Everett.¹⁴ Rather, NESCOE understands that refunds under the clawback provision would be made through Mystic's rate, in the same way that Everett's costs are recovered from consumers under the Mystic Agreement.¹⁵ This is entirely consistent with the Commission's holding of its jurisdictional authority regarding Everett's costs¹⁶ and Mystic's perspective on that authority.¹⁷

Contrary to Mystic's assertion, there is also no practical hurdle to applying the clawback mechanism to Everett's costs. Mystic's proposed cost recovery structure provides the vehicle for refunds under a clawback provision. Under Schedule 3A of the Mystic Agreement, there is a lag between the end of the cost-of-service period and the true-up of costs related to the Mystic Units *and* Everett, including capital expenditures and operations and maintenance expenses.¹⁸ (In fact,

¹² *Id.* Everett is owned by Constellation LNG, LLC, which is Mystic's corporate affiliate.

¹³ *Id.* at 9.

¹⁴ *Id.* at 2. *See also id.* at 14.

¹⁵ *See, e.g.,* NESCOE Clarification Request at 3 (describing cost recovery in connection with Everett's costs).

¹⁶ *See* December 2018 Order at P 106, citing *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (2018) (footnotes omitted) ("... the fact that Everett is an LNG facility does not render the costs unrecoverable by Mystic, in light of the extremely close relationship between Everett and Mystic 8 and 9. However, the Commission clarified that this finding of jurisdiction does not entitle Mystic to recover all costs that it claims in connection with Everett.").

¹⁷ Mystic Answer at 9-10 ("... the Commission has acted squarely within its jurisdiction in regulating the effect of [fuel supply] costs on Mystic's rates, by deciding what portion of those costs may be passed through to wholesale customers.").

¹⁸ Schedule 3A, Exhibit MYS-0052, at 8-9. This section of Schedule 3A is included herein as Attachment B. The cover page and first page of Schedule 3A are also included for context.

there are yearly true-up filings beginning in 2023).¹⁹ Schedule 3A requires Mystic to make a true-up filing by April 1, 2025 to cover Mystic 8 and 9 and Everett expenses incurred one year earlier, from January 2024 through the termination of the Mystic Agreement on May 31, 2024.²⁰ Accordingly, when the Mystic Agreement is terminated (including if a termination occurs earlier than 2024), accounting reconciliations continue to take place well beyond the termination date. Such accounting reconciliations are not unusual in the closings of any type of facility. In short, the Mystic rate survives termination of the Mystic Agreement under the structure Mystic proposed and the Commission accepted. Applying this structure to Mystic's hypothetical scenario where Mystic 8 and 9 retire but Everett remains in operation,²¹ settlements would still take place between ISO-NE and Mystic pursuant to the Mystic Agreement and there would be no impediment to flowing refunds back to consumers in accordance with a clawback mechanism. Indeed, NESCOE understands that the specific clawback mechanism that the Commission directed in this proceeding, modeled after the Midcontinent Independent System Operator's tariff, requires the immediate refund of capital expenditures and repairs upon a return to merchant operations.²² Given this requirement and the accounting reconciliations that will continue to occur between Mystic and ISO-NE beyond the termination date, there is no practical impediment to ensuring that consumers receive the refund of Everett costs they are entitled to under the Commission's clawback policies and its directives in this proceeding.²³

¹⁹ Schedule 3A, Exhibit MYS-0052, at 4-9.

²⁰ *Id.* at 8.

²¹ Mystic Answer at 14.

²² December 2018 Order at P 208. *See id.* at n. 425.

²³ *See* NESCOE Clarification Request at 4.

Alternatively, if Mystic’s claim is that the true-up and cost recovery structure under the Mystic Agreement is insufficient to enable refunds to consumers for Everett upgrades and other costs, the Commission has the authority to—and should—condition any cost recovery for Everett’s capital expenditures and repairs on Mystic’s development of an appropriate mechanism to flow such refunds back to consumers. In seeking a cost-of-service rate, Mystic undertakes the responsibility to ensure that the rate it ultimately recovers from consumers does not unjustly enrich resource owners “for years after the contract ends.”²⁴ That responsibility remains unsatisfied so long as Mystic is accorded special treatment for a corporate affiliate that is inexplicably exempted from the Commission’s clawback policies.

III. CONCLUSION

For the reasons discussed herein, NESCOE respectfully requests that the Commission accept and consider NESCOE’s answer in this proceeding and reject the Mystic Answer as it pertains to the clawback.

Respectfully Submitted,

/s/ Jason Marshall

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Dated: February 14, 2019

²⁴ December 2018 Order at P 210. *See id.* at PP 208 and 212.

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Cambridge, Massachusetts this 14th day of February, 2019.

/s/ Jason Marshall _____

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ATTACHMENT A

NES-MYS-1-45: Regarding Everett, please confirm that Everett is scheduled to be retired upon termination of the Agreement. Please provide a true-up mechanism for post- May 2024 valuation of investment and how the remaining value will be returned to ratepayers. If Everett is not to be retired, please provide recalculation of investments on a depreciable basis and proposed credit to be provided to the ratepayers.

OBJECTION: Mystic objects that this request is vague, unduly burdensome, irrelevant, and is not proper discovery in that it does not request information but requests that Mystic create an analysis it does not have. 18 C.F.R. §§ 385.402, 385.406, 385.407.

RESPONSE: Mystic does not yet own the Everett facility and it would be premature to make a decision about the facility's future at this time. Exelon is hopeful that ISO-NE's new fuel security product will enable the continued operation of the Everett facility. Exelon confirms that it is willing to agree to a clawback process to refund certain capital expenditures if Everett continues in service after the Mystic Agreement terminates.

Prepared by or under the supervision of William Berg
July 31, 2018

ATTACHMENT B

Exhibit No. MYS-0052

Clean Schedule 3A

**SCHEDULE 3A
RESOURCE COMPENSATION TRUE-UP**

I. Projected Cost Update, Capital Expense Support, and True-Up

The projections of certain components of the Annual Fixed Revenue Requirement and the Monthly Fuel Supply Cost as detailed below will be updated prior to the Term and are subject to true-up under the methodology outlined in-Section III. (“Methodology”). The estimate or forecast identified in the “Mystic 8&9 True-Up” and “EMT True-Up” tabs provided in the Methodology will be updated prior to the Term and are subject to a true-up adjustment to the actual costs incurred by Owner for maintaining and operating the Resources for the components of cost specified below.

Capital expenditures that will be incurred during the Term will be supported prior to their incurrence and are subject to a true-up adjustment to the actual costs in accordance with the protocols as detailed below and the Methodology.

Actual costs may be larger or smaller than estimated or forecast costs, so the true-up adjustment may be made in either a positive or negative direction.

A. Costs and Formula Rate Inputs Subject to Updated Projection and True-Up

The Annual Fixed Revenue Requirement, the Maximum Monthly Fixed Cost Payment, and the Fixed O & M/Return on Investment component of the Monthly Fuel Cost Charge set forth in Schedule 3 of the Agreement shall be updated prior to the Term and subject to true-up as detailed herein and in accordance with the Methodology for the following cost and only the following components: 1) capital expenditures; 2) operations and maintenance expenses and one eighth O&M cash working capital allowance; 3) administrative and general expenses; and 4) taxes other than income

accordance with the ISO Tariff, unless another manner of collection is directed by FERC.

5. 2025 Filing:

i. True-Up to Actual Costs for Capital Expenditures expensed during the Term, and Operations and Maintenance Expense and One Eighth O&M Cash Working Capital, Administrative and General Expense, and Taxes Other Than Income Taxes incurred between January 1, 2024 and May 31, 2024

The Owner shall file on or before April 1, 2025, in accordance with the Informational Exchange and Challenge Procedures detailed below, to true-up the Annual Fixed Revenue Requirement, the Maximum Monthly Fixed Cost Payment, and the Fixed O & M/Return on Investment component of the Monthly Fuel Cost Charge provided for and calculated in accordance with Schedule 3 above and updated in the 2022 Filing (section B(2)(ii)), the 2023 capital expense Filing (section B(3)(i)), and the 2023 true-up Filing (section B(3)(ii)), to the costs actually incurred for capital expenditures expensed during the Term in 2024 (January 1, 2024 to May 31, 2024), and operations and maintenance expense and one eighth O&M cash working capital, administrative and general expense, and taxes other than income taxes incurred by Owner for maintaining and operating the Resource and LNG Terminal during the Term in 2024 (January 1, 2024 to May 31, 2024) based upon information contained in Owner's books and records. For capital expenditures previously identified as being necessary to meet the reliability need, this filing will only true-up the amount for each capital expenditures to actuals, not whether a capital expenditure should have been designated as necessary to meet the reliability need. Emergent capital expenditures will be subject to review as to whether they are necessary to meet the reliability need under the Informational Exchange and Challenge Procedures. Owner shall submit in accordance with the Informational Exchange and Challenge

Procedures below the information necessary to true-up 2024 estimated and projected costs to actual costs. The Methodology includes the mechanism for determining the actual costs incurred by the Owner. Actual costs may increase or decrease the Annual Fixed Revenue Requirement, the Maximum Monthly Fixed Cost Payment, and the Fixed O & M/Return on Investment component of the Monthly Fuel Cost Charge, so the true-up adjustment may be made in either a positive or negative direction. The difference between the Annual Fixed Revenue Requirement, the Maximum Monthly Fixed Cost Payment, and the Fixed O & M/Return on Investment component of the Monthly Fuel Cost Charge provided for and calculated in accordance with Schedule 3 above, as adjusted prior to the Term in the 2022 Filing, and the actual costs in accordance with the Methodology, plus interest determined in accordance with the Commission's interest rate on refunds (18 C.F.R. § 35.19a), will be added to or subtracted from the 2024 calendar year Annual Fixed Revenue Requirement, the Maximum Monthly Fixed Cost Payment, and the Fixed O & M/Return on Investment component of the Monthly Fuel Cost Charge. The difference between the Annual Fixed Revenue Requirement, the Maximum Monthly Fixed Cost Payment, and the Fixed O & M/Return on Investment component of the Monthly Fuel Cost Charge provided for and calculated in accordance with Schedule 3 above, as adjusted and the actual costs in accordance with the Methodology, plus interest determined in accordance with the Commission's interest rate on refunds (18 C.F.R § 35.19a), will be settled within 60 days of the Informational Filing detailed below, unless otherwise ordered by the Commission. Any allocation among Interested Parties for resettling of refunds or surcharges will be in accordance with the ISO Tariff, unless another manner of collection is directed by FERC.

II. Informational Exchange and Challenge Procedures for each True-Up