

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

Constellation Mystic Power, LLC)

Docket No. ER18-1639-000

**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 (“FERC” or “Commission”),¹ the New England States Committee on Electricity (“NESCOE”) respectfully submits this motion for leave to answer and answer to the Response to Formal Challenges filed by Constellation Mystic Power, LLC (“Mystic”) on November 17, 2021.² The Mystic Response addresses the formal challenge NESCOE submitted on October 15, 2021.³

I. MOTION FOR LEAVE TO ANSWER

NESCOE moves for leave to submit this answer to the Mystic Response. The Commission has permitted answers that clarify the record, contribute to an understanding of the issues, or assist with the decision-making process.⁴ NESCOE’s answer will assist the Commission in its understanding of the issues, particularly with respect to the need for clarity

¹ 18 C.F.R. §§ 385.212, 385.213.

² Constellation Mystic Power, LLC’s Response to Formal Challenges to Its September 15, 2021 2022 CapEx Informational Filing, Docket No. ER18-1639-000 (filed Nov. 17, 2021) (“Mystic Response”).

³ Formal Challenge of the New England States Committee on Electricity, Docket No. ER18-1639-000 (filed Oct. 15, 2021) (“NESCOE Formal Challenge”). The Mystic Response also addresses Formal Challenges of the Eastern New England Consumer-Owned Systems [(“ENECOS”)] to 2021 Informational Filing, Docket No. ER18-1639-000 (filed Oct. 15, 2021).

⁴ See, e.g., *ISO New England Inc.*, 175 FERC ¶ 61,195 at P 14 (2021) (accepting answers because they provided information that assisted the Commission in its decision-making process); *Ameren Illinois Co.*, 170 FERC ¶ 61,267 at P 12 (2020) (same).

regarding the procedures (or “Protocols”) in Schedule 3A of the Cost of Service Agreement among Constellation Mystic Power, LLC, Exelon Generation Company LLC and ISO New England Inc. (the “Agreement”). Accordingly, good cause exists to grant NESCOE’s motion for leave to answer, and NESCOE respectfully requests that the Commission grant this motion.

II. ANSWER

There is one thing about which NESCOE and Mystic agree: “As this is the First Filing of many under the Protocols, it is important for all parties to have certainty about the rules of the road.”⁵ Based on the fact that Mystic devoted nearly twenty pages in its Response arguing why NESCOE’s (and ENECOS’) understanding of the Protocols is wrong,⁶ it is clear that all parties do *not* have certainty about the rules of the road.

First, NESCOE believes the Protocols expressly require Mystic to have included with its 2021 Informational Filing an update to the Mystic 8&9 Annual Fixed Revenue Requirement (“AFRR”) and the Everett Marine Terminal (“Everett or “EMT”) AFRR (the “Methodology”) for the June 2022-December 2022 period. As NESCOE explained, its understanding is based on the plain language of the Protocols.⁷ Conversely, Mystic insists that it is under no such obligation,⁸ relying heavily on a chart included in an exhibit sponsored by one of its witnesses during the expedited hearing.⁹

⁵ Mystic Response at 11.

⁶ *See id.* at 1-20.

⁷ *See* NESCOE Formal Challenge at 4, 7, 8-12 (citing Schedule 3A, Section I.B.1.i) (for the 2021 Informational Filing, “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 for the relevant period of the Term in Schedule 3 will be updated in accordance with the Methodology and shall exclude true-up of investment and expense items disallowed by the Commission, if any.”).

⁸ *See* Mystic Response at 6-20.

⁹ *Id.* at 15; *see also id.* at 7.

Second, again, based on a plain reading of the Protocols, NESCOE believes that the Protocols expressly require Mystic to support capital expenditures prior to their incurrence.¹⁰ By contrast, Mystic believes that its obligation to support capital expenditures for the June 2022-December 2022 period (“2022 CapEx Projects”) is not constrained by the timing set forth in Section I.B.1.i of the Protocols, but rather, that Mystic can provide support for 2022 CapEx Projects whenever it is ready to do so.¹¹

Contrary to Mystic’s depiction in its Response, NESCOE is not employing a “gotcha” tactic¹² to try to prevent Mystic from recovering prudently-incurred costs that are consistent with the Protocols and the Commission’s orders. Rather, NESCOE interests lie in ensuring that the several hundreds of millions of dollars that Mystic is seeking to recover are appropriately being charged to New England consumers.¹³ NESCOE is trying to *prevent* a “gotcha” scenario where it challenges capital expenditures that have already been incurred, only to be told that it is too late. NESCOE’s concern stems from the lack of an express provision in the Protocols giving Interested Parties a right to review and challenge the 2022 CapEx Projects or other costs

¹⁰ See NESCOE Formal Challenge at 15-21 (citing Schedule 3A, Section I) (“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”).

¹¹ See Mystic Response at 26-32.

¹² See *id.* at 18 (“NESCOE appears to seize on the absence of the extra projection it reads into the Protocols as a ‘gotcha’ in hopes of preventing Mystic from recovering its actual costs of service.”); see *id.* at 19.

¹³ See NESCOE Formal Challenge at 4-5 (quoting Schedule 3A, Section II.2.A) (“If the Filing will support the capital expenditures that will be incurred during the Term it shall: 1. Provide an explanation of need that explains why the capital expenditure is necessary in order to meet the obligations of the Agreement; 2. Demonstrate that the expenditure is reasonably determined to be the least-cost commercially reasonable option consistent with Good Utility Practice to meet the obligations of the Agreement; and 3. Include a description of the project(s), the need for the project(s), the alternatives considered with respect to the least-cost alternatives, the expected start and completion date(s), and the project costs. 4. Identify whether either of the following occurred for projects that it is proposing to expense over the term of the Agreement, and if so explain why: (a) the project was scheduled for before the Term but delayed into the Term, or (b) the project was scheduled for during the Term but should have been completed prior to the Term.”).

associated with the June 2022-December 2022 period at a future time. Schedule 3A, Section II.3.A (Information Exchange Procedures) provides that if an informational filing substantiates the capital expenditures that will be incurred during the Term, Interested Parties may probe:

- a. Whether the capital expenditure is necessary to meet the obligations of the Agreement;
- b. Whether the expenditure is reasonably determined to be the least-cost commercially reasonable option consistent with Good Utility Practice to meet the obligations of the Agreement; and
- c. Whether either of the following occurred: (i) the project was scheduled for before the Term but delayed into the Term, or (ii) the project is scheduled for during the Term but should have been completed prior to the Term.

However, the Protocols do not require Mystic to substantiate the 2022 CapEx Projects with the 2022 Informational Filing; rather, with the 2022 Informational Filing, Mystic is required to substantiate the capital expenditures to be incurred in 2023.¹⁴ There needs to be some avenue to challenge whether the 2022 CapEx Projects meet the standard set forth in Section II.3.A. NESCOE does not want its rights to slip through the cracks by virtue of Mystic's adherence to a timeline that is more fluid than that set forth in the Protocols. Mystic is dismissive of NESCOE's concerns, insisting that "[t]here will be plenty of opportunity in the future for Interested Parties to test Mystic costs that have not, at those dates, already been litigated. Just as Mystic is not foreclosed from updating its costs, neither are customers or their representatives foreclosed from challenging such updates."¹⁵ That promise is not, however, explicit in the language of the Protocols. To the extent the Commission agrees with Mystic and does not

¹⁴ Schedule 3A, Section I.B.2.i.

¹⁵ Mystic Response at 3.

require costs to be substantiated in accordance with the schedule set forth in Mystic's Protocols, NESCOE respectfully requests that the Commission clarify that Interested Parties shall not lose the right to review and challenge capital expenditures and other costs in later periods.

Moreover, Mystic's own view as to what it must do support its 2022 CapEx Projects seems to be a moving target. Mystic submitted testimony in response to NESCOE's Formal Challenge,¹⁶ documentation that Mystic apparently believed it was under no obligation to submit with the 2021 Informational Filing in the first instance. This approach is not consistent with the Commission's high priority being placed on transparency. As explained by the Commission in directing modifications to the Midcontinent Independent System Operator Transmission Owner formula rate protocols (on which Mystic's Protocols are based):

the annual update must provide interested parties information about the transmission owners' implementation of the formula rate in sufficient detail and with sufficient explanation to demonstrate that each input to the formula rate is consistent with the requirements of the formula rate, without forcing interested parties to make extensive information requests to understand the transmission owner's implementation of the formula rate and to verify its correctness.^[17]

Providing information only in response to a Formal Challenge does not provide the kind of transparency NESCOE believes the Commission values. The submission of such new supporting documentation at this late stage underscores the need for the rights of Interested Parties to be codified in the Protocols. Short of that, however, NESCOE respectfully requests

¹⁶ See, e.g., Mystic Response, Attachment C, Affidavit of Jonathan Lauck at P 4 ("The purpose of my affidavit is to provide support for the EMT capital projects...identified as necessary in calendar year 2022...").

¹⁷ *Midwest Independent Transmission System Operator, Inc.*, 143 FERC ¶ 61,149 at P 86 (2013), *order denying reh'g*, 146 FERC ¶ 61,209 (2014).

that the Commission provide needed clarity to the process that is being implemented by Mystic in ways that are inconsistent with the plain language of its Protocols.

III. CONCLUSION

For the reasons discussed above, NESCOE respectfully requests that the Commission accept this answer, provide the clarity sought regarding the Protocols, and grant the relief requested in NESCOE's Formal Challenge—*i.e.*, find that Mystic cannot recover costs in the June-December 2022 period for which Interested Parties have not had a full opportunity to review and challenge in accordance with Schedule 3A.

Respectfully Submitted,

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Date: December 6, 2021

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 Washington, DC this 6th day of December, 2021.

/s/ Phyllis G. Kimmel

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