

**ORAL ARGUMENT HELD MAY 5, 2022****IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**Constellation Mystic Power, LLC, *et al.**Petitioners,*

v.

Federal Energy Regulatory Commission,

*Respondent.*

CASE NO. 20-1343 (LEAD)

CONSOLIDATED WITH  
20-1361, 20-1362, 20-1365,  
20-1368, 21-1067, 21-1070**RESPONSE OF STATE PETITIONERS AND INTERVENORS TO  
RESPONDENT'S MOTION FOR LEAVE**

Pursuant to Federal Rule of Appellate Procedure and Circuit Rule 27(a)(3)(A), the State Petitioners<sup>1</sup> and Intervenors<sup>2</sup> respond to the May 13, 2022, "Motion For

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<sup>1</sup> The State Petitioners are the Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, and Connecticut Office of Consumer Counsel (together, Connecticut Parties), the Attorney General of the Commonwealth of Massachusetts, and the New England States Committee on Electricity, Inc.

<sup>2</sup> The Intervenors are Braintree Electric Light Department, Concord Municipal Light Plant, Georgetown Municipal Light Department, Hingham Municipal Lighting Plant, Littleton Electric Light & Water Department, Middleborough Gas and Electric Department, Middleton Electric Light Department, Norwood Municipal Light Department, Pascoag Utility District, Reading Municipal Light Department, Taunton Municipal Lighting Plant and Wellesley Municipal Light Plant (collectively the Eastern New England Consumer-Owned Systems or ENECOS), Massachusetts Municipal Wholesale Electric Company, and New Hampshire Electric Cooperative, Inc.

Leave” (Motion) submitted by Respondent Federal Energy Regulatory Commission (Commission), ECF No. 1946599.

The Commission asks the Court for leave to authorize issuance of the Commission’s May 2, 2002, order in *Constellation Mystic Power, LLC*, 179 FERC ¶ 61,081 (May 2 Order), “[t]o the extent” the Court finds that the order “constitutes a modification or vacatur of the capital structure ruling in the initial orders” on review in this proceeding. Motion at 4. Except perhaps in one limited respect (discussed below), the requested authorization is unnecessary because the May 2 Order did not modify or vacate the orders on review and, thus, did not intrude upon this Court’s jurisdiction under section 313(b) of the Federal Power Act (FPA), 16 U.S.C. § 825l(b).

In support of this position, State Petitioners and Intervenors state:

When the Commission issued the orders now on review, Mystic was a subsidiary of Exelon Generation Company, LLC (ExGen) whose parent was Exelon Corporation (Exelon). In the orders on review, FERC held that Mystic should use Exelon’s capital structure to compute its rates, because ExGen’s structure was too equity heavy to produce just and reasonable results. *See Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267, PP 48-52 (2018), JA1285-87, *reh’g denied in relevant part*, 172 FERC ¶ 61,044, PP 132-134 (2020), JA1610-1612.

On February 1, 2022, Exelon consummated a spin-off transaction through which ExGen became Constellation Energy Generation, LLC and was transferred to a newly created parent holding company, Constellation Energy Corporation. A month later, Mystic made a rate-change filing pursuant to FPA section 205, 16 U.S.C. § 824d, which initiated Commission Docket No. ER22-1192-000.<sup>3</sup> Mystic there sought approval to replace, in the formula rate used to establish its costs under the Agreement, “the inputs related to Exelon Corporation’s capital structure and cost of debt with inputs from the capital structure and cost of debt of its immediate corporate parent, Constellation [Energy Generation] (formerly ExGen).” May 2 Order PP 3, 8. Protestors objected that in the orders on review in this proceeding the Commission had rejected the use of ExGen’s capital structure in setting rates under Mystic’s Cost of Service Agreement (Agreement). *Id.* P 11.

The FPA obligates the Commission to act on section 205 filings within sixty days of submission; if the Commission does not act within that timeframe, the filing will go into effect by operation of law. 16 U.S.C. § 824d(d). In the May 2 Order, the Commission accepted and suspended the new filing, and allowed it to take effect subject to refund and the outcome of settlement discussions, and, potentially, a paper hearing. With respect to the capital structure issue, the Commission determined

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<sup>3</sup> Constellation Mystic Power, LLC, Post-Spin Compliance Filing Update to Mystic Agreement, (Mar. 3, 2022), Docket No. 22-1192-000, eLibrary 20220303-5158.

(May 2 Order P 7) that after the February 2022 spinoff Exelon ceased to be the ultimate owner of Mystic and it therefore was no longer appropriate to impute Exelon's capital structure to Mystic in setting Agreement rates. *Id.* PP 24-25. But the Commission did not reconsider or modify its decision in the orders under review rejecting Mystic's use of the capital structure of its immediate corporate parent as anomalously equity heavy. The Commission instead noted that Mystic was proposing to adopt a capital structure that was even more equity heavy than "those historically accepted by the Commission for electric utilities," and cited one of the orders on review in this proceeding in support of this finding.<sup>4</sup>

The May 2 Order accepted Mystic's assertion that, due to the spinoff transaction that removed Mystic from Exelon's ownership, it no longer was appropriate to impute Exelon's capital structure to Mystic in setting Agreement rates. To the extent the Court views that aspect of the May 2 Order as modifying the orders on review, State Petitioners and Intervenors would not oppose an order granting the Commission's motion.

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<sup>4</sup> May 2 Order P 25 (citing *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267, PP 50-51 (Dec. 20, 2018) (December 2018 Order), JA1286-87). In reviewing the background to Mystic's filing, the Commission also restated its earlier determination that "Mystic did not show that adopting ExGen's capital structure for ratemaking purposes would result in just and reasonable rates." May 2 Order P 5 (citing December 2018 Order P 48, JA1285-86).

But FERC needs no special authorization to enable it to issue an order that *adheres to* and *applies* the orders on review rejecting Mystic’s use of ExGen’s capital structure as too equity heavy. 16 U.S.C. § 825l(c) (“The commencement of [judicial review] . . . shall not, unless specifically ordered by the court, operate as a stay of the Commission’s order.”); *Jupiter Corp. v. FPC*, 424 F.2d 783, 791 (D.C. Cir. 1969) (“In the absence of a stay, the Commission’s orders were ‘entitled to have administrative operation and effect during the disposition of (these) proceedings’” (quoting *Dyer v. Sec. & Exch. Comm’n*, 289 F.2d 242, 244 (8th Cir. 1961))). Nor does any mootness or ripeness problem prevent the Court from reaching that issue. As noted, the May 2 Order cited approvingly the December 2018 order’s decision to reject ExGen’s capital structure as anomalous.

In its reply brief in this proceeding, Mystic alerted the Court to the recent corporate restructuring, and pointed out that it did not “affect this appeal”:<sup>5</sup>

As of February 1, 2022, as a result of a “spin” transaction, Mystic is no longer affiliated with Exelon Corporation. But Mystic remains a wholly-owned subsidiary of ExGen, n/k/a Constellation Energy Generation, LLC. The transaction does not affect this appeal because the crux of the issue remains whether *ExGen* (now known as Constellation Energy Generation, LLC)’s capital structure is anomalous.

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<sup>5</sup> Mystic, Reply Brief 14-15 n.3 (Feb. 18, 2022), ECF No. 1935830.

Mystic made the same point in response to the Commission's May 3, 2022, Rule 28(j) submission, noting that if the Court were to reverse the earlier finding that ExGen's capital structure is anomalous, that would "eliminate entirely the issue raised in the May 2 order," and "remove the need for FERC to find a new model to replace Exelon Corporation." Mystic, Response 1 (May 3, 2022), ECF No. 1945383. On the other hand, were the Court to affirm the earlier finding that ExGen's capital structure was anomalous, that would likewise "eliminate entirely" Mystic's contention in Docket No. ER22-1192 that the Commission should use the capital structure of Constellation Energy Generation, LLC in setting Agreement rates. Thus, if the Commission prevails on review, it can address Mystic's new rate filing in Docket No. ER22-1192 by applying its December 2018 Order, rejecting (once again) the use of ExGen's capital structure, and deciding what capital structure (other than Exelon's) to use in its place.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this motion response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion response contains 1,266 words, excluding the parts exempted by Fed. R. App. P. 32(f).

*/s/ Scott H. Strauss*

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May 23, 2022

## CERTIFICATE OF SERVICE

I hereby certify that I have on this 23rd day of May, 2022, caused the foregoing motion to be electronically served through the Court's CM/ECF system.

*/s/ Scott H. Strauss*

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