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New England States Committee on Electricity Informal Challenges to Mystic's April 2022 Informational Posting

August 1, 2022

In accordance with the protocols contained in Schedule 3A to the Amended and Restated Cost-of-Service Agreement among Constellation Mystic Power, LLC (“Mystic”), Constellation Energy Generation, LLC (“Constellation”), and ISO New England Inc. (“ISO-NE”) (the “Agreement”),¹ the New England States Committee on Electricity (“NESCOE”) submits the following Informal Challenges to the Informational Posting that Mystic submitted for posting to ISO-NE on April 1, 2022, as updated on June 21, 2022 (“2022 Informational Posting”).

I. INTRODUCTION

Section I.B.2 of Schedule 3A requires Mystic to file on or before April 1, 2022: (i) “appropriate support for the capital expenditures and costs that will be collected as an expense during calendar year 2023 (January 1, 2023 to December 31, 2023);” and (ii) an update to the Annual Fixed Revenue Requirement (“AFRR”), the Maximum Monthly Fixed Cost Payment, and the Fixed O & M/Return on Investment component of the Monthly Fuel Cost Charge (the “2023 Update”); and (iii) an update of net plant to include actual capital expenditures and depreciation incurred between January 1, 2018 and December 31, 2021 (“2021 Net Plant Update”).

In the 2022 Informational Posting, Mystic provided on April 1, 2022:

- A cover letter (“April 1 Cover Letter”);
- Attachment A, an excel spreadsheet listing 2023 capital expenditure projects (“CapEx Projects”) related to the Mystic 8 & 9 units (the “Mystic 8&9

¹ Schedule 3A is referred herein to as “the Protocols.” Capitalized terms not defined in this Informal Challenge are intended to have the meaning given to such terms in the Protocols (and if not defined in the Protocols, then the meaning given to such terms in the Agreement).

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Template”), and to the Everett Marine Terminal (“Everett” or “EMT”) (the “EMT Template”);

- Attachment B, the Populated Methodology updated to reflect (1) the 2023 CapEx Projects, (2) the 2023 Update, and (3) the 2021 Net Plant Update; and
- Attachment C, a confidentiality agreement.

On June 21, 2022, Mystic provided:

- A cover letter (“June 21 Cover Letter”), which includes an Appendix summarizing the changes; and
- An updated Attachment B.

In accordance with Section 3 of the Protocols, NESCOE submitted five sets of information and document requests to Mystic.

NESCOE has reviewed the 2022 Informational Posting and the responses to its information and document requests through the lens of the Protocols and the orders of the Federal Energy Regulatory Commission (“FERC” or the “Commission”). Below, NESCOE submits Informal Challenges related to Mystic’s 2022 Informational Posting.

II. INFORMAL CHALLENGES

A. Attachment A – Emergent 2023 CapEx Projects

The Protocols provide that “[c]apital 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”² The Protocols further describe what Mystic needs to do to support CapEx projects:

If the Filing will support the capital expenditures that will be incurred during the Term it shall:

² Schedule 3A, Section I.

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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.^[3]

As the Commission has summarized, Mystic has the burden to demonstrate that its capital expenditures “are: (1) necessary to meet Mystic’s obligations under the Mystic Agreement; and (2) the least-cost commercially reasonable option consistent with Good Utility Practice.”⁴

Mystic has included in its 2023 Update a number of capital expenditures for projects it describes as “emergent.” Mystic states:

2023 CapEx Projects in Attachment A do not include Constellation’s projected budget for emergent (i.e., as yet unidentified) capital projects (e.g., replacement of property units such as valves and motors as the need for replacement arises). However, Constellation has budgeted for these items based upon the longstanding experience of Constellation personnel with the equipment that they operate and maintain, meaning that there is a reasonable likelihood that emergent capital expenditures will be incurred in amounts similar to the budgeted amount. Thus, while these anticipated emergent projects are not included in the 2023

³ Schedule 3A, Section II.2.A. Aspects of these provisions are under review at the U.S. Court of Appeals for the D.C. Circuit in Case. No. 20-1343.

⁴ *Constellation Mystic Power, LLC*, 179 FERC ¶ 61,011, at P 26 (2022), Notice of Denial of Rehearing by Operation of Law, 179 FERC ¶ 62,179 (2022).

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they are nonetheless included in the 2023 Update by including such budgeted amounts in the 2023 RMR CapEx cell in the Methodology.[⁵]

Mystic has not provided sufficient—and for most of the 2023 CapEx projects, any—documentation that demonstrates that they are necessary to meet Mystic’s obligations under the Agreement, that they were not delayed until the Term, and/or that the expenses are the least-cost commercially reasonable alternatives available. Mystic’s theory that “these budgeted amounts are included pursuant to Section I.B.2.ii. of the Protocols (discussed below), not Section I.B.2.i”⁶ is creative but not supported by the plain language of Section I.B.2 of the Protocols.

NESCOE sought information regarding the projects listed in WP8 for EMT: “For each project listed in WP8, please provide documentation such as annual inspection reports, evidence of known service wear, and internal reports that led to the addition of the project and the recommendation to replace or upgrade the equipment.”⁷ Similarly, NESCOE sought information regarding the projects listed in WP9 for Mystic 8&9: “For each project listed in WP9, please provide documentation such as annual inspection reports, evidence of known service wear, and internal reports that led to the addition of the project and the recommendation to replace or upgrade the equipment.”⁸

In both cases, Mystic referred back to the response to NES-MYS-1.2, which stated:

Based on Mystic’s years of experience operating the facilities, the Emergent CapEx Projects represent those projects that Mystic expects to need, and that would be placed into service in 2023 to meet the obligations of the Cost of Service Agreement, but that Mystic cannot at this time confirm due to their emergent nature. The “WP9 2023 CapEx” tab of Attachment B (Mystic 8&9) and

⁵ April 1 Cover Letter at 2-3 (footnotes omitted).

⁶ *Id.* at 3.

⁷ NES-MYS-2.7-Everett.

⁸ NES-MYS-2.5-Mystic.

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the “WP8 2023 CapEx” tab of Attachment B (EMT) provide the budgeted spend by project category in 2023. Interested parties may challenge the prudence of these costs during the appropriate true-up period when such costs are identified and supported consistent with the Mystic Protocols.

NESCOE does not disagree that there may be the need for expenditures that arise after the April 1, 2022 Informational Posting deadline. However, Mystic has deemed as “emergent” substantial amounts: \$8.35 million of EMT 2023 CapEx and \$2.5 million of Mystic 2023 CapEx. This essentially renders nugatory the provision in the Protocols that places the burden on Mystic to support the need for those expenditures before they are incurred. And it leaves NESCOE and the Commission with no information to ascertain whether Mystic is recovering from ratepayers projected capital expenditures included in the 2023 Update in accordance with the standards set forth in the Protocols.

The following are the 2023 CapEx projects about which Mystic has provided no supporting information:

[BEGIN CUI//PRIV-HC]

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED] ⁹

⁹ Mystic 8&9, WP9.

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[REDACTED]

[END CUI//PRIV-HC]

With the exception of the four items noted with an asterisk, Mystic provided no supporting information about these emergent capital expenditures in the 2022 Informational Posting. Mystic did not answer information requests about these projects. Accordingly, there is no way to verify if Mystic has made the requisite demonstrations regarding its right to recover

¹⁰ EMT WP8.

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these costs under the Agreement. As such, these projects are unsupported and the costs cannot be incurred until they have been supported in accordance with the Protocols.

Regarding the four 2023 CapEx projects marked with an asterisk, although Mystic provided some documentation, NESCOE has not been able to verify based on the information provided that the projects are needed to meet the reliability need under the Agreement, that the projects have not been delayed until the Term or should have been completed prior to the Term, and/or that the expenditures are the least-cost commercially reasonable alternatives.

B. Property Tax Unrelated to Mystic 8 & 9

In the December 2018 order, FERC held that “including property taxes associated with the Mystic 7 land in the Mystic 8 and 9 revenue requirement is inappropriate under the ‘used and useful’ standard of ratemaking....Accordingly, we find that Mystic may not recover property tax expenses associated with Mystic 7 land under the term of the Agreement.”¹¹ Mystic included these property taxes as a line item in its populated methodology in its March 2019 compliance filing stating that “by the time Mystic makes its true-up filing, the tax assessment will change because Mystic will have either sold the land associated with Mystic 7 or, the current tax finance agreement will have expired.”¹² Over NESCOE’s protest, the Commission permitted this, stating that “[t]he true-up process is designed to address precisely these types of issues in the future.”¹³

¹¹ *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267, at P 92 (2018).

¹² *Constellation Mystic Power, LLC*, Order on Compliance and Directing Further Compliance, 172 FERC ¶ 61,045, at P 29 (2020) (“July 2020 Order”) (quoting Mystic March 1, 2019 Transmittal Letter at 17).

¹³ July 2020 Order at P 36.

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In its 2023 Update, Mystic included \$13,439,843 in taxes other than income.¹⁴ When NESCOE attempted to probe into the question of whether Mystic included any property tax expense associated with land other than Mystic 8 & 9 (i.e., land associated with Mystic 7 and the Mystic Jet), Mystic’s response was: “Mystic does not receive a separate tax bill for Mystic Unit 7, nor does Mystic receive a separate tax bill for the other Mystic units not included in the Agreement (i.e., units other than Mystic 8 & 9). There is only one Mystic property tax bill from the City of Everett, and the tax bill does not differentiate between the different units.”¹⁵

Although Mystic confirmed that [BEGIN CUI//PRIV-HC] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁶ [END

CUI//PRIV-HC] Mystic’s view is that these questions are outside the scope of discovery of the 2022 Informational Posting.

Because Mystic has not answered the information requests fully, NESCOE does not know the precise amount of tax that is related to [BEGIN CUI//PRIV-HC] [REDACTED]
[REDACTED]

¹⁴ See Mystic 8&9 Schedule B, line 8; and NES-MYS-1.9 [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC]

¹⁵ NES-MYS-5.1.

¹⁶ NES-MYS-5.2(b)(ii)-(iii).

17 [REDACTED]

[REDACTED] [END CUI//PRIV-HC]

While Mystic would not provide any information in response to NESCOE’s information requests here, NESCOE understands that as of 2018, the amount of property tax associated with Mystic 7 was approximately [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC].¹⁸ Mystic is not permitted to recover any of this amount from ratepayers. To the extent Mystic seeks to do so through this true-up process, this is an inappropriate attempt to shift its property tax burden related to the Mystic 7 site to consumers as part of its cost-of-service arrangement for Mystic 8 & 9. Mystic has the burden to demonstrate that its recovery of property taxes from consumers is just and reasonable, and it has not done so in the 2022 Informational Posting.

C. Budget Increases for Various Expenses

Mystic has explained in response to NESCOE’s information request that “[a]s required by the Methodology, Mystic provided in this year’s annual posting (the “Second Mystic Posting”) an update of certain projected costs based on 2021 actuals.”¹⁹ NESCOE appreciates that Mystic used 2021 actual costs to derive the estimates used in the 2023 Update, which contains projections for costs to be incurred throughout the Term. NESCOE does not object to that method in all instances and understands that further review of these types of costs (e.g., Contracting, Materials, Travel & Entertainment, Other Operating Expenses, Auxiliary Power, and Insurance costs) at this time may not be relevant to the actual charges that will actually be incurred over the term of the Agreement. But by simply copying and pasting all 2021 actual

¹⁷ NES-MYS-5.2(h).

¹⁸ Exh. NES-005 at 2 (line 42); Exh. NES-047 at 1.

¹⁹ NES-MYS-1-10.

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expenses and adjusting them for inflation, Mystic's projected expenses included in the 2023 Update include costs for whole categories of expenses that may not recur in subsequent years of the Term, and conversely, may omit entire categories of costs that may be incurred in subsequent years of the Term that were not incurred in 2021. For example, Mystic based its projections on the retention bonus incurred during 2021, shown in Schedule B,²⁰ and refused to answer an information request asking Mystic to confirm that the amounts included as 2021 actuals were expected to be materially similar to that in 2022, 2023 and 2024.²¹ Similarly, Mystic indicated that it inadvertently omitted [BEGIN CUI//PRIV-HC] [REDACTED]²² [END CUI//PRIV-HC] in severance payments, for which Mystic has not provided any support. Given that Mystic 7 and the Jet retired in 2021, and that any severance packages paid to those employees likely will not be repeated in 2022, 2023 and 2024, it is likely this will result in an overcollection. It is also possible that Mystic will incur other charges that were not included the 2021 costs that could materially impact any true up amount.

Another example of what seems to be a non-recurring budget item is LNG Tank Preventative Work. Mystic included in the 2023 Update [BEGIN CUI//PRIV-HC] [REDACTED]
[REDACTED] [END CUI//PRIV-HC].
Mystic provided little information about these costs other than to state that this project [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC],²³ and Mystic refused to answer whether the work is expected to continue in 2022, 2023, and 2024.²⁴

²⁰ NES-MYS-1.20.

²¹ NES-MYS-5.3.

²² See June 21 Cover Letter, Appendix.

²³ NES-MYS-5.4.

²⁴ *Id.*

