

111 FERC ¶ 61,133  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeen G. Kelly.

Mystic Development, LLC

Docket No. EL05-71-000

v.

Boston Edison Company and  
NSTAR Electric and Gas Corporation

ORDER ON COMPLAINT

(Issued April 29, 2005)

1. This order concerns a complaint filed by Mystic Development, LLC (Mystic Development)<sup>1</sup> against Boston Edison Company (Boston Edison) and NSTAR Electric and Gas Corporation (NSTAR)<sup>2</sup> (jointly, Respondents). Mystic Development claims that Respondents have violated the terms of their executed interconnection agreement (executed IA) by failing to properly allocate the Annual Facilities Charge (AFC) under the cost sharing mechanism provided in ISO New England, Inc.'s (ISO-NE) Open Access Transmission Tariff (OATT). Since Mystic Development raises issues of material fact, we will set the complaint for hearing. This order benefits customers because it establishes a forum for the parties to resolve their concerns.

**Background**

2. On January 4, 2001, in Docket No. ER01-890-000, Boston Edison filed an unexecuted interconnection agreement between itself and Mystic Development (unexecuted IA). The parties disputed the terms of section 5.4<sup>3</sup> of the unexecuted IA,

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<sup>1</sup> Mystic Development was formerly known as Exelon Mystic Development, LLC, which was originally known as Sithe Mystic Development, LLC.

<sup>2</sup> Boston Edison is a wholly-owned indirect subsidiary of NSTAR.

<sup>3</sup> Construction Outage Related Costs.

which govern redispatch cost responsibility. By order issued March 5, 2001 (March 5, 2001 Order), the Commission accepted the unexecuted IA for filing, suspended it for a nominal period to become effective March 6, 2001, subject to refund, and set section 5.4 for hearing.<sup>4</sup>

3. In the course of that proceeding, Boston Edison and Mystic Development reached a settlement on section 5.4 issues. By letter order dated February 27, 2002 (February 27, 2002 Letter Order),<sup>5</sup> the Commission approved the settlement and directed Boston Edison to file a substitute interconnection agreement reflecting the terms and conditions of the settlement agreement. Accordingly, on March 28, 2002, Boston Edison filed the executed IA.

4. Mystic Development protested section 5.6<sup>6</sup> of the executed IA, regarding the AFC, arguing that section 5.6 was inconsistent with the Commission's decision in *Boston Edison*,<sup>7</sup> and requested that the Commission clarify whether its policy on operation and maintenance (O&M) charges<sup>8</sup> for network upgrades, as stated in *Boston Edison*, would apply to all generators interconnecting with the Boston Edison transmission system.

5. By letter order issued May 31, 2002 (May 31, 2002 Letter Order),<sup>9</sup> the Commission accepted for filing the executed IA, subject to certain modifications. Citing *Boston Edison*,<sup>10</sup> the Commission stated that Boston Edison cannot charge an interconnecting generator O&M costs for facilities that are part of Boston Edison's integrated transmission system. The Commission directed Boston Edison to "revise [s]ection 5.6 to

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<sup>4</sup> *Boston Edison Company*, 94 FERC ¶ 61,236 (2001).

<sup>5</sup> *Boston Edison Company*, 98 FERC ¶ 61,198 (2002).

<sup>6</sup> Section 5.6 reads:

[t]o the extent one or more of the interconnection facilities are new additions to [Boston Edison's] Transmission System, not merely higher capacity replacements or upgrades of existing facilities, such new facilities shall be subject to an [AFC] for the full service life of [Mystic Development's] generators.

<sup>7</sup> *Boston Edison Company*, 98 FERC ¶ 61,200 (2002) (*Boston Edison*). This order issued on the same date as the February 27, 2002 Letter Order.

<sup>8</sup> As defined in the executed IA, AFC would include O&M charges.

<sup>9</sup> *Boston Edison Company*, 99 FERC ¶ 61,241 (2002).

<sup>10</sup> 98 FERC at 61,696-97.

state that AFC will not be assessed for network upgrades and to delete, in Schedule 2, the asterisk from any line items that qualify as network upgrades.”<sup>11</sup>

6. Boston Edison sought rehearing. It argued that the Commission could not direct changes to section 5.6 of the executed IA without initiating a proceeding pursuant to section 206 of the Federal Power Act (FPA)<sup>12</sup> because the Commission had conditionally accepted for filing the unexecuted IA (in the March 5, 2001 Order) and set for hearing only issues surrounding section 5.4. Boston Edison explained that sections 5.6 in the unexecuted IA and the executed IA were identical, that Mystic Development had been fully aware of its responsibilities under that section, and that Mystic Development should not be allowed to raise new issues concerning that section after construction of the subject interconnection facilities was 95 percent complete.

7. Notwithstanding its rehearing request, on July 2, 2002, Boston Edison submitted its compliance filing to the May 31, 2002 Letter Order (July 2, 2002 Compliance Filing). Mystic Development initially protested the July 2, 2002 Compliance Filing, arguing that Schedule 2 retained an asterisk by three facilities, erroneously indicating that those facilities were network upgrades.<sup>13</sup> Boston Edison filed a response, maintaining that its compliance filing properly characterized the nature of the facilities at issue. Subsequently, however, both parties filed a joint withdrawal of pleadings, agreeing to certain AFC calculations based upon whether the Commission either granted or denied Boston Edison’s rehearing request.<sup>14</sup>

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<sup>11</sup> 99 FERC at 61,991.

<sup>12</sup> 16 U.S.C. § 824e (2000).

<sup>13</sup> The three facilities were: (1) the Mystic Development Interconnection at Dexter Street; (2) 90 percent of the Mystic Development Unit 9-3 115kV Tie; and (3) 90 percent of the Mystic Development Unit 9-4 115 kV Tie.

<sup>14</sup> More specifically, the parties agreed that, if the Commission ruled in Mystic Development’s favor, *i.e.*, denied Boston Edison’s rehearing request, then Boston Edison would determine the actual installed costs of the non-network portions of all new facilities included in the Mystic Development interconnection, subject to reconciliation and audit contemplated in section 5 of the executed IA, and would use such actual costs as the basis for the AFC calculations provided in Schedule 3. If, on the other hand, the Commission ruled in Boston Edison’s favor and found that Schedule 2 should remain as originally filed, then the parties agreed that the costs of each of the asterisked line items of Schedule 2, to the extent of the percentages indicated therein, would be used to calculate the AFCs. Such costs would be subject to reconciliation and audit.

8. In the Order on Rehearing issued February 17, 2004 (February 17, 2004 Order), the Commission found that it had erred in ordering changes to section 5.6 of the executed IA, explaining:

In the May 31, 2002 Letter Order, we relied upon *Boston Edison* in ordering Boston Edison to modify Section 5.6. As explained in *Boston Edison*, 98 FERC at 61,696-97, O&M charges cannot be assessed for facilities that are part of Boston Edison's integrated transmission system. However, we also found that Section 5.6 of the [Bellingham IA], which mirrors Section 5.6 of the executed IA at issue here, did not conflict with that policy, since it subjected only non-integrated transmission facilities to AFC.

9. Accordingly, the Commission reversed its prior directive that Boston Edison modify section 5.6 of the executed IA and directed Boston Edison to submit a compliance filing restoring the language of section 5.6 and Schedule 2 as originally proposed in the executed (and unexecuted) IA. Given the parties' joint withdrawal of pleadings, the Commission made no finding regarding the nature of the disputed facilities.

10. Mystic Development sought rehearing, arguing that the Commission's compliance directive in the February 17, 2004 Order erroneously allowed Boston Edison to charge O&M costs to Mystic Development for network upgrades. It contended that the directive was inconsistent with the Commission's stated policy in that order, and that Boston Edison could not charge O&M costs for network upgrades. Mystic Development maintained that section 5.6 of the executed IA in its present case was almost identical to section 5.6 of the Bellingham IA at issue in *Boston Edison*, with one crucial distinction. Namely, the distinction was that there were no network upgrades at issue in *Boston Edison* because no facilities were flagged with an asterisk in Schedule 2 of the Bellingham IA. However, there were network facilities at issue in its present case because certain items were asterisked in Schedule 2 of the executed IA. Therefore, Mystic Development alleged that, while section 5.6 of the Bellingham IA subjected only non-integrated facilities to the AFC, section 5.6 of the executed IA actually subjected integrated, as well as non-integrated, facilities to the AFC.

11. By order issued September 22, 2004 (September 22, 2004 Order),<sup>15</sup> the Commission accepted the March 18, 2004 compliance filing, effective March 6, 2001, as complying with the February 17, 2004 Order and denied Mystic Development's rehearing request. The Commission found that Mystic Development improperly raised matters in a rehearing request which the Commission had previously accepted over three years ago as

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<sup>15</sup> *Boston Edison Company*, 108 FERC ¶ 61,289 (2004)

part of an unexecuted IA, and two years ago as part of an executed IA. The Commission stated that “generally [it] will not entertain on rehearing issues that should have been raised earlier, because doing so effectively creates an impermissible moving target.”<sup>16</sup>

12. Mystic Development has appealed the May 31, 2002 Letter Order, February 17, 2004 Order, and September 22, 2004 Order to the U.S. Court of Appeals for the District of Columbia.<sup>17</sup> In the appeal, Mystic Development is disputing which items of interconnection equipment fall within the scope of AFCs.

### **Mystic Development’s Complaint**

13. On March 2, 2005, Mystic Development filed a complaint against Respondents under section 206 of the FPA,<sup>18</sup> claiming that Respondents are in violation of their executed IA for failure to properly calculate AFCs, resulting in overcharges of \$1,342,034.63.<sup>19</sup> Specifically, Mystic Development asserts that Respondents did not apply the 50/50 cost sharing mechanism established by Schedule 11 of the New England Power Pool (NEPOOL) OATT<sup>20</sup> to the AFCs.

14. Under section 5.6 of the executed IA, Mystic Development pays AFCs on certain facilities required to connect its generators to Boston Edison’s transmission system. Specifically, only those interconnection facilities that are new additions and not merely higher capacity replacements or upgrades of existing facilities are used in calculating AFCs. Section 5.6 further provides that AFCs shall apply to the percentage of each line

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<sup>16</sup> *Id.* at 62,501. See, e.g., *Californians for Renewable Energy, Inc. v. Calpine Energy Services, L.P.*, 107 FERC ¶ 61,238 at P 7 & n.7 (2004); *Central Maine Power Co.*, 90 FERC ¶ 61,198 at 61,241 & n.8 (2000); *Ocean State Power II*, 69 FERC ¶ 61,146 at 61,548 & n.65 (1994).

<sup>17</sup> *Mystic Development, LLC v. FERC*, No. 04-1395 (D.C. Cir. filed Nov. 19, 2004).

<sup>18</sup> 16 U.S.C § 824e (2000).

<sup>19</sup> Mystic Development acknowledges its pending appeal. However, it contends that the issues in the present complaint are separate and distinct from those raised on appeal. It clarifies that, in the instant proceeding, the issue pertains to the allocation of AFCs. In the case on appeal, it argues that the issue focuses on which interconnection facilities are used to determine AFCs, specifically whether network upgrades should be included in the pool of facilities subject to the AFC.

<sup>20</sup> Now Schedule 11 of the ISO-NE OATT. Effective February 1, 2005, the ISO-NE OATT superseded the NEPOOL OATT. Schedule 11 of the ISO-NE OATT is identical to Schedule 11 of the NEPOOL OATT. Hereinafter, “NEPOOL” will refer to “ISO-NE” where appropriate.

item listed in Schedule 2 of the executed IA, which is flagged by an asterisk, and calculated pursuant to the formula in Schedule 3 of the executed IA. Mystic Development argues that the allocation of AFCs between Mystic Development and Respondents is not addressed in either section 5.6 or Schedules 2 or 3 of the executed IA.

15. Mystic Development claims that the allocation is addressed in sections 7 and 29 of the executed IA, which require application of Schedule 11 of the NEPOOL OATT.<sup>21</sup> Schedule 11 determines how upgrade costs, with respect to the facilities needed for the interconnection of a new generator to a transmission system, will be allocated. Generally, generators are required to pay 100 percent of the costs of interconnection. However, there is an exception for Category B generators,<sup>22</sup> which allows for a 50/50 cost sharing of the Shared Amount<sup>23</sup> between the generator and the transmission company. Mystic Development asserts that it is listed as a Category B generator within Schedule 11 and thus subject to the 50/50 cost sharing exception.

16. Mystic Development argues that Respondents' failure to apply Schedule 11's 50/50 cost sharing provision to the AFCs amounts to a violation of the executed IA since Schedule 11 is incorporated into the executed IA by sections 7 and 29.

17. Next, Mystic Development contends that Respondents are in violation of a Commission-approved tariff for failing to apply Schedule 11's 50/50 cost sharing provision to the AFCs. It argues that even where an IA, filed under the NEPOOL

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<sup>21</sup> Section 7 of the executed IA is titled "Adjustment of Capitalized Interconnection Facilities Costs" and provides that "any cost sharing mechanism pursuant to the NEPOOL Tariff...which is determined to be applicable to the Interconnection Facilities, shall be applied to the Interconnection Facilities pursuant to the applicable NEPOOL and/or ISO procedures." Section 29 of the executed IA is titled "Regulatory Approvals" and states that "[o]n July 22 1998, NEPOOL filed [Schedule 11] with FERC that proposed, among other things, allocation of [pool transmission facilities (PTF)]costs to new generators. The Parties to this Agreement intend that [Mystic Development]'s responsibility for the costs of the Interconnection Facilities under this Agreement shall be consistent with FERC's and NEPOOL's implementation of the NEPOOL Tariff."

<sup>22</sup> A Category B project is one whose Generator Owner is committed to pay for upgrade costs on or after October 29, 1998 but before June 22, 1999. Schedule 11 lists the Category B projects, including "Sithe, Mystic Station Expansion."

<sup>23</sup> The Shared Amount of the capital cost of the Generator Interconnection Related Upgrade is initially determined as of the time of the System Impact Study Agreement. It is the lesser of the full actual capital cost of the Generator Interconnection Related Upgrade or the amount determined in accordance with the formula listed under section 3(c).

OATT, does not explicitly adopt or reference Schedule 11, Commission precedent dictates that Schedule 11's provisions govern the executed IA.<sup>24</sup>

18. Next, Mystic Development claims that Respondents' current position, that cost sharing of the AFCs is addressed in section 5.6 of the executed IA and should trump Schedule 11, is wholly inconsistent with its earlier statements accepting the application of Schedule 11 to the AFCs.<sup>25</sup> Moreover, Mystic Development argues that the presence of sections 7 and 29 in the executed IA negate the possibility of the executed IA trumping Schedule 11.

19. Finally, Mystic Development argues that Respondents have wrongly offset portions of AFC charges from amounts owed to Mystic Development and seeks reimbursement of the amount overpaid for AFCs, as well as the remaining refunds due Mystic Development.<sup>26</sup> As of February 1, 2005, Respondents have invoiced Mystic Development for \$2,684,069.26 of network AFC charges, but Mystic Development contends that it is liable for only \$1,342,034.63, or 50 percent, under Schedule 11's cost sharing provision. Mystic Development has paid the entire amount<sup>27</sup> and seeks reimbursement of \$1,342,034.63.<sup>28</sup> Furthermore, Mystic Development argues that Respondents

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<sup>24</sup> *United Illuminating Co.*, 107 FERC ¶ 61,003 (2004).

<sup>25</sup> Boston Edison has stated that "[S]ection 4 of Schedule 11 dictates that [Mystic Development], as the interconnecting generator, is required to pay on-going, post construction costs for upgrades to Boston Edison's transmission system... [T]he Commission should conclude that [Mystic Development] is obligated to pay its *pro rata* share of post-construction costs associated with network upgrades, in the form of the AFC pursuant to Section 5.6 of the IA, as originally filed." Request for Expedited Consideration of Application for Rehearing and Clarification of Boston Edison Company at 5 (Docket Nos. ER02-1465-001, *et al.*). It also stated that section 7 of the IA provides that "any cost sharing mechanism pursuant to the NEPOOL [OATT]... shall be applied to the Interconnection Facilities pursuant to the applicable NEPOOL... procedures." *Id.* at 6.

<sup>26</sup> Amounts owed Mystic Development under section 7 of the IA for construction costs incurred prior to the date of commercial operations for each unit. These refunds are associated with Schedule 11's reimbursement for 50 percent of those construction costs. According to Respondents' estimates, the refunds total \$3,501,000. However, Mystic Development has not yet audited this figure. Respondents have offset AFC charges against these refunds twice (on October 3, 2004 by \$2,014,300 and on November 30, 2004 by \$459,861.42) and holds the remaining refunds of \$1,026,838.58.

<sup>27</sup> Through two refund offsets totaling \$2,474,161.42 and other cash payments.

<sup>28</sup> \$2,684,069.26 - \$1,342,034.63 = \$1,342,034.63

inappropriately offset the AFC charges against the refund amounts without authority to do so under the IA or the NEPOOL OATT, instead of agreeing to escrow disputed funds. It states that offsets of “post-construction operating and maintenance charges” against “pre-operational refunds due for construction expenses” violates Commission precedent, which allows for offsets when the refunds and debt arise from the same rates, rate periods, or rate issues.<sup>29</sup> It claims that the periods and amounts involved here are separate and distinct, thus offsetting is inappropriate. It requests a proscription of future offsets and asks for a release of the remaining refunds, totaling \$1,026,838.58.

20. Mystic Development requests reimbursement of \$1,342,034.73 for AFCs overpaid before the filing of the complaint, plus any amounts overpaid during the pendency of this complaint, plus interest. It requests release of the refunds, plus interest, due to Mystic Development for construction costs. It further requests that Respondents apply Schedule 11’s 50/50 cost sharing provision to future AFC charges and that they be barred from offsetting any disputed charges from unrelated refunds owed.

### **Notice of Filing and Responsive Pleadings**

21. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 11,628 (2005), with the answer, interventions, and protests due on or before March 22, 2005. The due date for answers to the complaint was extended to March 28, 2005. On March 28, 2005, Respondents filed their answer. No protests or interventions were filed. On April 11, 2005, as corrected on April 12, 2005, Mystic Development filed an answer to Respondents’ answer. On April 27, 2005, Respondents filed an answer to Mystic Development’s answer.

### **Respondents’ Answer**

22. On March 28, 2005, Respondents filed an answer to Mystic Development’s complaint. Respondents contend that Mystic Development’s complaint amounts to a collateral attack on the February 17, 2004 Order and violates longstanding Commission policy precluding relitigation of issues previously decided.<sup>30</sup> They argue that allocation of the AFC is determined under section 5.6 and Schedule 2 of the executed IA and that the present issue was already addressed and resolved by the Commission in the February 17, 2004 Order. Further, Mystic Development’s request for rehearing of the February 17, 2004 Order on March 18, 2004 made no suggestion that section 5.6 of the IA was

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<sup>29</sup> See, e.g., *Ohio Edison Co.*, 2 FERC ¶ 61,017 at 61,028 (1978).

<sup>30</sup> See, e.g., *Alamito Co.*, 43 FERC ¶ 61,274 (1988). “Absent a showing of significant change in circumstances, the relitigation of an issue is simply not justified.” *Id.* at 61,753.

somehow contrary to Schedule 11, thus Mystic Development lost its claim over this issue.<sup>31</sup> According to Respondents, this complaint serves as a supplement to Mystic Development's earlier request for rehearing of the February 17, 2004 Order and would not be timely under section 313(a) of the FPA.<sup>32</sup> Respondents allege that the present issue could have been raised by Mystic Development in its rehearing request, and Mystic Development's failure to do so cannot be cured by the filing of this complaint.

23. Respondents argue that the executed IA is a negotiated, arm's-length agreement between the parties that was accepted by the Commission. During the negotiation, the parties agreed that the AFCs would be paid based on the percentage in Schedule 2 of the executed IA, on those items indicated with an asterisk in Schedule 2.<sup>33</sup> According to Respondents, Mystic Development is unhappy with the bargain it struck, and this complaint serves as an ad hoc, bad faith effort to revise negotiated terms. Respondents claim that Mystic Development also refuses to abide by its agreement in the parties' joint withdrawal of pleadings, where Mystic Development agreed to pay AFCs on those asterisked line items of Schedule 2, to the extent of the percentages indicated therein, if the Commission ruled in Boston Edison's favor in its rehearing request of the May 31, 2002 Letter Order. According to Respondents, these agreements should be upheld and not abrogated, since Mystic Development has not provided any evidence that the executed IA is contrary to the public interest.<sup>34</sup>

24. Respondents argue that the executed IA does not require Schedule 11's 50/50 cost sharing provision to be applied to the AFC. Rather the AFC is allocated under section 5.6 and Schedule 2 of the executed IA. Section 7 of the executed IA does not apply to AFCs but to capital construction costs, and section 29 of the executed IA simply requires that any cost allocation mechanism adopted must be *consistent* with Schedule 11, not pursuant to its terms. Respondents assert that Commission precedent requires that the terms of an interconnection contract should govern cost allocation between the parties, notwithstanding a change in circumstances.<sup>35</sup>

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<sup>31</sup> Boston Edison and NSTAR Answer at 8.

<sup>32</sup> 16 U.S.C. § 825k (2000). Under this section, requests for rehearing must be filed within 30 days of the issuance of an order.

<sup>33</sup> Boston Edison and NSTAR Answer at 16.

<sup>34</sup> *Id.* at 13.

<sup>35</sup> *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, LLC*, 107 FERC ¶61,069 (2004)

25. Respondents argue that section 5.6 of the executed IA is fully consistent with Schedule 11, requiring a Category B generator to pay its pro rata share of all post-construction costs for upgrades associated with the interconnection (*i.e.*, a generator must pay 50 percent of *all* PTF interconnection-related upgrade costs, as identified in Schedule 2, not simply those costs that have been asterisked).<sup>36</sup> They accuse Mystic Development of “cherry-picking” portions of the executed IA it agrees with, paying 50 percent on only the line items with an asterisk in Schedule 2, rather than 50 percent on all items listed in Schedule 2. The parties negotiated that AFCs would be charged against only those costs asterisked in Schedule 2, under the cost allocation provision in section 5.6 and Schedule 2 of the executed IA. However, Respondents argue, if Schedule 11’s allocation is to be applied instead, then Mystic Development should be responsible for 50 percent of all costs in Schedule 2. To allow otherwise, according to Respondents, would contravene law, equity, and Commission policy.

26. Respondents also claim that Mystic Development’s request for \$1,342,034.73 for alleged AFC overcharges is barred under section 206 of the FPA, as a retroactive rate change. They claim that section 5.6 of the executed IA has been accepted by the Commission and thus is a part of the filed rate. Further, Respondents claim that any relief must be effective only prospectively after Commission action on the complaint.

27. Finally, Respondents profess to “self-help measures” to collect payment for overdue AFC charges. They claim that, in view of Mystic Development’s failure to make payments of AFCs as mandated by the Commission’s February 17, 2004 Order and September 22, 2004 Order, Respondents engaged in their common law right of recoupment, asserting that such a remedy was appropriate given that the offsetting claims arose from the same agreement (*i.e.*, the executed IA) and in order to protect their financial interests.<sup>37</sup>

## **Discussion**

### **A. Procedural Matters**

28. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Mystic Development’s answer or Respondents’ April 27, 2005 answer and will, therefore, reject them.

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<sup>36</sup> Boston Edison and NSTAR Answer at 14.

<sup>37</sup> Respondents claim that Mystic Development’s two predecessors in interest were virtually bankrupt. Respondents state that they were concerned that Mystic Development might soon be sold or left in bankruptcy.

## **B. Hearing Procedures**

29. We find that Mystic Development raises matters that we cannot resolve on the record before us. In particular, there are material issues of fact concerning the applicability of Schedule 11 to the executed IA, the existence of a cost sharing provision in section 5.6, the consistency of section 5.6 with Schedule 11, and the offsetting of AFCs against construction refunds. Accordingly, we will set the complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA.

30. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy,<sup>38</sup> we will set the refund effective date 60 days after the date of the filing of this complaint, *i.e.*, May 1, 2005.

31. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date is May 1, 2005, the Commission cannot follow its normal procedure.

32. Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that the presiding judge would be able to issue an initial decision within approximately six months of the commencement of hearing procedures, or by November 30, 2005. If the presiding judge is able to render a decision within that time, and assuming the case does not settle, we estimate that we will be able to issue our decision within approximately three months of the filing of briefs on and opposing exceptions, or by April 30, 2006.

### The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly

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<sup>38</sup> See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning this complaint, as discussed in the body of this order.

(B) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within approximately fifteen (15) days of the date of this order in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E. Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(C) The refund effective date established pursuant to section 206(b) of the Federal Power Act is May 1, 2005.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.