

164 FERC ¶ 61,022
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Constellation Mystic Power, LLC

Docket No. ER18-1639-000

ORDER ACCEPTING AND SUSPENDING FILING
AND ESTABLISHING HEARING PROCEDURES

(Issued July 13, 2018)

1. On May 16, 2018, pursuant to section 205 of the Federal Power Act (FPA),¹ Constellation Mystic Power, LLC (Mystic) submitted an executed cost-of-service agreement (Agreement) among Mystic, Exelon Generation Company, LLC (Exelon), and ISO New England Inc. (ISO-NE).² The Agreement provides cost-of-service compensation to Mystic for continued operation of the Mystic 8 and 9 natural gas-fired generating units (Mystic 8 and 9). ISO-NE has requested that the Commission accept the Agreement to enable ISO-NE to retain Mystic 8 and 9 to ensure fuel security in New England for the period of June 1, 2022 to May 31, 2024.

2. As discussed below, we accept the Agreement for filing, suspend it for a nominal period, to become effective June 1, 2022, as requested subject to refund and subject to the outcome of the ongoing proceeding in Docket No. EL18-182-000, and establish hearing procedures.

I. Background

3. Exelon's Mystic 8 and 9 units currently participate in ISO-NE's Forward Capacity Market (FCM). On March 23, 2018, Exelon submitted Retirement De-List Bids for four units located in Boston, Massachusetts, including its Mystic 8 and 9 units, which provide approximately 1,400 MWs of capacity. Exelon indicated that unless it obtains cost-of-

¹ 16 U.S.C. § 824d (2012).

² See Constellation Mystic Power, LLC, FERC FPA Electric Tariff, [Cost of Service Agreement, Rate Schedule FERC No. 1, 0.0.0.](#)

service compensation for Mystic 8 and 9, it will retire those units. Mystic 8 and 9 are fueled exclusively by the Everett Marine Terminal (Distrigas Facility), a liquefied natural gas (LNG) import terminal. The Distrigas Facility is currently owned by Engie Gas & LNG Holdings LLC (Engie), but Exelon states that it is in the process of purchasing the Distrigas Facility, to secure fuel for its Mystic units.

4. Of relevance here, on May 1, 2018, in a separate proceeding in Docket No. ER18-1509-000, ISO-NE sought waiver of several provisions of its Tariff³ to enable it to enter into this cost-of-service Agreement with Mystic for the purpose of ensuring fuel security. ISO-NE recognized that its Tariff provides for cost-of-service agreements only for transmission updates needed to address local reliability concerns; the Tariff does not provide for cost-of-service agreements to ensure fuel security, such as the Agreement at issue here. In requesting waiver, ISO-NE submitted evidence showing that, if Mystic 8 and 9 do not provide capacity during the capacity commitment periods associated with the thirteenth and fourteenth Forward Capacity Auctions (FCA 13 and FCA 14), ISO-NE will not be able to ensure fuel security in the region.⁴ On July 2, 2018, the Commission issued an order denying the requested waiver. However, the Commission instituted a proceeding under FPA section 206⁵ in Docket No. EL18-182-000, based on a preliminary finding that the ISO-NE Tariff may be unjust and unreasonable because it fails to address specific regional fuel security concerns. The Commission directed ISO-NE to either submit interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns, as well as permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns; or show cause as to why its Tariff remains just and reasonable in the short- and long-term such that one or both filings is not necessary.⁶ That section 206 proceeding remains pending. The Commission further noted that it would continue to evaluate the Agreement filed by Mystic in this docket.⁷

5. The Agreement provides for the continued operation and compensation of Mystic 8 and 9 for the two years associated with the capacity commitment periods for FCA 13 and FCA 14, beginning June 1, 2022, until May 31, 2024. Mystic's proposed annual

³ ISO-NE Transmission, Markets and Services Tariff (ISO-NE Tariff or Tariff).

⁴ *See generally, ISO New England Inc.*, 164 FERC ¶ 61,003 (2018) (ISO-NE Waiver Order).

⁵ 16 U.S.C. § 824e.

⁶ ISO-NE Waiver Order, 164 FERC ¶ 61,003 at P 2.

⁷ ISO-NE Waiver Order, 164 FERC ¶ 61,003 at P 59.

fixed revenue requirement (AFRR) for Mystic 8 and 9 is \$218,974,263 for 2022-2023 and \$186,951,485 for 2023-2024.⁸ The Agreement's AFRR is based on the traditional cost-of-service formula of the sum of return on rate base, income taxes, operations and maintenance (O&M) expenses, depreciation expense, and taxes other than income taxes. Depreciation expense was based on the estimated physical life of the units (i.e., until 2047).⁹ Mystic states that the Agreement omits a provision of the *pro forma* cost-of-service agreement (*pro forma* agreement) regarding cost allocation, noting that ISO-NE proposes to address cost allocation at a later date.¹⁰ Mystic explains that the Agreement contains enhanced performance penalties, requested by ISO-NE, that provide additional incentives for Mystic to be available to meet the fuel security need during the term of the Agreement. Under the Agreement, Mystic 8 and 9 are subject to a penalty rate during the winter period when (i) Capacity Scarcity Conditions exist, (ii) the region is experiencing fuel scarcity, and (iii) when Mystic 8 and 9 are unavailable due to a lack of fuel as evidenced by its storage tanks falling below certain prescribed levels.

6. Mystic states that the Agreement specifies that Mystic can terminate the Agreement in the event of certain regulatory actions. The Agreement provides as conditions precedent that the Commission must issue an order accepting the Agreement and the AFRR by December 21, 2018, and both Mystic and ISO-NE must accept the Commission-approved Agreement by January 4, 2019. Mystic states that this process will grant it the opportunity to obtain approval of the revenue requirement, terms, and conditions of the Agreement before it decides whether to unconditionally retire Mystic 8 and 9 or to have the units participate in FCA 13.¹¹ Mystic requests that the Commission accept the Agreement by December 21, 2018, without setting it for hearing or settlement procedures. However, Mystic requests that, if the Commission does set the Agreement for hearing and/or settlement procedures, the Commission forgo a hearing and set it only for expedited settlement procedures.¹² Under the latter option, Mystic proposes that the

⁸ See Constellation Mystic Power, LLC May 16, 2018 Transmittal Letter at 8 (Mystic Transmittal Letter).

⁹ See Mystic Transmittal Letter at 4, 8-11.

¹⁰ Specifically, Mystic removes the following provision from Schedule 3 of the Agreement: "The Supplemental Capacity Payment shall be charged to Regional Network Load in the affective Reliability Region." See Mystic Transmittal Letter at 6; Agreement, Schedule 3.

¹¹ See Mystic Transmittal Letter at 24.

¹² See Mystic Transmittal Letter at 25-26.

Commission require parties to file any settlement by October 10, 2018, and the Commission to act upon the settlement by December 21, 2018.¹³

7. Further details regarding the Agreement and responsive comments are summarized by issue below.

II. Notice of Filing and Responsive Pleadings

8. Notice of the filing was published in the *Federal Register*, 83 Fed. Reg. 23,664, 23,665 (2018), with interventions and protests due on or before June 6, 2018. The entities listed in the Appendix to this order filed notices of intervention, timely motions to intervene, and comments and/or protests. On June 19, 2018, Mystic submitted an answer. On June 29, 2018, Connecticut Parties submitted an answer; on July 3, 2018, Massachusetts AG submitted an answer; and, on July 11, 2018, ENECOS submitted an answer.

III. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, given their interest in the proceedings, the early stage of the proceedings, and the absence of undue prejudice or delay, we grant the unopposed, late-filed motions to intervene and late-filed comments of those listed in the Appendix to this order.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2017), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers submitted by parties because they have provided information that assisted us in our decision-making process.

IV. Substantive Matters

A. Establishing Hearing

11. Our preliminary analysis indicates that the Agreement has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. The Agreement raises issues of material fact that cannot be resolved based on the record before us and includes issues that are more appropriately addressed in hearing procedures. Therefore, we accept the Agreement for filing, suspend it for a nominal period, to become effective June 1, 2022, subject to

¹³ See Mystic Transmittal Letter at 26.

refund and subject to the outcome of the ongoing proceeding in Docket No. EL18-182-000, and establish hearing procedures.¹⁴ Although we are setting the Agreement for hearing, we make findings on certain disputed issues and provide guidance on others, as discussed below.

12. We direct the presiding judge¹⁵ to conduct hearing procedures and certify the record to the Commission without issuing an initial decision.¹⁶ The participants are directed to submit a joint schedule to the presiding judge within seven days of this order. Of particular note, the Commission directs the presiding judge to certify the record to the Commission no later than October 12, 2018. The participants will then submit briefs directly to the Commission, with initial briefs due on November 2, 2018, and reply briefs due on November 16, 2018.

13. The participants may request a settlement judge to conduct formal settlement procedures.¹⁷ However, the hearing procedures will not be held in abeyance, allowing

¹⁴ In this proceeding, we establish an expedited hearing schedule due to the January 4, 2019 deadline for Exelon to determine whether it will unconditionally retire Mystic 8 and 9 and the commencement of FCA 13 on February 4, 2019. We make our acceptance of this filing subject to the outcome of the ongoing proceeding in Docket No. EL18-182-000 because the tariff revisions that ISO-NE may submit in that proceeding in response to the above-noted ISO-NE Waiver Order are likely to be relevant to the Commission's further action in this proceeding, following the hearing established in this order.

¹⁵ As noted below at Ordering Paragraph (C), the Chief Judge is hereby directed to appoint a presiding judge in this proceeding within four (4) days of the date of this order.

¹⁶ The Commission's regulations recognize that the Commission may direct a presiding judge to certify the record without issuing an initial decision. *See* 18 C.F.R. § 385.708(b) (2017) ("Except as otherwise ordered by the Commission...the presiding officer will prepare a written initial decision"); *see also id.* § 385.710(a) (2017) (contemplating circumstances in which an initial decision is not issued upon motion by the parties).

¹⁷ The participants should submit such a request to the Chief Judge, who will then appoint a settlement judge to this proceeding pursuant to Rule 603 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.603 (2017). If the participants desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose. If the participants request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within two days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a

any settlement proceedings instead to run on a parallel track with the hearing schedule.¹⁸ Should the participants choose to engage in settlement discussions, we encourage the participants to make every effort to settle or narrow their dispute while in the early stages of the hearing.

B. Hearing Issues Including Guidance

14. Next, we turn to certain disputed issues for which we make findings and provide guidance.

1. Capital Expenditures

15. Mystic proposes to recover the capital expenditures that it states are necessary to reliably operate Mystic 8 and 9 over the two-year term of the Agreement. Mystic argues that this approach is just and reasonable because, as mandated by the Tariff, Mystic has no future opportunity to recover these costs beyond the two-year term of the Agreement.¹⁹ However, Mystic states that it is willing to provide a “clawback” process to refund certain capital expenditures incurred during the reliability term if the units remain in service past the termination date. Mystic explains that the current Tariff does not contemplate such a provision, but Mystic believes this item could be addressed in the settlement process if this matter is set for hearing and settlement. Mystic states that the requested capital expenditures are necessary to ensure the reliable operation of Mystic 8 and 9 in accordance with Good Utility Practice and that these items were contained in Mystic’s budget for Mystic 8 and 9 with one exception: capital expenses related to

summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

¹⁸ Should a settlement judge be appointed, the settlement judge shall report to the Chief Judge and the Commission within 14 days of the date of the order appointing him or her concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate. As long as settlement discussions continue, the settlement judge shall file a report at least every fourteen (14) days thereafter, informing the Commission and the Chief Judge of the parties’ progress toward settlement.

¹⁹ The ISO-NE Tariff currently does not provide a path by which Mystic can unilaterally return to the market after the term of the Agreement, because it has submitted Retirement De-List bids for these units. After the term of the Agreement, Mystic’s interconnection rights will terminate and the status of the resource will be converted to “retired” on the date of retirement. *See* ISO-NE Tariff § III.13.2.5.2.5.3.

enhanced critical infrastructure protection requirements that directly result from Mystic 8 and 9's designation as reliability-must-run units have been added.²⁰

a. Comments and Answer

16. Commenters argue that Mystic fails to justify the projected capital expenditures to be incurred during the term of the Agreement.²¹ Among other concerns, NESCOE asks whether full cost recovery of the cost of \$13.575 million in new capital investment flowed through the Fuel Supply Charge is just and reasonable.²² Eversource asks the Commission to require Mystic to further explain the reason it must invest in certain upgrades related to the North American Electric Reliability Corporation's Critical Infrastructure Protection requirements due to Mystic 8 and 9's designation as cost-of-service units.²³ Massachusetts AG contends that (1) given the identified Electric Plant in Service for the Distrigas Facility is \$60 million, it is difficult to understand how \$33.1 million in capital expenditures will be required over the course of four and a half years and (2) the expected capital expenditures may not be spent.²⁴

17. Certain parties also argue that Commission precedent does not permit the recovery of future projected capital expenditures in rates without the opportunity for a prompt true-up to proven actual cost. They also ask the Commission to direct Mystic to include a

²⁰ See Mystic Transmittal Letter at 16. Mystic explains that, due to ISO-NE's designations of Mystic 8 and 9 as resources needed to ensure reliability, the classification of these resources under CIP-002-5 will change from "low impact" to "medium impact" cyber systems. Mystic states that this new classification will necessitate extensive investment in information technology upgrades, equipment changes, and other expenditures. See Testimony of William B. Berg, Mystic Transmittal, Attachment C at 21 (Berg Testimony).

²¹ See Eversource Comments at 12; Massachusetts AG Comments at 3; National Grid Comments at 8.

²² See NESCOE Comments at 12. Fuel Supply Charge refers to the Monthly Fuel Supply Cost, as referenced in the Agreement and defined in the Fuel Supply Agreement. See Mystic Transmittal Letter, Attachment A at 46 (referencing Monthly Fuel Supply Costs); Berg Testimony, Ex. MYS-004 at 5 (defining the Monthly Fuel Supply Costs).

²³ See Eversource Comments at 12.

²⁴ See Massachusetts AG Comments at 14-15.

“clawback” mechanism in the Agreement to prevent toggling concerns (i.e., Mystic 8 and 9’s return to the competitive markets after the term of the Agreement).²⁵

18. Mystic argues that the Commission should disregard the various arguments about Mystic’s projected capital expenditures. Mystic asserts that arguments about whether capital expenditure costs are adequately supported are relevant to the amount of recovery, which Mystic states should be addressed in settlement. Regarding true-ups, Mystic notes that ISO-NE and Mystic propose a forward-looking stated rate that is sufficient because it is consistent with the Tariff.²⁶ Mystic proposes to add its projected capital expenditures prior to the reliability term to its plant in service and states that, as with any other capital expenditure prior to the term, it will collect an amortized portion of these costs during the term.²⁷ Mystic notes that full cost recovery for expenditures during the terms of reliability agreements is consistent with precedent and authorized by the ISO-NE Tariff.²⁸ Mystic also disputes arguments that the Agreement raises toggling concerns. Mystic states that under the ISO-NE Tariff, Mystic 8 and 9 cannot unilaterally return to the market after having submitted a Retirement De-List Bid, but Mystic reiterates its willingness to consider a potential “clawback” provision while remaining mindful of any relevant Tariff provisions that ISO-NE might file to address fuel security.²⁹

b. Commission Determination

19. We find that the record provided by Mystic is insufficient for determining the justness and reasonableness of the amount of reported capital expenditures, and thus direct the participants to submit evidence regarding that issue at the hearing ordered herein.

20. However, we find that Mystic should be allowed to collect actual prudently incurred costs, on a formulary basis subject to true-up, with the prudence of such costs to

²⁵ See ENECOS Comments at 18-19; EPSA Comments at 6-7; Eversource Comments at 11-12; Massachusetts AG Comments at 16; NESCOE Comments at 53–55.

²⁶ See Mystic Answer at 7-8.

²⁷ See Mystic Answer at 8. As discussed below, with respect to capital expenditures that occur during the Agreement’s term, Mystic proposes to recover the full projected costs of its capital expenditures and capital expenditures at the Distrigas Facility as an expense, *id.*

²⁸ See Mystic Answer at 8-9 (citing ISO-NE Tariff § III.13.2.5.2.5.2).

²⁹ See Mystic Answer at 10.

be reviewed in a future Commission proceeding when the costs are actually known. We find that given the inherent difficulty in projecting costs in advance of the Agreement's effective date, and the concerns raised as to whether certain expenditures will be necessary to keep the Mystic Units operational during the proposed service period, a true-up mechanism is necessary to ensure that the rates established reflect actual costs incurred. Accordingly, we direct the participants to present evidence regarding the appropriate design of the true-up mechanism in the Agreement.³⁰ Regarding the related clawback provision, we also note that ISO-NE may choose to address such a provision in its filing in Docket No. EL18-182-000.

2. Fuel Supply Charge

21. During the term of the Agreement, Mystic 8 and 9 will receive fuel from the Distringas Facility, which will be purchased by an Exelon affiliate, Constellation LNG, this winter. According to Mystic, the Distringas Facility will receive administrative and collateral support from Exelon for a cost-based fee.³¹ The Distringas Facility will pass those costs to Mystic monthly through a separate fuel agreement (Fuel Supply Agreement).

22. Mystic explains that the Distringas Facility will charge Mystic a cost-of-service rate for fuel. Mystic states that this rate uses the traditional cost-of-service formula and is based on a historic test period of 2017 actual expenses, with those expenses projected into the years 2022 through 2024. Mystic states that the actual monthly fuel supply cost incurred by Mystic to obtain natural gas from the Distringas Facility will be recovered separately through the Fuel Supply Charge. Under the Fuel Supply Agreement, the Fuel Supply Charge will be credited with half of the margin on any forward third-party sales of LNG (e.g., sales to the local distribution company (LDC) or one of the two interstate natural gas pipelines). Mystic states that ISO-NE included this credit and percentage requirement to create a strong incentive for the Distringas Facility to make economic third-party sales to boost fuel reliability in the region and reduce net service costs of Mystic. However, Mystic states that both it and ISO-NE will adopt a 100 percent margin credit if

³⁰ According to Mystic, O&M and administrative and general expenses were calculated based on actual costs for 2017, escalated by 2.5 percent per year based on historical trends and the average escalation for these expenses over the 2013-2017 period and then projected into the years 2022 through 2024. Mystic Transmittal Letter at 10, 19. These costs should also be subject to the true-up mechanism.

³¹ Exelon is the direct parent company of Mystic.

directed by the Commission; all the margin earned on near-term sales to third parties will be credited against the Fuel Supply Charge and will reduce the costs to consumers.³²

23. In addition to the fixed O&M/return on investment component, Mystic states that the Fuel Supply Charge in Schedule 3 of the Agreement will also include the variable O&M expense associated with re-gasification services, a monthly fee of \$127,750 for administrative and general support services provided by ExGen to the Distrigas Facility, and a credit and collateral support fee based on the value of the transaction. Mystic explains that, in the course of arranging supply for Mystic 8 and 9 and third-party sales of LNG, the Distrigas Facility may also incur pipeline transportation agreement costs (to facilitate the sale of excess vapor) and costs (or payments) associated with cancelling or diverting scheduled cargos.

24. Finally, Mystic states that the Fuel Supply Charge in Schedule 3 provides for an Actual Fuel Cost Adjustment, which credits or debits any differences between the fuel cost components of the Stipulated Variable Costs set forth in section 3.4 and Schedule 1 and the commodity cost of fuel for Mystic 8 and 9 in accordance with the terms of the Fuel Supply Agreement for the relevant month. Mystic states that the Internal Market Monitor (IMM) prefers to use fuel index prices for the purposes of establishing Reference Levels rather than setting the Reference Level at the actual contractual price of fuel delivered to a unit.³³ Mystic states that it will use the actual contractual price of fuel delivered to Mystic 8 and 9 (which is calculated on a weighted average daily cost of gas basis) for the Reference Levels. The Agreement refers to these levels as Stipulated Variable Costs. While Mystic states that it is hopeful that the IMM will allow its Reference Level calculation, the Agreement provides a means by which Mystic will recover any actual fuel costs that exceed the fuel cost components of the Stipulated Variable Costs and refund any amounts where the fuel cost in the Stipulated Variable Costs would result in Mystic recovering more than its actual fuel costs.³⁴

a. Comments

25. Numerous parties oppose the recovery of the Distrigas Facility's cost under the Agreement, contending that there is no other cost-of-service filing in which the

³² See Mystic Transmittal Letter at 19-20.

³³ The IMM determines Reference Levels for the financial and physical parameters of supply offers. When a resource fails applicable market power screens, the parameters of the resource's supply offer will be set to its respective Reference Level. See ISO-NE Tariff § III.A.7.

³⁴ See Mystic Transmittal Letter at 20-21.

Commission has permitted the inclusion of an entire LNG terminal in a cost-of-service rate and arguing that Mystic has not justified inclusion of cost recovery for the Distrigas Facility here. These parties note that the Distrigas Facility has historically operated as a stand-alone entity with its own cost structure that recovers its costs through the market. These parties also question whether recovery of the costs of an LNG import terminal with multiple customers can be legally recovered through a wholesale rate under the FPA, asserting that the Commission does not have authority under the FPA to regulate the rates of LNG facilities or include the costs of those facilities, particularly 100 percent of the costs, in wholesale rates.³⁵

26. Verso asks the Commission to direct parties in the settlement proceedings to find a less expensive solution, including allowing the Distrigas Facility to close, rather than approving cost recovery for the Distrigas Facility, while NESCOE notes that the Agreement lacks an incentive for the Distrigas Facility to be managed in a way that minimizes pass-through costs and maximizes the value of the facility.³⁶

27. Several commenters express concern about the proposal to allow the Distrigas Facility to retain 50 percent of the margin on third-party forward LNG sales, including the concern that Mystic has failed to support the reasonableness of the 50 percent margin incentive. These parties note that the Distrigas Facility would be guaranteed its 50 percent share of margin at the time the forward transaction was executed, and such a proposal creates an incentive for the Distrigas Facility to execute all forward transactions that appear to yield positive margins, while the actual costs to supply the contract, if higher, would be passed through the Monthly Fuel Charge under the Fuel Supply Agreement to Mystic 8 and 9 and ultimately to electric customers.³⁷ ISO-NE, however, contends that the 50 percent credit will encourage economic utilization of the Distrigas Facility, which will have the dual benefit of reducing the net cost to ratepayers for the Agreement and contributing to additional winter fuel reliability by making LNG available to other parties in the region.³⁸

28. Other protesting parties request that the appropriate margin retention levels be set for hearing, as this proposal can have unintended consequences across New England natural gas markets. Some believe that the Agreement should not incentivize natural gas

³⁵ See Connecticut Parties Comments at 36; Massachusetts AG Comments at 19; New Hampshire PUC Comments at 3; NRG Comments at 8; Verso Comments at 2.

³⁶ See Verso Comments at 4; NESCOE Comments at 34-35.

³⁷ See FirstLight Comments at 8; Massachusetts AG Comments at 20.

³⁸ See ISO-NE Comments at 5-6.

sales from the Distrigas Facility and that any margin from sales to third parties should be credited 100 percent against the Fuel Supply Charge. These parties argue that allowing for the sale of LNG to third parties under the terms of the Fuel Supply Agreement adds complexity, risk of higher costs under the Agreement, dueling storage priorities, and a formula rate which can act as a subsidy for third parties purchasing LNG. Others argue that, if the Commission finds the margin incentive to be necessary, the margin of any forward sales of LNG retained by Mystic should not exceed 10 percent.³⁹

29. Parties express concerns that the Agreement and Fuel Supply Agreement could result in the subsidization of the Distrigas Facility's sales to third parties, which will convey an undue preference and competitive advantage to the Distrigas Facility over other LNG suppliers in the region, harming competition in the natural gas market and raising substantial issues about the justness and reasonableness of rates and charges resulting from affiliated ownership. They explain that the Fuel Supply Agreement may include incentives to sell LNG below spot-market prices and requires changes to or replacement of the forward sales margin.⁴⁰ EDF requests that the Commission require Exelon to identify the term sales arrangements to third parties that will be purchased along with the Distrigas Facility.

30. In its answer, Mystic requests that the Commission affirmatively rule that the Agreement should include recovery of the full cost-of-service of the Distrigas Facility, calculated over a normal service life.⁴¹ Mystic explains that it does not seek approval of the Fuel Supply Agreement or the rates charged by the Distrigas Facility, but rather only seeks to pass through Mystic's rate the costs incurred from its purchase of fuel from the Distrigas Facility.⁴²

31. Mystic also argues that, to the extent that the settlement procedures include discussion of a "clawback" mechanism for Mystic 8 and 9 capital expenditures during the Agreement term, discussed below, it also would be appropriate to consider the inclusion of the Distrigas Facility capital expenditures during the Agreement term in those discussions. Mystic argues that it would be inappropriate to allocate some portion of the Distrigas Facility's fixed costs to third-party customers because neither Constellation

³⁹ See Eversource Comments at 13; NextEra Comments at 7; FirstLight Comments at 2; National Grid Comments at 9.

⁴⁰ See Repsol Comments at 3; NEPGA Comments at 4-5; ENECOS Comments at 4.

⁴¹ See Mystic Answer at 4.

⁴² See Mystic Answer at 5.

LNG nor the Commission has the authority to require such customers to pay for their share of such costs.⁴³ In response to the questions regarding the detail of the Distringas Facility's cost-of-service rate, Mystic commits to provide additional support in the settlement proceedings to parties executing non-disclosure certificates under a Protective Order.⁴⁴

32. In response to affiliate abuse concerns, Mystic notes that affiliate restrictions do not apply to this situation as the rules cited by ENECOS apply to transactions involving franchised utilities or transmission owners.⁴⁵ Nevertheless, Mystic argues that it has demonstrated that the purchase of fuel from the Distringas Facility is the least cost alternative by a large measure. Mystic contends that speculations that other supply alternatives might be cheaper are without merit and are insufficient to require setting this issue for hearing because they are not backed by evidence.⁴⁶

33. As to concerns that the Fuel Supply Agreement will create an improper subsidy of third-party sales, Mystic responds that the incentive structure in the Agreement appropriately balances a variety of competing interests and the practical realities of operating the Distringas Facility.⁴⁷ With respect to the 50 percent margin on third-party sales, Mystic repeats that the Agreement provides a strong incentive to Constellation LNG to market forward sales while benefitting ratepayers equally.⁴⁸ Mystic also reaffirms that it is willing to adopt the original methodology of crediting 100 percent of margin to customers if that is the Commission's preference.

b. Commission Determination

34. The Commission finds that the record provided by Mystic is insufficient for determining the justness and reasonableness of the Fuel Supply Charge, and we therefore direct the participants to address this issue at hearing in accordance with the findings and guidance below.

⁴³ See Mystic Answer at 6.

⁴⁴ See Mystic Answer at 6.

⁴⁵ See Mystic Answer at 12.

⁴⁶ See Mystic Answer at 13-14.

⁴⁷ See Mystic Answer at 16.

⁴⁸ See Mystic Answer at 17.

35. However, in advance of the hearing, we find unpersuasive arguments that the FPA prohibits any recovery of the Fuel Supply Charge for the Dstrigas Facility. For the Commission to approve a public utility's recovery of costs under section 205 of the FPA, those costs must be in connection with "the transmission of electric energy in interstate commerce" or "the sale of electric energy at wholesale in interstate commerce," as set forth in section 201(b) of the FPA.⁴⁹ The Agreement, which Mystic filed under section 205 of the FPA, reflects rates, terms, and conditions for the "sale of electric energy at wholesale in interstate commerce," specifically, the sale of energy, ancillary services, and capacity from Mystic 8 and 9 into ISO-NE markets.⁵⁰ Under the Agreement, costs related to operation of the Dstrigas Facility are a component of Mystic's proposed cost-of-service rate.⁵¹

36. The fact that the Dstrigas Facility is an LNG facility does not render the costs unrecoverable by Mystic, in light of the extremely close relationship between the Dstrigas Facility and Mystic 8 and 9. As ISO-NE explained in its June 7, 2018 answer in the ISO-NE Waiver Petition proceeding in Docket No. ER18-1509-000, the Dstrigas Facility is fully integrated with Mystic 8 and 9, and each depends on the other to operate economically.⁵² Under the Commission's general practice regarding cost-of-service rates, the Commission reviews, among other items, a generator's purported costs of fuel, including purchase, transportation, handling, and on-site storage.⁵³ We find that the relationship between the Dstrigas Facility and Mystic 8 and 9 places costs related to

⁴⁹ 16 U.S.C. § 824(b)(1) (2012).

⁵⁰ Mystic explains that it will incur the costs related to the operation of the Dstrigas Facility to effectuate a jurisdictional sale of Mystic 8 and 9's capacity to ISO-NE pursuant to the Agreement. *See* Transmittal Letter at 4.

⁵¹ These costs are reflected in the proposed annual fixed revenue requirement for the Dstrigas Facility that is included in the Fuel Supply Agreement that Mystic filed with the Agreement. *See* Berg Testimony, Ex. MYS-004 at 1, 5.

⁵² ISO-NE argues that, because the Mystic 8 and 9 units are dependent on the Dstrigas Facility to operate economically, for the purposes of recovery of LNG costs as part of the Mystic 8 and 9 cost of service, "[the Dstrigas Facility] . . . is analogous to oil storage tanks, pipelines, fuel warmers and similar facilities at a dual-fuel generator, and to coal storage, crushers, conveyers and other fuel handling equipment at a coal-fired plant." *See* ISO-NE June 7, 2018 Answer, Docket No. ER18-1509-000, at 27.

⁵³ *See, e.g.*, 18 C.F.R. pt. 101, §501 (2018).

operation of the Distrigas Facility within this general practice for purposes of this proceeding.

37. This finding as to jurisdiction does not mean that Mystic is entitled to recover all costs that it claims in connection with the Distrigas Facility. Whether individual components of a cost-of-service rate, including fuel-related costs, are recoverable turns on whether they are just and reasonable, not whether the Commission has regulatory authority over all aspects of those rate components.⁵⁴ As stated above, we direct the participants to address at hearing the justness and reasonableness of the Fuel Supply Charge.

38. As to the question of sharing revenues from third-party sales, the Commission agrees with ISO-NE that, absent some sort of partial credit, the Distrigas Facility has little incentive to make LNG sales to third parties. However, allowing Mystic to keep 50 percent of the margin on third-party sales appears to be excessive.⁵⁵ In this respect, we also note Mystic's statement that it is amenable to having up to 100 percent of third-party sales credited against the costs of the Agreement. Accordingly, while we will not prohibit Mystic from retaining a percentage of the margin on third-party sales, we direct

⁵⁴ See, e.g., *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1296-97 (D.C. Cir. 2004) (the "salient criterion" for recovery of non-jurisdictional litigation costs "is whether the underlying activity being defended in the litigation serves the interests of ratepayers"); *Grand Council of Crees v. FERC*, 198 F.3d 950, 957 (D.C. Cir. 2000) ("The environmental issues posed by construction and operation of energy facilities will invariably be reviewed under other [statutory] provisions [than FPA section 205]; if those reviews (or other forces such as liability risks or firm commitment to environmental quality) cause the utility to incur costs, such costs would feed into the Commission's normal rate calculation"); *Pub. Serv. Comm'n v. FERC*, 589 F.2d 542, 558 (D.C. Cir. 1978) ("We need not consider how much weight the FPC may give to national [offshore] leasing policy in ratemaking because it has not yet discussed the matter at all. We hold only that the FPC cannot abdicate its responsibility to give reasoned consideration simply because leasing involves another department")

⁵⁵ We note that, in another context, Exelon proposed and the Commission accepted an analogous provision of a cost-of-service agreement that allowed Exelon to retain a 15 percent margin on energy and capacity revenues from the Ginna nuclear power plant. *R.E. Ginna Nuclear Power Plant, LLC*, 151 FERC ¶ 61,023, *order on reh'g*, 152 FERC ¶ 61,027, at P 29 (2015). The Commission's approval of the 15 percent margin in that case relied on the fact that Ginna's proposed revenue requirement was less than its full cost-of-service, and the amount of energy and capacity revenues that Ginna could retain under this provision was capped, so Ginna could not recover more than its full cost-of-service.

the participants to address at hearing the appropriate amount of the margin on third-party sales to be retained by Mystic.

3. Cost Allocation

a. Comments

39. Several parties express concern about the lack of a cost allocation method in the Agreement. National Grid asks the Commission to condition approval of the Agreement on the acceptance of a cost allocation methodology that is just and reasonable and consistent with Commission precedent. New Hampshire PUC asserts that, if pay-for-performance is unable to mitigate regional fuel security risks due to strict environmental mandates imposed by one or more New England states, then the states that imposed those mandates should be allocated the costs of the Agreement, rather than socializing those costs throughout the entire region. Industrial Energy Consumer also contends that socialization of costs associated with the Agreement is not an acceptable solution, arguing that this would undermine the competitive market because the Agreement only provides benefits to ratepayers in Eastern Massachusetts.⁵⁶

40. ISO-NE states that cost allocation is more appropriately addressed in a broader forum for resources retained to provide fuel security. ISO-NE states that it will address this issue in a separate FPA section 205 filing later this year, as part of a set of ISO-NE Tariff changes providing interim measures that apply more broadly to all resources that may be retained to provide fuel security. ISO-NE states that these interim measures will be in place until it is able to develop and implement a fuel security market solution.⁵⁷ Mystic states in its answer that cost allocation issues are not critical for the end-of-year decisional deadline and should be resolved later, as ISO-NE proposes.⁵⁸

b. Commission Determination

41. In the ISO-NE Waiver Order, the Commission directed ISO-NE to propose a cost allocation method if it files market rule changes allowing it to retain resources needed for fuel security. The Commission stated, “if ISO-NE proposes to revise its Tariff, such proposal should include an *ex ante* cost allocation proposal for resources retained under fuel security cost-of-service agreements,” and noted that, since ISO-NE explains that fuel

⁵⁶ See National Grid Comments at 10; New Hampshire PUC Comments at 4; Industrial Energy Consumer at 4.

⁵⁷ See ISO-NE Comments at 10.

⁵⁸ See Mystic Answer at 33.

security is a regional rather than a local problem, “[w]e would expect any cost allocation proposal to adhere to our cost causation precedent and appropriately identify the beneficiaries of the service rendered.”⁵⁹ Any cost allocation method that ISO-NE proposes and the Commission accepts in that proceeding will apply to the Agreement here. Thus, participants need not present evidence at the hearing in this case regarding cost allocation. Parties may instead submit comments, as necessary or relevant, in Docket No. EL18-182-000.

C. Other Hearing Issues

42. Parties have challenged numerous other aspects of the Agreement. With the exception of the issues listed above as to which the Commission makes specific findings, protestors have raised issues of material fact regarding the proposed expenditures that are best resolved in a hearing. Therefore, among other issues, we set for hearing the amount and rate treatment of the proposed capital expenditures, O&M expenses, and administrative and general expenses for the Mystic Generating Station and the Distrigas Facility.

The Commission orders:

(A) We hereby accept the Agreement for filing, suspend it for a nominal period, to become effective June 1, 2022, subject to refund and subject to the outcome of the ongoing proceeding in Docket No. EL18-182-000, and establish hearing procedures, as discussed in the body of this order.

(B) 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 the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission’s Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the Agreement, as discussed in the body of this order.

(C) Pursuant to Rule 504 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.504, the Chief Judge is hereby directed to appoint a presiding judge in this proceeding within four (4) days of the date of this order. Within fourteen (14) days of the date of the presiding judge's designation, the presiding judge shall convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. Due to the expedited nature of this proceeding, we direct the participants to submit a joint procedural schedule within seven (7) days of this order. The presiding judge is authorized to establish procedural dates,

⁵⁹ ISO-NE Waiver Order, 164 FERC ¶ 61,003 at P 58 (footnotes omitted).

and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(D) We hereby direct that the presiding judge conduct hearing procedures and certify the record to the Commission (without issuing an initial decision) no later than October 12, 2018, as discussed in the body of this order. We also hereby direct that initial briefs will be due November 2, 2018, and reply briefs will be due November 16, 2018, as discussed in the body of this order.

By the Commission. Commissioners Powelson and Glick are dissenting with separate statements attached.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix

Intervention and Protest and/or Comment:

Algonquin Gas Transmission, LLC (Algonquin)
American Public Power Association*
Avangrid Renewables, LLC*
Avangrid Networks, Inc.*
Bay State Gas Company**
Berkshire Gas Company**
Braintree Electric Light Department**±
Calpine Corporation (Calpine)*
Cavus Energy LLC*
City of Holyoke, Massachusetts Gas and Electric Department**
City of Norwich, Department of Public Utilities**
Citizens Energy Corporation†
Concord Municipal Light Plant**±
Connecticut Department of Energy and Environmental Protection**±
Connecticut Municipal Electric Energy Cooperative*
Connecticut Natural Gas Corporation**
Connecticut Office of Consumer Counsel**±
Connecticut Public Utilities Regulatory Authority**±
Consolidated Edison Energy, Inc.*
Constellation Mystic Power, LLC (Mystic) ±
Direct Energy Companies*
Dighton Power, LLC*
Distrigas of Massachusetts LLC**
Dominion Energy Services, Inc.*
Electric Power Supply Association (EPSA)
ENGIE Gas & LNG LLC**
Environmental Defense Fund (EDF)
Emera Energy Services, Inc.*
Eversource Energy Service Companies (Eversource)
FirstLight Power Resources, Inc. (FirstLight)
Fitchburg Gas & Electric Light Co.**
GenOn Energy Management, LLC**
Georgetown Municipal Light Department**±
Hingham Municipal Lighting Plant**±
Industrial Energy Consumer Group (Industrial Energy Consumer)
ISO New England Inc. (ISO-NE)
Liberty Utilities (New England Natural Gas Company) Corp.**
Littleton Electric Light & Water Department**±
LS Power Associates (LS Power)*

Maine Public Utilities Commission (Maine PUC)
 Massachusetts Attorney General Maura Healey (Massachusetts AG)±
 Massachusetts Department of Public Utilities*
 Massachusetts Executive Office of Energy and Environmental Affairs*
 Massachusetts Municipal Wholesale Electric Company**
 Middleborough Gas & Electric Department**±
 Middleton Electric Light Department**±
 Milford Power, LLC*
 Monitoring Analytics, LLC*
 National Grid USA (National Grid)
 New England Power Generators Association Inc. (NEPGA)
 New England Power Pool Participants Committee (NEPOOL) ±
 New England States Committee on Electricity (NESCOE)
 New Hampshire Electric Cooperative, Inc.**
 New Hampshire Office of Consumer Advocate (New Hampshire Consumer Advocate)*
 New Hampshire Public Utilities Commission (New Hampshire PUC)
 NextEra Companies (NextEra)
 Norwood Light & Broadband Department**±
 Northern Utilities, Inc.**
 NRG Power Marketing LLC**
 NSTAR Gas Company**
 PSEG Power LLC*
 Pascoag (Rhode Island) Utility District**±
 Public Citizen, Inc. *
 Reading Municipal Light Department**±
 Repsol Energy North America (Repsol) ±
 Southern Connecticut Gas Company**
 Taunton Municipal Lighting Plant**±
 Verso Corporation (Verso)
 Vermont Public Utility Commission*
 Vitol Inc. (Vitol)*
 Wellesley Municipal Light Plant**±
 Westfield Gas & Electric Department**±
 Yankee Gas Service Company**

* Entities submitting interventions only

** Entities submitting comments or interventions as part of a coalition

± Entities submitting answers

† Entities submitting motions to intervene out of time

‡ Entities submitting comments and no motion to intervene

List of Coalitions' Individual Members

Connecticut Parties

Connecticut Public Utilities Regulatory Authority
Connecticut Department of Energy & Environmental Protection
Connecticut Office of Consumer Counsel

Eastern New England Consumer-Owned System (ENECOS)

Braintree Electric Light Department
Concord Municipal Light Plant
Georgetown Municipal Light Department
Hingham Municipal Lighting Plant
Littleton Electric Light & Water Department
Middleborough Gas & Electric Department
Middleton Electric Light Department
Norwood Light & Broadband Department
Pascoag (Rhode Island) Utility District
Reading Municipal Light Department
Taunton Municipal Lighting Plant
Wellesley Municipal Light Plant
Westfield Gas & Electric Department

ENGIE and Distrigas

ENGIE Gas & LNG LLC
Distrigas of Massachusetts LLC

New England Local Distribution Companies (New England LDCs)

Bay State Gas Company
Berkshire Gas Company
Connecticut Natural Gas Corporation
Fitchburg Gas & Electric Light Co.
City of Holyoke, Massachusetts Gas and Electric Department
Liberty Utilities (New England Natural Gas Company) Corp.
Middleborough Gas & Electric Department
NSTAR Gas Company
Northern Utilities, Inc.
City of Norwich, Department of Public Utilities
Southern Connecticut Gas Company
Westfield Gas & Electric Department
Yankee Gas Service Company

NRG Companies (NRG)

NRG Power Marketing LLC

GenOn Energy Management, LLC

Public Systems

Massachusetts Municipal Wholesale Electric Company

New Hampshire Electric Cooperative, Inc.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Constellation Mystic Power, LLC

Docket No. ER18-1639-000

(Issued July 13, 2018)

POWELSON, Commissioner, *dissenting*:

I write separately to explain my disagreement with today's order, which, as my colleague Commissioner Glick writes, is yet another rush to judgment. For reasons I cannot understand, the majority accepts and suspends a cost-of-service agreement (Agreement) that is woefully under-supported and lacking in detail. A more prudent approach would have been to reject the Agreement and provide guidance where appropriate. This result would allow ISO New England and its stakeholders to *collectively* consider the best path forward following the July 2, 2018 Order (Waiver Order).¹ Unfortunately, today's order *again* puts the interests of one stakeholder above those of all others, and more troubling, paves the way for changes that threaten the long term viability of electricity markets in New England.

In the Waiver Order, the Commission stated, among other things, that the ISO New England tariff *may* be unjust and unreasonable due to its failure to address regional fuel security concerns that could result in reliability violations as soon as 2022.² Further, it gave ISO-New England the option to either: 1) submit "interim Tariff revisions that provide... a short-term, cost-of-service agreement to address demonstrated fuel security concerns [,]" or 2) "show cause as to why the Tariff remains just and reasonable in the short- and long-term such that one or both filings is not necessary."³

Today's order, however, prejudices the outcome of the section 206 proceeding by accepting and suspending the Agreement. Despite language in the Waiver Order highlighting a preference for "markets" or "market-based solutions," the action taken sends a different message. By setting the Agreement for modified settlement and hearing procedures, the majority is expressing a preference for a short-term cost-of-service mechanism to address fuel security. That message may have been implied in the Waiver

¹ *ISO New England, Inc.*, 164 FERC ¶ 61,003 (Waiver Oder) (2018).

² *Id.* at P 2.

³ *Id.* at P 2.

Order, but after today's order there is no question as to the majority's direction.⁴ I share Commissioner Glick's frustration that the Commission is not even waiting for stakeholders' responses to the Waiver Order issued just last week before moving forward with plans to provide short-term out-of-market compensation to Exelon.⁵

This is problematic for a number of reasons. First, the Agreement itself is deficient. Perhaps most notably, it is void of any cost allocation proposal. ISO New England has explained that fuel security is a regional, rather than a local issue. Similarly, throughout the Waiver Order, the majority consistently referred to the fuel security issue as regional in nature, as opposed to local.⁶ While the majority affirmed its expectation that any cost allocation proposal "adhere to our cost causation precedent," and "identify the beneficiaries of the service rendered," it is becoming increasingly evident that any *ex ante* cost allocation proposal that does not allocate costs on a regional basis will be difficult for the Commission to justify.

What makes this concerning is that numerous parties raised cost allocation concerns – particularly, whether costs should be allocated regionally or locally – in the Waiver Order record, and again in this proceeding. For example, the Maine Public Utilities Commission and the New Hampshire Public Utilities Commission (NHPUC) both argue that the costs associated with the Agreement, or a similar cost-of-service agreement, should be allocated to the local area that caused the need to retain the resource.⁷ NHPUC argues that if Pay-for-Performance is determined to be unable to mitigate regional fuel security concerns due to environmental mandates imposed by one or more New England states, then that state or states should be allocated the costs of any fuel security cost-of-service agreement.⁸ I agree.

⁴ See Waiver Order at P 54: "In short, if a state, through policy or permitting authority, prevents investors from adequately responding to the price signals sent by the market, there may be instances where the market alone does not address the problem. As a result, in some circumstances, *it may be necessary to consider reliance upon short-term, out-of-market mechanisms to retain certain existing units*, while ISO-NE continues to develop longer-term market solutions." (emphasis added).

⁵ See *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (Glick, Comm'r, dissenting).

⁶ See Waiver Order at PP 47, 49, 54, 55, 57, 58.

⁷ Maine Public Utilities Commission June 6, 2018 Protest at 1-2; New Hampshire Public Utilities Commission (NHPUC) June 6, 2018 Comments at 4.

⁸ NHPUC June 6, 2018 Comments at 4.

Unfortunately, having declared that fuel security is a regional issue, and by finding that “any cost allocation method that ISO-NE proposes and the Commission accepts in [the 206] proceeding will apply to the Agreement here,” the majority has failed to adequately consider a critical element of any short-term cost-of-service proposal – or, for that matter, any just and reasonable rate.⁹ By accepting and suspending the Agreement, the majority is placing a high degree of faith in the outcome of a stakeholder process – one that it has already prejudged – and could find itself at the center of a controversial cost allocation battle come December.

The second problem with the direction of the majority’s decision is that today’s order further draws attention away from the real problem. Over the next few months, interested participants will focus time and energy on the Agreement in an attempt to reach consensus on a host of challenging issues.¹⁰ Because the Commission has failed to narrow the issues to be addressed in this proceeding,¹¹ today’s order has opened a proverbial can of worms. Thus, instead of working collaboratively to respond to the Commission’s section 206 inquiry or consider more cost-effective alternatives, stakeholders will be working on the Mystic Agreement.

Another reason the majority’s decision is deficient is because it disregards how expensive a solution Exelon is proposing, particularly in light of the fact that it is only a *temporary* solution. I am far from convinced that retaining Mystic is the least-cost option. Assume, for the sake of argument, that \$400 million is necessary to keep Mystic online for two years.¹² At best, New England ratepayers will pay \$400 million for a two year solution, after which, Mystic will be gone. For reference, oil procurement for the Winter Reliability Program for the 2015/2016 through 2017/2018 winters cost New England ratepayers roughly \$91 million – less than a quarter of the \$400 million

⁹ See *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at P 41.

¹⁰ Issues raised include: Mystic’s annual fixed revenue requirement, future capital expenditures, return on equity and proposed capital structure, fuel supply charge, fuel supply agreement, whether Mystic is the “least-cost” option, etc. See NESCOE June 6, 2018 Comments.

¹¹ Due in part to the volume and complexity of the issues, the NESCOE requested that the Commission “narrowly define the scope of the proceeding and establish a process to resolve any issues on an expedited basis.” See NESCOE June 6, 2018 Comments at 1.

¹² The proposed annual fixed revenue amount for Mystic 8 and 9 is \$218,974,263 for 2022-2023 and \$186,951,485 for 2023-2024 for a total of \$405,925,748. See *Constellation Mystic Power, LLC* May 16, 2018 Transmittal Letter at 8.

requested by Exelon.¹³ Longer-term alternatives, even if done through out-of-market payments, could be more cost effective than retaining Mystic. For example, continuing the Winter Reliability Program could produce similar results as retaining Mystic at a much lower cost. Additionally, transmission alternatives may exist that could solve the problem created by the retirement of Mystic at a lower cost. Unfortunately, these options have been disregarded by ISO New England and the majority.

Other alternatives, such as additional dual fuel capability should also not be foreclosed by the region. In a 2016 study, the U.S. Department of Energy's National Energy Technology Laboratory (NETL) highlighted the potential for dual fuel capability to limit gas and electric system interdependences during stressed system conditions in New England.¹⁴ According to the analysis, six power plants (totaling 3,572 MW, which is double the output of Mystic) have space for fuel storage tanks.¹⁵ The analysis further found that 80 percent of all gas-fired generation and 75 percent of non-dual fuel capable generation lie within 10 miles of a current non-natural gas pipeline that could transport a secondary fuel.¹⁶ In the same report, dual fuel conversion costs were estimated to be between \$16,000/MW and \$54,000/MW¹⁷, or between \$12.8 million and \$43.2 million for a hypothetical 800 MW facility. This is yet another option that would address the issue at a price tag well below the \$400 million requested by Exelon.

Pay-for-Performance was explicitly designed to provide financial incentives to resources to ensure availability through, for example, dual fuel capability. If, for some reason, these incentives are insufficient, or market participants are unable to adequately respond to them, spending \$400 million outside of the market to add dual fuel capability could substantially increase the region's fuel security by having resources with onsite fuel located across the New England region – not just in downtown Boston. While I am not advocating for any out-of-market payment, I think it is important to understand what \$400 million could buy, other than a two-year contract with Mystic. The region should

¹³ See ISO New England Winter Program Payment Rate at <https://www.iso-ne.com/markets-operations/markets/winter-program-payment-rate/>.

¹⁴ See *ISO New England Dual Fuel Capabilities to Limit Natural Gas and Electric Interdependencies* (NETL Study) (2016), available at https://www.eenews.net/assets/2017/11/21/document_gw_11.pdf.

¹⁵ *Id.* at 17.

¹⁶ *Id.*

¹⁷ *Id.*

not abandon dual fuel as a potential solution, particularly when it is a viable, potentially economic, option with built-in redundancies.

Alternatively, given the New England region's environmental goals, two other options to consider are: 1) pairing variable energy resources such as off-shore wind – which has a considerably higher capacity factor than on-shore wind – with natural gas-fired peaking resources; or, 2) in a few years, pairing variable energy resources and/or natural gas peaking facilities with energy storage. These examples make progress toward state renewable energy targets and energy storage mandates while simultaneously increasing fuel security. Unfortunately, no one is considering these options because ISO New England, Exelon, and now the Commission, all agree that Mystic – or something similar – is necessary in the short-term.

Finally, I am troubled that the majority and ISO New England appear beholden to the timelines demanded by Exelon. While the majority is willing to waive certain tariff provisions and allow Exelon to defer its retirement decision until January 2019, it is troubling that they are unwilling to question Exelon's December 21, 2018 ultimatum. Although the Agreement will be set for modified settlement and hearing procedures, there are decisions made in today's order that reflect a striking level of confidence given the divisive nature of the issues, limited record, and short timeframe in which stakeholders have been on notice.

Never has the Commission more clearly let one stakeholder – a *single* market participant – fundamentally alter the course of wholesale electricity markets as it has both in today's order and the Waiver Order. In what has amounted to an unprecedented exercise of market power, using lack of fuel security as its threat, Exelon has, yet again, crafted a creative solution simply because they are unable to compete in the market.

Accordingly, I respectfully dissent.

Robert F. Powelson
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Constellation Mystic Power, LLC

Docket No. ER18-1639-000

(Issued July 13, 2018)

GLICK, Commissioner, *dissenting*:

Today's order continues the Commission's needless rush to judgment on a series of significant questions regarding the potential retention of the Mystic units and the Distrigas LNG facility.¹ Although this approach may provide Exelon with certainty in the near-term, the fundamental economic and legal questions created by today's order will ultimately create far greater uncertainty for every other market participant. The eventual consequence of the Commission's action will be New England ratepayers bearing significant additional costs without even a cursory examination by the Commission of other options for addressing potential fuel security concerns more efficiently.

The fact that reliability is among the Commission's most important responsibilities does not transform every reliability concern into an emergency. This is particularly true here, where the reliability concern created by Mystic's potential retirement will not manifest itself for at least four years, even under conservative assumptions.² But rather than giving this important issue the consideration that it deserves, the Commission is again jumping to conclusions without adequately evaluating the causes and contours of the fuel security issues in New England or identifying a comprehensive set of potential

¹ It is particularly troubling that the rush is one of Exelon's making. *See, e.g., Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022, at P 11 n.14 (2018) (explaining that the Commission is establishing an expedited hearing schedule due to the deadline for Exelon to determine whether to unconditionally retire Mystic 8 and 9); *id.* P 6 (stating that the cost-of-service agreement "provides as conditions precedent that the Commission must issue an order accepting the Agreement and the [annual fixed revenue requirement] by December 21, 2018").

² *ISO New England Inc.*, 164 FERC ¶ 61,003, at P 49 (2018) (Show Cause Order) ("accept[ing] ISO-NE's conclusions that the retirement of Mystic 8 and 9, under current ISO-NE Tariff provisions, could cause ISO-NE to violate mandatory reliability standards as soon as 2022").

solutions.³ Indeed, the Commission is not even waiting for stakeholders' responses to the Show Cause Order it issued *last week* before plunging ahead with its plans to bail out Mystic and Distrigas. In setting this cost-of-service agreement for hearing, the Commission is moving forward under the assumption that ISO-NE will respond to the Show Cause Order by filing tariff provisions that will permit Mystic to recover its full cost-of-service—and maybe more. Or, regardless of what ISO-NE files, the Commission will revise ISO-NE's tariff to produce the same result. Rather than rushing to address a cost-of-service agreement for implementing tariff provisions that ISO-NE has not yet proposed and that the Commission has (at least nominally) not yet approved or even found to be necessary, the Commission should be encouraging ISO-NE and its stakeholders to engage in a thorough process to evaluate fuel security issues and identify the most cost-effective solution(s). I agree with my colleague Commissioner Powelson that today's order and the Show Cause Order disregard alternative options that may be considerably more cost-effective at addressing New England's fuel security issues than paying \$400 million for a *temporary* solution.⁴

In addition to pre-judging the outcome of the show cause proceeding, today's order sweeps aside fundamental legal questions raised by the Commission's actions. In addressing what appears to be a question of first impression, the Commission concludes that it has authority to allow Mystic to recover through its wholesale electric rate the cost—perhaps the entire cost—of operating the Distrigas facility. Mystic should be able to recover certain costs associated with purchasing fuel from Distrigas, such as the prudently incurred variable costs of fuel burned to produce electricity, because those costs are sufficiently related to the wholesale sale subject to the Commission's jurisdiction. However, it is not at all clear that the Commission has jurisdiction to permit Mystic to recover all of the costs of operating Distrigas in its wholesale electric rate, even if they are arguably just and reasonable.

In its haste to respond to Exelon's threat to retire Mystic, the Commission is making a results-oriented jurisdictional claim without taking the time to seriously address its implications. Rather than summarily deciding this sole issue, I would further examine the question and its implications. The Commission should have included this jurisdictional question within those to be addressed in participants' briefs after the

³ *Id.* at 1 (Glick, Comm'r, dissenting in part).

⁴ *See Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at 3-5 (Powelson, Comm'r, dissenting). Even if out-of-market action is shown to be necessary to address fuel security issues in New England, alternative options that may be more cost-effective include continuing the Winter Reliability Program, developing transmission alternatives, expanding dual-fuel capability, and pairing renewable resources such as offshore wind with energy storage.

hearing procedures established by today's order.⁵ Or the Commission could have instead ordered a further paper hearing to run in parallel to that proceeding. Neither would have delayed the Commission's expedited schedule and would have allowed the Commission to methodically consider the jurisdictional question before it.

It cannot be the case that the FPA permits the Commission to authorize a generator to recover through a wholesale rate any but for cost of producing electricity. That would mean that the Commission could permit a natural-gas fired generator to recover the costs of any upstream expense, even the cost of financing the construction of a natural gas pipeline or operating a Russian LNG export facility.⁶ I believe that a cost can be recovered through a wholesale rate only if that cost bears a sufficiently close relationship to the wholesale sale over which the Commission has jurisdiction. Thus, the critical question in this proceeding is whether the costs to be recovered are sufficiently related to Mystic's jurisdictional sales.⁷ In concluding that the Commission has jurisdiction over

⁵ See *id.* P 12.

⁶ See, e.g., Jon Chesto, *Russian LNG is unloaded in Everett; the supplier (but not gas) faces US sanctions*, Boston Globe (Jan. 30, 2018), <https://www.bostonglobe.com/business/2018/01/29/tanker-unloads-Ing-everett-terminal-that-contains-russian-gas/rewj1wKjajaKtLp79irzTI/story.html> (“A giant tanker of liquefied natural gas that unloaded at the Distrigas terminal in Everett over the past two days included fuel from a plant in Siberia owned by a Russian company under US sanctions.”).

⁷ The order cites a number of cases for the proposition that the Commission's review of Mystic's cost-of-service agreement does not turn on whether the Commission has regulatory authority over all aspects of that agreement. *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at P 37 n.54. None of these cases support the Commission's conclusion that it may assert jurisdiction over all of the costs of operating Distrigas. For example, in *BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004), the court upheld the Commission's decision to reject a pipeline's recovery of certain civil litigation expenses because that litigation lacked the “requisite nexus” to the pipeline's Commission-jurisdictional service to justify inclusion in the wholesale rate. *Id.* at 1294-95. The court also explained that its precedent provided a test for determining whether a utility's litigation costs were recoverable, namely whether the underlying “litigation serves the interests of ratepayers.” *Id.* at 1296-97. But that conclusion sheds no light on whether the costs of operating a separate facility can be recovered through a public utility's wholesale rate. Similarly, in *Grand Council of Crees v. FERC*, 198 F.3d 950 (D.C. Cir. 2000), the court noted that environmental costs associated with developing and operating a facility whose rates were subject to Commission regulation under sections 205 and 206 of the FPA could potentially be recovered through the facility's wholesale

every component of Mystic's cost-of-service agreement, today's order makes no effort to develop a framework for determining which costs are sufficiently related to the wholesale sales over which the Commission has jurisdiction and those which are not. This is particularly concerning given the lack of a fully developed record that would permit us to understand the practical implications of the Commission's theory.⁸

Today's order asserts jurisdiction over all of Distrigas' operating costs because of the "extremely close relationship" between Mystic and Distrigas. The order relies on Mystic's statement that it will incur costs related to Distrigas' operation "to effectuate a jurisdictional sale," and that Distrigas is "fully integrated" with Mystic 8 and 9 and that "each depends on the other to operate economically."⁹ The argument appears to be that because ISO-NE's answer suggests that "Distrigas *likely* would not be a viable enterprise without the Mystic units,"¹⁰ the Commission is authorized to enable Mystic to recover the costs of the Distrigas facility in Mystic's wholesale rates. This logic suggests that the Commission has the authority to require customers to pay the full cost of operating any facility simply because a public utility is that facility's biggest customer and the facility might not exist without the public utility's business. But the Commission identifies no precedent to support this assertion. At the very least, the Commission should be exploring in greater detail the actual relationship between Mystic and Distrigas to

rate, even though the Commission does not regulate the underlying environmental issues. *Id.* at 957. But the environmental costs of developing and operating a particular facility are without question costs directly related to the rates that that facility charges. The case thus provides no foundation for the Commission's more sweeping theory of its jurisdiction.

⁸ For example, today's order appears to approve of Mystic's recovery of Distrigas' capital expenditure costs despite the fact that the record does not indicate what those expenditures would be or whether they are sufficiently related to Mystic's wholesale sale of electricity to warrant their recovery through Mystic's wholesale electric rate. And the Fuel Supply Agreement, which describes the Distrigas costs that will flow to Mystic, refers to unspecified services (e.g., the indeterminate administrative services fee) and to agreements not provided as part of the record (e.g., the LNG Terminal Service Agreement). In fact, the order leaves open the possibility that Mystic could recover, through Mystic's wholesale electric rate, the entire cost of operating Distrigas, even though Mystic's LNG purchases represent only 31 percent of Distrigas' maximum send-out capacity. NESCOE Comments at 36.

⁹ *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at PP 35 n.50, 36.

¹⁰ ISO-NE June 7, 2018 Answer, Docket No. ER18-1509-000, at 27 n.99 (emphasis added).

determine where the line should be drawn between jurisdictional and non-jurisdictional costs. In short, although the Commission keeps focusing on the need for certainty—in this case to keep Mystic 8 and 9 (and Distrigas) from retiring—today’s order does the opposite by introducing a novel interpretation of the FPA without building a record to support that decision.

Finally, I agree with Commissioner Powelson that what is being proposed amounts to an unprecedented exercise of market power by Exelon that will let a single market participant fundamentally alter the course of the wholesale electricity markets.¹¹ As I previously stated, I suspect that the most likely outcome of the Commission’s approach to addressing fuel security in ISO-NE will be a parade of uneconomic generators seeking cost-of-service rate treatment under the guise of fuel security.¹² Today’s order is yet another step in the direction of addressing the fuel security issue through a series of one-off determinations regarding the need to keep particular resources, which I fear will short circuit efforts to fundamentally reform the ISO-NE markets to address the drivers of whatever fuel security problem may exist.

Accordingly, I respectfully dissent from today’s order.

Richard Glick
Commissioner

¹¹ See *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at 5 (Powelson, Comm’r, dissenting).

¹² Show Cause Order, 164 FERC ¶ 61,003 at 3 (Glick, Comm’r, dissenting in part).