165 FERC ¶ 61,267
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

Constellation Mystic Power, LLC Docket No. ER18-1639-000

ORDER ACCEPTING AGREEMENT, SUBJECT TO CONDITION, AND DIRECTING BRIEFS

(Issued December 20, 2018)

Paragraph Numbers

1. On May 16, 2018, pursuant to section 205 of the Federal Power Act (FPA),[1] in Docket No. ER18-1639-000, 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). On July 13, 2018, the Commission accepted the Agreement for filing, suspended it for a nominal period, to become effective June 1, 2022, as requested, subject to refund and subject to the outcome of the ongoing Commission proceedings regarding interim Tariff provisions addressing fuel security.[3] The Commission also established expedited hearing procedures.[4]

2. As discussed below, we accept the Agreement, subject to condition, effective June 1, 2022, as requested. We direct a compliance filing within 60 days of this order and a paper hearing on the issue of return on equity (ROE). For the paper hearing, participants are to submit initial briefs to the Commission 120 days from the date of this order. Responses to those initial briefs are due 90 days after the date that the initial briefs are due. No answers or additional briefs will be permitted.

I. Background and Procedural History

A. Forward Capacity Market (FCM)

3. To ensure a sufficient supply of capacity, ISO-NE operates a Forward Capacity Market (FCM), which requires resources to offer their supply into an annual Forward Capacity Auction (FCA). Resources that clear the auction receive a Capacity Supply Obligation (CSO) to be fulfilled for a one-year period, starting three years later.

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[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.

[3] *See ISO New England Inc.*, 165 FERC ¶ 61,202 (2018) (Interim Fuel Security Provisions Order).

[4] *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (2018) (July 13 Order).

Suppliers that are awarded CSOs receive payments in exchange for committing to offer their capacity into ISO-NE's day-ahead and real-time energy markets on a daily basis.[5] Once a resource enters the FCM, it is automatically re-entered into every FCA, unless it affirmatively seeks to remove its capacity from the market permanently, referred to as retirement, or for a single capacity commitment period.

4. An existing resource seeking to retire must submit a Retirement De-list Bid 11 months before the FCA corresponding to the period for which it intends to retire. The Internal Market Monitor (IMM) will review and mitigate Retirement De-List Bids in some circumstances.[6] ISO-NE also reviews all requests to de-list to determine if the capacity associated with the de-list bid is needed for reliability. If ISO-NE determines that a resource is needed because the absence of the capacity would result in a violation of Northeast Power Coordinating Council, Inc. or North American Electric Reliability Corporation (NERC) criteria or other ISO-NE system rules, it may request that the resource stay in service. If the resource owner chooses to remain in service, it may choose either to receive the Commission-accepted Retirement De-List Bid or to file a cost-of-service rate with the Commission under FPA section 205.[7] Once the reliability need is resolved, the resource will retain its CSO through the end of the capacity commitment period for which it was retained for reliability and then must retire.

[5] Currently ISO-NE is in Capacity Commitment Period 9 (June 1, 2018 – May 31, 2019) for which capacity was procured in FCA 9.

[6] ISO-NE, Transmission, Markets and Services Tariff § III.13.1 (57.0.0) (ISO-NE Tariff). A supplier's Retirement De-List Bid specifies the minimum capacity price that a resource must receive from the FCM for it to stay in the market, rather than retire. In some instances, the IMM mitigates bids (i.e., replaces the resource's bid with the IMM's own estimate) to ensure the bids reflect that resource's going forward and opportunity costs. ISO-NE Tariff § III.13.1.2.3.2.1.1.2. Once the IMM has made its determination on a resource's Retirement De-List Bid, the resource may either accept the IMM-authorized Retirement De-List Bid or unconditionally retire.

[7] Once ISO-NE has informed a resource that it is needed for reliability, it has 10 days to decide whether to remain in service or retire. Such a resource must then elect to receive either the Commission-approved Retirement De-List bid or a cost-of-service rate within six months of ISO-NE's filing of the FCA results with the Commission. ISO-NE Tariff, § III.13.2.5.2.5.1(b). Here, Mystic has elected to be compensated under a cost-of-service rate. However, the Agreement provides as conditions precedent that the Commission issue an order accepting the Agreement by December 21, 2018, and both Mystic and ISO-NE must accept the Commission-approved Agreement by January 3, 2019. Agreement § 2.1.

5. ISO-NE has noted that New England's generation fleet relies primarily on fuels imported from elsewhere in the United States or from overseas to produce power and that, during winter, fuel for nearly half the region's generating capacity may become inaccessible due to priority demand for natural gas from the heating sector.[8] In other words, when companies serving the heating sector use their allocated natural gas supplies from pipelines in New England, natural gas-fired generating resources may be unable to obtain enough fuel to operate their plants.

B. Waiver Proceedings

6. The thirteenth FCA (FCA 13), which will procure capacity for the corresponding capacity commitment period of June 1, 2022 – May 31, 2023, will be held beginning on February 4, 2019. Existing capacity resources seeking to retire (and therefore not participate in FCA 13) were required to submit their Retirement De-list Bids by March 23, 2018.[9]

7. Exelon is the owner of the Mystic Generation Station in Boston, including the Mystic 8 and 9 combined-cycle generators, which have a combined winter seasonal capacity rating of just over 1,700 MW. The only fuel source for Mystic 8 and 9 is natural gas purchased from the Everett Marine Terminal, located adjacent to the Mystic Generation Station. Everett provides Mystic 8 and 9 with a fuel source that is not subject

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[8] *See* Petition for Waiver, ISO New England Inc., Docket No. ER18-1509-000, at 8 (filed May 1, 2018) (Petition for Waiver). *See also* ISO New England Inc., Testimony of Peter Brandien, Attachment to Petition for Waiver, Docket No. ER18-1509-000, at 5-7 (filed May 1, 2018) (Brandien Testimony).

> In New England, real-time system reliability is increasingly challenged by the possibility that the region's generating fleet will not have, or will not be able to obtain, the fuel necessary to produce sufficient energy to meet system demand and to maintain required operating reserves during extended periods of cold winter weather or other, similar system-stressed conditions . . . . [This results from the] unavailability of gas transportation capacity for non-firm customers, like most gas-fired generators in New England, when the capacity of the natural gas-fuel infrastructure is fully utilized by firm shippers, primarily for service to residential and commercial space heating customers.

[9] *See* ISO-NE, Forward Capacity Auction 13 Schedule, https://www.iso-ne.com/static-assets/documents/2017/05/fca-13-timeline-5-9-2017.pdf. The Retirement De-List Bid specifies the minimum capacity price that a resource must receive from the FCM for it to stay in the market, rather than retire.

to the region's historical interstate natural gas pipeline constraints.[10] As discussed below, Exelon recently purchased the Everett facility. On March 23, 2018, Exelon submitted Retirement De-List Bids for all four Mystic units. Through those bids, Exelon notified ISO-NE of its intention to retire the generators at its Mystic facility when the existing CSOs associated with the Mystic Generation Station expire on May 31, 2022.[11]

8. Prior to Exelon submitting Retirement De-List Bids for the Mystic Generation Station, in January 2018, ISO-NE published an Operational Fuel-Security Analysis (OFSA),[12] which evaluated the level of operational risk posed to the bulk power system under various fuel-mix scenarios. For each scenario, the study quantified the magnitude and frequency of energy shortfalls (including the depletion of reserves and, eventually, load shed) that would require ISO-NE to use its emergency Operating Procedures to serve aggregate system demand while maintaining the required levels of operating reserves.[13] Based on the OFSA, ISO-NE concluded that Mystic 8 and 9 would be needed for the winter of 2024-25 to maintain reliability.[14] Specifically, ISO-NE concluded that the loss of both Everett and Mystic 8 and 9 would lead to 87 hours of depletion of 10-

[10] *ISO New England Inc.*, 164 FERC ¶ 61,003 at P 4 (2018) (Waiver Order).

[11] Petition for Waiver at 1.

[12] ISO-NE, *Operational Fuel-Security Analysis* (Jan. 2018), https://iso-ne.com/static-assets/documents/2018/01/20180117_operational_fuel-security_analysis.pdf.

[13] Brandien Testimony at 22-23. The study quantified operational risks by reporting the number of hours when ISO-NE would be forced to implement Operating Procedure 4 (Action During a Capacity Deficiency) (i.e., depletion of 30-minute reserves, load relief, and emergency import), and the number of hours when ISO-NE would deplete its 10-minute operating reserves, and the number of hours and days when ISO-NE would be required to implement Operating Procedure 7 (Action in an Emergency) (i.e., load shed). *See* ISO-NE, *ISO New England Operating Procedure No. 4 - Actions During a Capacity Deficiency* (effective June 1, 2018), https://www.iso-ne.com/static-assets/documents/rules_proceds/operating/isone/op4/op4_rto_final.pdf; ISO-NE, *ISO New England Operating Procedure No. 7 - Action in an Emergency,* ISO New England Inc. (effective Jan. 8, 2018), https://www.iso-ne.com/static-assets/documents/rules_proceds/operating/isone/op7/op7_rto_final.pdf.

[14] Brandien Testimony at 30.

minute operating reserves and 24 hours of load shedding.[15] Additionally, ISO-NE conducted an analysis similar to that performed in the OFSA to assess implications to system operations if Mystic 8 and 9 were retired or otherwise unable to operate during the 2022-2024 capacity commitment periods, and ISO-NE concluded that unacceptable reliability impacts would occur with the loss of Mystic 8 and 9.[16] Specifically, ISO-NE estimated that, even with Everett's continued availability, the retirement of Mystic 8 and 9 could result in multiple days of load shedding.[17] ISO-NE further concluded that, if Mystic 8 and 9 retired, Everett might no longer be financially viable[18] and that, if Everett also retired, the region's risk of operating reserves depletion and load shedding would increase, as would the length and severity of such events.[19]

9. On May 1, 2018, in Docket No. ER18-1509-000, ISO-NE requested waiver of its Tariff to enable it to enter into an out-of-market cost of service contract with Exelon for Mystic 8 and 9 in order to meet the region's fuel security needs during the capacity commitment periods associated with FCA 13 and FCA 14 (i.e., June 2022 through May 2024).[20] The Commission rejected the request for waiver, stating that, rather than seeking a waiver of existing Tariff provisions, ISO-NE's request "creates an entire

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[15] ISO-NE, *Operational Fuel-Security Analysis* (Jan. 2018) at 45-46, https://iso-ne.com/static-assets/documents/2018/01/20180117_operational_fuel-security_analysis.pdf.

[16] Brandien Testimony at 31, 35.

[17] *Id.* at 43. The concerns raised by the dissent regarding the mechanics of ISO-NE's fuel security studies were addressed in prior Commission orders. The Commission agreed with ISO-NE's reasonable explanation that it balanced the uncertainty inherent in forecasting one to three years in the future with the need to set triggering criteria that reflect a regional fuel security need that cannot be met through other means during extreme events. *See* Waiver Order, 164 FERC ¶ 61,003 at P 49 (finding ISO-NE had used a reasonable set of assumptions in the fuel security and Mystic retirement studies).

[18] Waiver Order, 164 FERC ¶ 61,003 at P 11 (citing Testimony of Richard L. Levitan and Sara Wilmer on Behalf of ISO New England, Inc., Petition for Waiver, Ex. ISO-002 at 7, 11-12 (Levitan Testimony) ("ISO-NE explains that, because [Everett] is economically reliant on the continued operation of Mystic 8 and 9, its largest customers, the retirement of these units could set in motion a series of events that would endanger the continued operation of [Everett]").

[19] *See* Brandien Testimony at 5.

[20] Waiver Order, 164 FERC ¶ 61,003 at P 12.

process that is not in the ISO-NE Tariff in order to allow for a cost-of service agreement to meet regional fuel security concerns."[21]

10. However, the Commission found that the OFSA and Mystic Retirement Studies indicated that the Tariff may be unjust and unreasonable because it contained no mechanism to address ISO-NE's pressing fuel security concerns,[22] and it instituted a proceeding under FPA section 206[23] to enable ISO-NE to propose interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns and to submit by July 1, 2019 permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns.[24]

C. **Agreement**

11. As noted above, on May 16, 2018, Mystic filed the Agreement among itself, Exelon,[25] and ISO-NE providing for cost-of-service compensation for continued operation of Mystic 8 and 9. In its July 13 Order, the Commission accepted the Agreement for filing, suspended it for a nominal period to become effective June 1, 2022, as requested, subject to refund and subject to the outcome of the Commission proceedings that ultimately resulted in the development and acceptance of interim Tariff provisions governing fuel security agreements.[26] The Commission noted that "ISO-NE submitted evidence showing that, if Mystic 8 and 9 do not provide capacity during the

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[21] *Id.* P 47.

[22] *Id.* P 49.

[23] 16 U.S.C. § 824e (2012).

[24] Waiver Order, 164 FERC ¶ 61,003 at P 55. The Commission additionally acted *sua sponte* to provide a limited extension of the Tariff deadline that would otherwise have required Exelon to decide by July 6, 2018 whether to retire unconditionally Mystic 8 and 9 rather than enter the units into FCA 13, and instead allowed Exelon to postpone its retirement decision regarding Mystic 8 and 9 up to and including January 4, 2019. Waiver Order, 164 FERC ¶ 61,003 at P 59.

[25] Mystic and Exelon Generation (ExGen) are affiliates and are both subsidiaries of Exelon Corporation. NESCOE Initial Br. at 1.

[26] ISO-NE submitted proposed interim Tariff revisions on August 31, 2018, which the Commission accepted on December 3, 2018. Interim Fuel Security Provisions Order, 165 FERC ¶ 61,202.

capacity commitment periods associated with FCA 13 and FCA 14, ISO-NE will not be able to ensure fuel security in the region."[27] However, although the Commission accepted the Agreement, provided guidance and made certain findings,[28] it set additional contested issues for hearing and settlement judge proceedings. The Commission directed the Presiding Judge to conduct hearing procedures and certify the record to the Commission without issuing an initial decision,[29] and the Presiding Judge certified the record to the Commission on October 12, 2018.[30] Participants then submitted initial briefs and reply briefs to the Commission.

II. Discussion

12. We accept the Agreement, subject to condition, to become effective June 1, 2022, as discussed below. We also direct Mystic to submit a further compliance filing, within 60 days of this order and direct additional briefing on the issue of ROE. For the paper hearing, participants are to submit initial briefs to the Commission 120 days from the date of this order. Responses to those initial briefs are due 90 days after the date that the initial briefs are due. No answers or additional briefs will be permitted.

A. Cost of Capital

1. Return on Equity

a. Proposal

13. Mystic proposes an overall rate of return of 8.46 percent based on a cost of debt of 4.76 percent, ROE of 10.26 percent, and a capital structure of 32.7 percent debt and 67.3 percent equity.[31] Mystic's witness, Dr. Olson, submitted testimony in support of the ROE, performing a detailed discounted cash flow (DCF) analysis to determine the

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[27] July 13 Order, 164 FERC ¶ 61,022 at P 4 (citing Waiver Order, 164 FERC ¶ 61,003).

[28] *See id.* PP 19-20, 34-38, 41.

[29] *Id.* P 12.

[30] Certification of Record in Constellation Mystic Power, LLC of Presiding Administrative Law Judge Steven L. Sterner, Docket No. ER18-1639-000 (October 12, 2018).

[31] Waiver Order, 164 FERC ¶ 61,003 at P 12.

appropriate ROE for Mystic.[32] Dr. Olson performed a DCF analysis on a proxy group of other entities that are publicly traded, resulting in an imputed ROE. Dr. Olson states that he adhered to the national proxy group approved by the Commission in Opinion No. 531[33] and identified companies within the group with comparable risk to Exelon, Mystic's corporate parent.[34] In the hearing, Mystic proposed an updated second ROE analysis, arguing that its ROE should be increased to 10.71 percent (the median of the upper half of the range) because: (1) it is subject to more risk than the New England transmission owners; and (2) the same anomalous capital market conditions that existed in Opinion Nos. 531 and 551 exist in the record in this proceeding.[35] Alternatively, Mystic argued that it would be appropriate to use the 10.57 percent ROE of Mystic's interconnected utility, Eversource Energy.[36] At hearing, multiple participants opposed Mystic's proposed ROE and instead proposed an ROE of 8.22 percent, noting their disagreement with Mystic's DCF proxy group and its proposal to set the ROE at the midpoint value.[37]

b. <u>Opposing Briefs</u>

14. Numerous participants argue that Mystic's proposed proxy group is unjust and unreasonable.[38] ENECOS and Massachusetts AG argue that the Commission has held

[32] Mystic Cost of Service Agreement, Attachment E (Testimony of Dr. Charles E. Olson) at 1 (Olson Testimony). Exelon is the parent of ExGen and therefore the ultimate parent of Mystic.

[33] *Martha Coakley v. Bangor-Hydro Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014), *vacated and remanded*, *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (*Emera Maine*).

[34] Olson Testimony at 4. Exelon is the parent of ExGen and therefore the ultimate parent of Mystic. *See supra* n.25.

[35] Mystic Initial Br. at 46-49 (citing Ex. MYS-0050 at 2; Ex. MYS-0029 at 15; Ex. MYS-0010 at 6-8).

[36] Mystic Transmittal Letter at 14-15.

[37] *See* ENECOS Initial Br. at 37; Trial Staff Initial Br. at 23-24; Connecticut Parties Initial Br. at 52-54; NESCOE Initial Br. at 21; Massachusetts AG Initial Br. at 14-15.

[38] ENECOS Initial Br. at 38; Trial Staff Initial Br. at 24; Connecticut Parties Initial Br. at 57; Massachusetts AG Initial Br. at 21.

that the primary concern in selecting a proxy group is identifying companies with comparable risks to those facing the applicant and that the Commission has adopted a series of screens to ensure the resulting proxy group is of comparable risk to the target utility.[39] Trial Staff and Massachusetts AG argue that Trial Staff witness Mr. Keyton's proxy group appropriately applies the Commission's screens and identifies a proxy group containing 12 utilities which produces a range of reasonableness of 6.81 percent to 10.54 percent.[40] Massachusetts AG argues that, by contrast, Dr. Olson's proxy group contains only seven utilities and produces a significantly higher range of reasonableness of 9.24 percent to 11.87 percent, which results in an upward bias that Dr. Olson achieved by inventing new proxy group screens and ignoring existing ones.[41] ENECOS argues that, to ensure a sufficiently sized proxy group, the Commission should broaden its credit rating screen in this proceeding to include companies whose credit rating are within one notch of Exelon's S&P or Moody's credit rating.[42]

15. Numerous participants argue that Dr. Olson has adjusted the standard proxy group screening criteria applied by the Commission in countless proceedings in ways that skew the result toward higher numbers.[43] They argue that Dr. Olson wrongly included Avangrid, a utility whose corporate structure is fundamentally different than the rest of the proxy group, along with Dominion, and Sempra, each of whom should have been removed because their inputs were distorted by merger & acquisition (M&A) activity.[44] Connecticut Parties and Trial Staff argue that Dr. Olson incorrectly excluded from his DCF proxy group any utility with less than $2 billion in revenue, and, as a result,

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[39] ENECOS Initial Br. at 38; Massachusetts AG Initial Br. at 15-16.

[40] Trial Staff Initial Br. at 25; Massachusetts AG Initial Br. at 16 (citing Ex. S-0010 at 3).

[41] Massachusetts AG Initial Br. at 16.

[42] ENECOS Initial Br. at 40.

[43] Connecticut Parties Initial Br. at 57; Massachusetts AG Initial Br. at 16; Trial Staff Initial Br. at 26-30.

[44] ENECOS Initial Br. at 38; Connecticut Parties Initial Br. at 57; Massachusetts AG Initial Br. at 17; Trial Staff Initial Br. at 32-37.

Dr. Olson excluded seven companies from his proxy group that would otherwise have been included.[45]

16. Connecticut Parties note that Dr. Olson conducted a DCF study as part of his direct testimony using a six-month study period ending March 2018 and later updated that DCF study in his rebuttal testimony using a six-month study period ending August 2018.[46] Connecticut Parties argued at hearing that Dr. Olson mixed and matched data from the two different study periods rendering the updated study unreliable.[47]

17. Numerous participants argue that Mystic's ROE should be set at 8.22 percent (i.e., the median of the DCF range), arguing that Mystic's risk is comparable to the remainder of the proxy group.[48] Massachusetts AG and Connecticut Parties argue that Dr. Olson incorrectly asserts the median of the upper half of the zone is necessary. Pointing to Dr. Olson's reliance on Opinion Nos. 531 and 551 in support of his assertion that anomalous capital market conditions warrant an upward adjustment, they note that the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated and remanded Opinion No. 531.[49] Numerous participants argue that, even if Dr. Olson were correct that capital market conditions are anomalous, he did not provide evidence to present any non-DCF study that would justify an upward adjustment.[50]

18. Numerous participants disagree with Dr. Olson's assertion that Mystic faces greater business risk as a merchant generator than the diversified, integrated utilities that compose the DCF proxy group, arguing that there is no reasonable basis for this

[45] Connecticut Parties Initial Br. at 57; Massachusetts AG Initial Br. at 16-17; Trial Staff Initial Br. 25-28.

[46] Connecticut Parties Initial Br. at 64 (citing Ex. MYS-0011; Ex. MYS-0035).

[47] *Id.* at 64-65 (citing Ex. MYS-0035).

[48] ENECOS Initial Br. at 37; Trial Staff Initial Br. at 23-24; Connecticut Parties Initial Br. at 52-54; NESCOE Initial Br. at 21; and Massachusetts AG Initial Br. at 14-15.

[49] Massachusetts AG Initial Br. at 20 (citing *Emera Maine*, 854 F.3d at 27); Connecticut Parties Initial Br. at 55.

[50] ENECOS Initial Br. at 47-50; Massachusetts AG Initial Br. at 20-21 (citing *ISO New England v. Bangor Hydro-Elec. Co.*, 161 FERC ¶ 61,031 at P 28 (2017)); Connecticut Parties Initial Br. at 55; Trial Staff Initial Br. at 45-47.

position.[51] Trial Staff argues that Mystic 8 and 9 will be operating for two years on a reliability must-run (RMR) basis, and during that time Mystic will be able to expense all of the costs of the units, both capital and non-capital, and recover them in the year they are incurred.[52] ENECOS argues that a utility that has a cost-of-service tariff ensures immediate recovery of any increase in costs, thus limiting its risk.[53] Trial Staff argues that, once the RMR period ends, Mystic will have the option to continue to operate the newly refurbished units at market-based rates, which is the profile of a company of no more than average risk.[54] Connecticut Parties argue that, if the Agreement is approved, Mystic will be the only generator operating in New England that is compensated using a guaranteed ROE under a cost-of-service agreement with ISO-NE and will receive a guaranteed cost-of-service rate, not a market-based rate.[55] Massachusetts AG argues that, given that the ROE at issue will apply during a cost-of-service period, Mystic's risk is lower than the proxy group, not higher.[56]

19. In their reply briefs, numerous participants reiterate their arguments that Dr. Olson wrongly included in its proxy group Avangrid, a utility fundamentally different than the rest of the proxy group, and Dominion and Sempra, which should have been removed due to M&A activity.[57] Connecticut Parties, ENECOS, and Trial Staff also reiterate their claims that Dr. Olson incorrectly excluded from his DCF proxy group any utility with less than $2 billion in revenue, and there is no basis to disregard Commission precedent by applying a revenue screen to the DCF proxy group.[58]

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[51] ENECOS Initial Br. at 49-50; Massachusetts AG Initial Br. at 22-23; Connecticut Parties Initial Br. at 55-57; Trial Staff Initial Br. at 43-45.

[52] Trial Staff Initial Br. at 45.

[53] ENECOS Initial Br. at 49.

[54] Trial Staff Initial Br. at 45.

[55] Connecticut Parties Initial Br. at 55.

[56] Massachusetts AG Initial Br. at 23.

[57] Connecticut Parties Reply Br. at 36-37; ENECOS Reply Br. at 40-45; Trial Staff Reply Br. at 11-15.

[58] Connecticut Parties Reply Br. at 37; ENECOS Reply Br. at 45-46; Trial Staff Reply Br. at 8-11.

20. Numerous participants continue to argue that Mystic's ROE should be set at the median of the DCF range and that Mystic has failed to demonstrate that its ROE should be placed at the median of the upper half of the DCF range.[59] They also reiterate in their reply briefs that Mystic is not riskier than a single utility of average risk and that capital market conditions are not anomalous and that current conditions do not support placing an ROE above the median.[60] Connecticut Parties assert that both Connecticut witness Mr. Parcell and Trial Staff witness Mr. Keyton each presented DCF studies that are fully consistent with Commission precedent. Connecticut Parties state that the median result of both those DCF studies is 8.22 percent.[61] ENECOS argues that Commission precedent holds that a merchant generator transitioning to cost-of-service is a utility of average risk.[62] Connecticut Parties claim that, once Mystic enters into the cost-of-service agreement, Mystic will be operating as a generator with a guaranteed return and recovery of its costs, rather than a merchant generator facing market risk, and will be of comparable risk to the companies in the DCF proxy group.[63]

21. Connecticut Parties and ENECOS dispute Mystic's argument that its proposed 10.71 percent ROE should be approved because it is commensurate with Eversource Energy's ROE.[64] Connecticut Parties argue that Mystic's ROE should be set at its own cost of equity and that an ROE developed in a different proceeding for a company with a different risk profile for a different time period provides no information relevant to Mystic's own cost of equity in this proceeding.[65] Further, Connecticut Parties and ENECOS contend that, because the Commission has not yet reached a final

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[59] Connecticut Parties Reply Br. at 34; ENECOS Reply Br. at 11, 32-33; Trial Staff Reply Br. at 15-18.

[60] Connecticut Parties Initial Br. at 38-40; ENECOS Reply Br. at 34-40; Trial Staff Reply Br. at 15-18.

[61] Connecticut Parties Reply Br. at 34.

[62] ENECOS Reply Br. at 36 (citing *Devon Power Co.*, 104 FERC ¶ 61,123, at PP 48-49 (2003) (following the general policy of the time of employing the midpoint of the zone of reasonableness for utilities of average risk); *Milford Power Co., LLC*, 110 FERC ¶ 61,299, at P 72 (2005); *Devon Power LLC*, 106 FERC ¶ 61,264, at P 23 (2004)).

[63] Connecticut Parties Reply Br. at 38-39.

[64] *Id.* at 41; ENECOS Reply Br. at 46-47.

[65] Connecticut Parties Reply Br. at 41-42.

determination regarding Eversource's ROE, even if it were legally relevant, tying Mystic's ROE to Eversource's ROE is an exercise in speculation.[66]

c. Supporting Briefs

22. Mystic notes that Dr. Olson determined that the most reasonable approach to developing a proxy group in this case was to use companies with similar risk profiles to Exelon, Mystic's ultimate parent, because it was not possible to develop a sufficient proxy group of merchant generation companies similar in risk to Mystic or its immediate parent, ExGen.[67] Mystic notes that Dr. Olson adhered to the national proxy group approved by the Commission in Opinion Nos. 531 and 551 and identified companies within the group with comparable risk to Exelon.[68] Mystic states that Dr. Olson then compared Mystic and ExGen's risk profile to the proxy group, among other factors, to determine the appropriate placement within the range of reasonable returns.[69]

23. Mystic further states that Dr. Olson adhered to the Commission's proxy group screening criteria utilized in Opinion Nos. 531 and 551, which were recently affirmed by the Commission in *Coakley*.[70] Mystic notes that, in addition, Dr. Olson eliminated companies with total revenues of $2 billion or less, or 6 percent of Exelon's total revenues of $33.53 billion, in order to achieve a proxy group of companies of comparable

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[66] *Id.* at 42; ENECOS Reply Br. at 46-47 (citing *Martha Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018) (*Coakley*)).

[67] Mystic Initial Br. at 51-52 (citing Ex. MYS-0010 at 17-18).

[68] *Id.* at 52 (citing Ex. MYS-0010 at 9); *see also* Opinion No. 531, 147 FERC ¶ 61,234 at P 96.

[69] Mystic Initial Br. at 52.

[70] Mystic Initial Br. at 52-53 (citing Ex. MYS-0010 at 13-14; Opinion No. 531, 147 FERC ¶ 61,234 at P 92; *Association of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 551, 156 FERC ¶ 61,234, at PP 20, 37-43; *Coakley*, 165 FERC ¶ 61,030).

risk to Exelon.[71] Utilizing this criteria, Mystic notes that Dr. Olson developed a proxy group of seven utilities to obtain a DCF estimate of the cost of common equity capital.[72]

24. Mystic argues that Dr. Olson's proxy group selection criteria are largely uncontested. Mystic argues that the areas of dispute are ENECOS's witness Dr. Lesser's application of the Commission's bond screen, Dr. Olson's use of a revenue screen in this case, and the inclusion of Avangrid, Inc., Dominion, and Sempra in the proxy group, which Mystic notes is not surprising, given that they are the three highest DCF values in Dr. Olson's proxy group.[73] Further, Mystic argues that intervenors and Trial Staff provide results-driven opinions contrary to Commission precedent and prior opinions and that they propose vague standards that would be impossible to apply going forward.[74]

25. Mystic argues that it is necessary to place Mystic's ROE at the median of the upper half of the range of DCF results for three reasons: (1) Mystic and ExGen are more risky than the proxy group companies; (2) persisting anomalous capital market conditions; and (3) Mystic bears the risk of changing capital market conditions until the reliability term commences, and the return should reflect that risk.[75]

26. Mystic also asks the Commission to approve its proposed 10.71 percent ROE because it is commensurate with the benchmark provided by its significantly less risky interconnected transmission owner, Eversource Energy, and the other ISO-NE transmission owners. Mystic contends that the Commission does not need to rely on a custom-tailored proxy group of merchant generators to establish an ROE for generators providing reliability service. Mystic states that the Commission used the same 10.88 percent ROE as a proxy for New England reliability service providers for many years, based upon a national proxy group of high-risk cost-of-service regulated utilities, without case-specific analysis, because such generators are inherently more risky than cost-of-

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[71] Mystic Initial Br. at 53 (citing Ex. MYS-0010 at 1; Ex. MYS-0010 at 13; Tr. 1387:22-1393:7 (Lesser)).

[72] Mystic Initial Br. at 52-54; Ex. MYS-0010 at 13.

[73] Mystic Initial Br. at 54.

[74] *Id.* at 54.

[75] *Id.* at 73-87.

service regulated electric utilities.[76] Further, Mystic notes the Commission has permitted merchant generators to adopt the interconnected utility's ROE in other circumstances.

27. Mystic argues that opposing participants fail to follow the Commission's proxy group screening criteria, misapply other screens and invent new and inappropriate screens in an attempt to remove the three highest DCF results in the proxy group, Avangrid, Dominion and Sempra.[77] Mystic claims that the opposing participants inappropriately place the ROE within the range of results as if Mystic is of average risk and fail to grapple with the risks facing Mystic, and the entity that does its financing, ExGen.[78] With respect to ENECOS's argument that the Commission's bond screen should be broadened, Mystic asserts there is no basis to relax the proxy group screening criteria in this case, and, even if there were, there is no evidence that the bond screen should be the first screening criteria relaxed.[79]

28. Mystic also argues that it appropriately applied a revenue screen in its proxy group by excluding any utility with less than $2 billion in revenue. Mystic contends that the Commission has never rejected such a revenue screen and that the revenue screen is appropriate in Mystic's case to develop a proxy group of companies of comparable risk to Exelon, a company with over $33 billion in revenues.[80] With respect to issues raised by opposing participants concerning Dr. Olson's updated DCF study for the six-month data period ending August 2018, Mystic asserts that Dr. Olson ensured his proxy group members satisfied the Commission's screening criteria and correctly updated the short-term growth rates, dividend yields, and DCF results for his proxy group to provide the Commission with the most recent financial information possible.[81]

29. Mystic next argues that Mystic and ExGen, the entity that provides Mystic's capital, are merchant generators and thus more risky than the proxy group companies,

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[76] *Id.* at 85 (citing *Devon Power, Co.*, 102 FERC ¶ 61,314 (2003); *Devon Power LLC*, 103 FERC ¶ 61,082, *order on reh'g*, 104 FERC ¶ 61,123; *PPL Wallingford Energy LLC*, 103 FERC ¶ 61,185 (2003); *PSEG Power Conn., LLC*, 110 FERC ¶ 61,020, at P 45 (2005)).

[77] Mystic Reply Br. at 41.

[78] *Id.*

[79] *Id.* at 41-42.

[80] *Id.* at 43-45.

[81] *Id.* at 51-53.

which consist of utilities and transmission providers with assets under cost-of-service rate regulation for the entirety of their assets' lives.[82] Mystic also asserts that the transition to a cost-of-service rate for Mystic for a two-year period does not change this underlying risk for investors or make it comparable in risk to transmission companies and utilities with cost-of-service regulated assets for their entire lives.[83] Mystic also reiterates its argument that the evidence in this proceeding on anomalous market conditions justifies setting the ROE above the median produced by the mechanical application of the DCF methodology.[84]

30. Acknowledging that the Commission recently proposed a new ROE methodology,[85] Mystic requests that the Commission use its prior DCF-only approach.[86] Mystic argues that applying the new proposed methodology would: (1) likely demonstrate that Mystic's proposed ROE is conservative; (2) represent an abrupt departure from the established practice of relying solely on the DCF analysis, which participants relied upon in this proceeding; and (3) the results of applying the new proposed methodology in this case would create uncertainty given that Mystic must decide whether to retire by January 4, 2019.[87]

d. <u>Determination</u>

31. In this proceeding, we establish a paper hearing to determine whether and how the ROE methodology that the Commission proposed in *Coakley* should apply to Mystic. We find that this paper hearing, limited solely to determining Mystic's ROE, is necessary due to the different procedural postures of this proceeding and the *Coakley* proceeding. After the Presiding Judge certified the record in this proceeding, the Commission proposed in *Coakley* a new ROE methodology for analyzing the base ROE component of rates in response to the D.C. Circuit's *Emera Maine* decision that vacated and remanded Opinion No. 531. The new proposed methodology includes financial models other than the DCF. In *Coakley*, the Commission directed the participants to submit briefs regarding the proposed new ROE methodology. The Commission also stated that the

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[82] *Id.* at 54 (citing Ex. MYS-0010 at 17; Ex. MYS-0029 at 6).

[83] *Id.*

[84] *Id.* at 57.

[85] *Coakley*, 165 FERC ¶ 61,030.

[86] Mystic Initial Br. at 47-51; Mystic Reply Br. at 41 n.34.

[87] Mystic Initial Br. at 48-51.

proposed ROE methodology would apply to other proceedings currently pending before the Commission.[88]

32. *Coakley* issued after the certification of the record here, and the participants in this proceeding only submitted DCF analyses at the hearing. Therefore, the record certified by the Presiding Judge in this proceeding does not contain the evidence necessary to apply the ROE methodology proposed in *Coakley*. While the participants acknowledge the new proposed *Coakley* methodology in their initial briefs, no participant filed evidence concerning the merits of the proposed methodology or how to apply the proposed new methodology to this proceeding.

33. Although the participants argue that the Commission should apply its prior DCF policy, we disagree. While the proposed new methodology is a proposal and not a final policy, the Commission stated that the "new approach reflects the Commission's proposed policy for addressing this issue *in the future, including in the proceedings currently pending before the Commission*."[89] Accordingly, consistent with our approach in other pending ROE proceedings,[90] we direct the participants to address *Coakley*'s proposed new methodology in the context of this proceeding, including the merits of the proposed methodology and how to apply the proposed new methodology to the facts of this proceeding. As such, at this time, we will not make findings regarding the contested ROE issues before us (i.e., the appropriate proxy group, the level of risk Mystic faces, whether anomalous market conditions justify setting the ROE above the median produced by the mechanical application of the DCF methodology or whether Mystic's ROE should be tied to the ROE of its interconnected transmission owner).

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[88] *Coakley*, 165 FERC ¶ 61,030 at P 19 (stating that the "new approach reflects the Commission's proposed policy for addressing this issue in the future, including in the proceedings currently pending before the Commission").

[89] *Coakley*, 165 FERC ¶ 61,030 at P 19 (emphasis added); *see also Arkansas Pub. Serv. Comm'n v. System Energy Resources, Inc.*,, 165 FERC ¶ 61,119, at P 5 (2018) (*Arkansas Pub. Serv. Comm'n*).

[90] *See Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator. Inc*, 165 FERC ¶ 61,118, at P 1 (2018) (establishing a paper hearing on whether and how this methodology should apply to the proceedings pending before the Commission involving Midcontinent Independent System Operator, Inc. (MISO) transmission owners' ROE); *see also Arkansas Pub. Serv. Comm'n v. System Energy Resources, Inc.*,, 165 FERC ¶ 61,119 at P 9 n.18 (providing guidance that all pending ROE proceedings in which the record has not been certified to the Commission will address whether and how the *Coakley* methodology should apply to their proceeding).

34. In addition to filing briefs, the participants will not be prejudiced here because they may supplement the record with additional written evidence as necessary to support the arguments advanced in their briefs.[91] However, to the extent the participants submit additional financial data or evidence concerning economic conditions in this proceeding, it must relate to periods before the conclusion of the first hearing in this proceeding. Any additional evidence shall be submitted in the form of affidavits accompanying the relevant brief. Initial briefs are due 120 days from the date of this order. Responses to those initial briefs are due 90 days after the date that the initial briefs are due. No answers or additional briefs will be permitted.

2. Capital Structure and Cost of Debt

a. Proposal

35. Mystic proposes a capital structure of 67.28 percent equity and 32.72 percent debt based on its immediate parent, ExGen.[92] Mystic explains that the Commission uses the capital structure of the rate applicant if the applicant issues its own non-guaranteed debt, has a bond rating, and has an equity ratio within the historical range approved by the Commission.[93] Mystic states that, if the applicant does not satisfy these requirements, the Commission will impute the capital structure of the corporate parent unless the parent's capital structure is anomalous.[94] Mystic states that ExGen issues its own debt, has its

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[91] *See Consolidated Edison of N.Y., Inc. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (holding that the Commission may apply a new policy "retroactively to the parties in an ongoing adjudication, so long as the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standard"); *Town of Norwood, Mass. v. FERC*, 80 F.3d 526, 535 (D.C. Cir. 1996) (holding that, "the Commission takes account of changes that occur between the ALJ's decision and the Commission's review of that decision ... the Commission may not depart from the zone of reasonableness on the basis of the change without giving parties an opportunity to reopen the record") (citing *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1201-04 (D.C. Cir. 1989)); *see also Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (discussing factors that the D.C. Circuit considers when determining whether it would be inappropriate to apply a new policy retrospectively).

[92] Mystic Initial Br. at 87.

[93] *Id.* (citing *Transcontinental Gas Pipe Line Corp.*, Opinion No. 414, 80 FERC ¶ 61,157, at 61,667 (1997), Opinion No. 414-A, 84 FERC ¶ 61,084, at 61,415 (1998)).

[94] *Id.* at 88 (citing Opinion No. 414-A, 84 FERC at 61,413; *Williams Nat. Gas Co.*, 84 FERC ¶ 61,080, at 61,356 (1998)).

own bond rating, and its debt is not guaranteed by Exelon or any other entity. Mystic also contends that ExGen's debt to equity ratio falls within the range approved by the Commission for regulated entities in prior cases.[95] Mystic cites *Pac. Gas Transmission Co.* for this proposition.[96] Consistent with its recommendation to adopt ExGen's capital structure, Mystic also proposes to adopt ExGen's cost of debt, 4.76 percent, for ratemaking purposes.

b. <u>Opposing Briefs</u>

36. Numerous participants argue that Mystic's proposed capital structure is unjust and unreasonable.[97] Trial Staff agrees with Mystic that, in instances where a rate applicant cannot use its own capital structure for ratemaking purposes, the Commission will most often impute the capital structure of the corporate parent.[98] Trial Staff contends, however, that Dr. Olson adopted ExGen's capital structure without performing an independent analysis to determine whether it is reasonable. Trial Staff and Connecticut Parties argue that *Pac. Gas Transmission Co.*, cited by Mystic, is the highest equity ratio approved by the Commission in a litigated proceeding, noting that it was decided 25 years ago and involved four natural gas proceedings and that "any reliance on Commission-approved equity ratios should focus on recently litigated electric proceedings where the Commission issued a decision on the development of a full [cost of service] that included the development of the equity ratio."[99] Connecticut Parties point out that this case was decided before the Commission established its current policy on capital structure in 1997[100] and state that, to their knowledge, the Commission has never approved a capital structure for an electric utility with greater than 60 percent equity, and even that proceeding was unusual because it involved the first major independent

[95] *Id.*

[96] Opinion No. 381, 62 FERC ¶ 61,109, at 61,779 (1993).

[97] *See e.g.*, ENECOS Initial Br. at 50; Trial Staff Initial Br. at 48; Connecticut Parties Initial Br. at 67; NESCOE Initial Br. at 21; Massachusetts AG Initial Br. at 24.

[98] Trial Staff Initial Br. at 49.

[99] *Id.* at 50 (citing Exh. No. S-0009 at 48:5-9); *see also* Connecticut Parties Initial Br. at 68.

[100] Connecticut Parties Initial Br. at 68 (citing Opinion No. 414, 80 FERC ¶ 61,157).

transmission company.[101] Trial Staff similarly argues that the equity ratios for publicly traded electric companies should be given more weight than past Commission decisions given that current equity ratios are readily available, reflect the most recent annual data, and are better gauges for actual market-tested capitalization.[102]

37. Connecticut Parties and Massachusetts AG further argue that Commission policy prevents ExGen's capital structure from being imputed because it is anomalous.[103] Specifically, Connecticut Parties contend that, although ExGen issues its own debt and has a credit rating, ExGen's capital structure fails the third criterion because it is abnormally high. Connecticut Parties note that Regulatory Research Associates show that average equity ratios in state regulatory electric rate proceedings have ranged from 48.74 percent to 50.69 percent over the past five years.[104] Connecticut Parties also note that the average equity ratio of the companies in Mr. Parcell's proxy group is 48.2 percent. With respect to Dr. Olson's argument that ExGen's capital structure is lower than Avangrid's, and therefore satisfies the third prong of the Commission's test, Connecticut Parties and Trial Staff argue that Avangrid is not properly included in the proxy group.[105] Connecticut Parties explain that both ExGen and Avangrid have parents that can manipulate their capital structures. Similarly, Trial Staff states that the equity ratios for each of the proxy group companies used in Mr. Keyton's analysis ranged from 32.40 percent to 58.70 percent and that the average media equity ratios were 48.19 and 49.30 percent, respectively.[106] Trial Staff also notes that, based on the 39 electric utilities reported by the *Value Line Investment Survey* (*Value Line*), the average and median equity ratio is 47.30 percent and 48.50 percent, respectively, thus clearly showing that ExGen's 67.28 percent equity ratio is not in line with that of any typical utility.

38. NESCOE asserts that the capital structure of an affiliated utility such as Mystic is "double-leveraged" because it has debt investors of its own and debt and equity investor funds from its parent ExGen. NESCOE points to Ms. Cannady's testimony where she explained that ExGen does not issue stock and, therefore, its reported common equity is

[101] *Id.* at 45 (citing *ITC Holdings Corp.*, 102 FERC ¶ 61,182, at P 68 (2003)).

[102] Trial Staff Initial Br. at 51 (citing Ex. S-0009 at 48:9-13).

[103] Connecticut Parties Initial Br. at 67; Massachusetts AG Initial Br. at 24.m

[104] Connecticut Parties Initial Br. at 67 (citing Ex. CT-0001 at 19:9-16).

[105] Trial Staff Reply Br. at 19 (citing Ex. S-0009 at 49:1-8)

[106] Trial Staff Initial Br. at 51; Ex. S-0009 at 48:14-20; Ex. S-0012 at 3.

based on an infusion from its parent Exelon. [107] Therefore, NESCOE asks the Commission to use a double leverage capital structure to reflect this financing relationship between Exelon and ExGen. In response to Mystic's arguments that use of a double leverage capital structure introduces too much complexity and is therefore contrary to Commission precedent, NESCOE argues that Ms. Cannady's testimony provides a straightforward approach to calculate such a capital structure.[108] Alternatively, NESCOE asks that the Commission set Exelon's capital structure to 52.4 percent debt and 47.6 percent equity based on June 2018 data.[109]

39. ENECOS notes that Commission policy requires the exclusion of acquisition premiums from the calculation of public utility capital structure for rate purposes, unless the Commission has previously authorized recovery of the acquisition premium pursuant to FPA section 205.[110] ENECOS argues that Duff & Phelps' fair value analyses specific to Mystic 8 and 9—and Exelon's internal documents—show that the plant values for ExGen are the result of acquisition adjustments that are disallowed under Commission precedent.[111] ENECOS notes that similar acquisition premiums have been ascribed to the valuation of the generating units acquired by ExGen over its history, making imputation of ExGen's capital structure inappropriate under the Commission's *Ameren* decisions. In response to Mystic's statement that ENECOS' witness, Dr. Lesser, agreed with the proposal to impute ExGen's capital structure, ENECOS notes that Dr. Lesser filed his

[107] NESCOE Initial Br.at 21-22. NESCOE witness Ms. Cannady stated that "a double leverage capital structure for an affiliate that does not issue its own common equity recognizes that the equity infusion from a parent company is actually based on the manner in which the parent company attracts capital. . . . When a utility is owned by a parent company and the parent company obtains its funding through the issuance of debt and equity, double leveraging will occur when any of the parent funding is provided to its affiliate as equity. The resulting capital structure of the affiliated utility is double leveraged because it has debt investors of its own and debt and equity investor funds from the parent, thus double leverage." Ex. NES-0010 at 22-23.

[108] NESCOE Reply Br. at 8-10.

[109] NESCOE Initial Br. at 22-23 (citing Ex. NES-0010 at 21:10-16).

[110] ENECOS Initial Br. at 50-51 (citing *Ameren Corp.*, 140 FERC ¶ 61,034, at PP 25-40 (2012), *reh'g denied*, 147 FERC ¶ 61,225 (2014)).

[111] ENECOS Initial Br. at 51 (citing *Duke Energy Moss Landing, LLC*, 86 FERC ¶ 61,227, at 61,817-18 (1999)).

testimony before it became clear on the record that the equity component of ExGen's capital structure has been substantially inflated by acquisition premiums.[112]

40. ENECOS, Trial Staff, Connecticut Parties, and Massachusetts AG state that the capital structure for the Agreement should be based on Exelon's actual capital structure.[113] Connecticut Parties argue that, when a corporate parent's capital structure cannot be imputed to its immediate subsidiary, the Commission can look higher up in the corporate chain to identify a corporate parent whose equity structure satisfies the Commission's three-part test.[114] Connecticut Parties contend that Exelon's capital structure is consistent with the structures approved by both state commissions and this Commission, confirming that Exelon's capital structure is not excessive and is reflective of market forces. Trial Staff argues that Exelon's capital structure should be imputed because ExGen is a wholly-owned subsidiary of Exelon and Exelon's capital structure better reflects what publicly-traded companies consider as the optimal mixture of debt and equity financing to be raised in current capital markets.[115]

41. Lastly, numerous participants assert that Exelon's actual long-term debt cost rate of 4.09 percent should be used in this proceeding, with many arguing that, because ExGen's capital structure fails the Commission's three-part test, it is inappropriate to use ExGen's cost of debt.[116]

c. **Supporting Briefs**

42. Mystic argues that its proposal to use ExGen's capital structure for ratemaking purposes is consistent with Commission policy. Mystic asserts that, in instances when the capital structure of a rate applicant cannot be used, the Commission's policy is to look at the capital structure of the organization that does the financing for the regulated entity,

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[112] ENECOS Reply Br. at 47.

[113] ENECOS Initial Br. at 51; Trial Staff Initial Br. at 48; Massachusetts AG Initial Br. at 24; Trial Staff Reply Br. at 24. Trial Staff notes that Mr. Keyton identified errors in his earlier testimony and that the revised capital structure for Exelon consists of 50.02 percent long-term debt and 49.98 percent equity. Trial Staff Initial Br. at 55-56.

[114] Connecticut Parties Initial Br. at 69 (citing Op. No. 414, 80 FERC ¶ 61,157, at 61,655-67).

[115] Trial Staff Initial Br. at 52.

[116] ENECOS Initial Br. at 52; Connecticut Parties Initial Br. at 69; Trial Staff Initial Br. at 58; Massachusetts AG Initial Br. at 24.

provided the result is a just and reasonable rate.[117] Mystic states that Mystic is a wholly-owned subsidiary of ExGen, and ExGen's debt is not guaranteed by Exelon or any other entity. Mystic notes that Dr. Olson determined that this capital structure was not anomalous and that it is appropriate to utilize the capital structure entity that does the actual financing for Mystic. Mystic also notes that ENECOS's witness, Dr. Lesser, agrees that ExGen's capital structure should be used in this proceeding.[118] Similarly, Mystic contends that its proposed cost of debt of 4.76 percent is just and reasonable and it is appropriate to use ExGen's cost of debt for ratemaking purposes.[119]

43. Mystic claims that opposing participants that contend that Exelon's capital structure should be used rather than ExGen's capital structure, prefer Exelon's lower equity ratio.[120] In response to arguments that a parent's capital structure must be compared to the range of capital structures of the proxy group to determine if it is anomalous, Mystic argues that the determinative inquiry is only whether the capital structure of the parent is within the range of those previously approved by the Commission for ratemaking purposes.[121] Mystic notes that, while the Commission did previously compare capital structures with those of the proxy group, the Commission reversed this requirement on rehearing.[122] Mystic asserts that, even if the Commission

[117] Mystic Initial Br. at 88 (citing Opinion No. 414-A, 84 FERC at 61,415; *Enbridge Pipelines (KPC)*, 100 FERC ¶ 61,260, at PP 173, 184-185 (2002)).

[118] *Id.* at 87-88 (citing Ex. MYS-0010 at 7-8; Ex. MYS-0029 at 12-14; Ex. ENC-0001 at 70-71).

[119] *Id.* at 94.

[120] *Id.* at 89.

[121] *Id.* at 89-90 (citing *Transcontinental Gas Pipe Line*, 90 FERC ¶ 61,279, at 61,928 (2000) ("Even if the pipeline's equity ratio is outside the range of the proxy group, it is not inappropriate to use the pipeline's own capital structure if that structure is not anomalous when compared to other capital structures approved by the Commission")).

[122] *Id.* at 89 (citing Opinion No. 414, 80 FERC at 61,666-67 ("the Commission also will compare the applicant's capital structure with those approved by the Commission for other pipelines and with those of the proxy companies, although the Commission will not be bound by the proxy company range").

compares ExGen's capital structure with those of the proxy group companies, ExGen's capital structure is within the range of equity ratios of Dr. Olson's DCF proxy group.[123]

44. Mystic states that opposing participants do not cite precedent under which the Commission could reject the use of Exelon's proposed 67.28 percent equity ratio. Mystic notes that, although participants contend that *Pac. Gas Transmission Co.* should not serve as useful precedent because it was decided in 1993, no party provides a rationale for why the age of the precedent is significant. Mystic also notes that, when the Commission has found equity ratios to be "atypically high," they have been at least 20 percent higher than the ratio approved in *Pac. Gas Transmission Co.*[124] Mystic also argues that ExGen's equity ratio is not anomalous because it is the market-driven capital structure of a merchant generator and is commensurate with equity ratios of similar entities. Mystic argues that ExGen's equity ratio is higher than that of most of the proxy group because the proxy group is primarily made up of public utilities who earn their revenues on a long-term basis through cost-of-service rates. Mystic states that this difference only proves that ExGen's capital structure accurately reflects its financial risks and that a more relevant comparison is between ExGen's capital structure and that of other merchant generators, such as Avangrid.[125]

45. With respect to arguments that ExGen is not financially independent and, therefore, it is inappropriate to use ExGen's capital structure, Mystic notes that opposing participants' experts acknowledge that ExGen's bond ratings reflect its stand-alone credit profile with no uplift related to parent support.[126] Mystic adds that participants' arguments regarding ExGen's financial independence are unfounded. Mystic contends that ties between corporate parent and subsidiary entities have not caused the Commission to employ the parent's capital structure, unless the subsidiary issues no long-term debt, issues long-term debt only to its parent, or issues long-term debt to outside investors only with the guarantee of its parent.[127] Mystic asserts that Trial Staff's

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[123] *Id.* at 91.

[124] Mystic Reply Br. at 59 (citing *KansOK P'ship*, 71 FERC ¶ 61,320 (1995); *La. Intrastate Gas Corp*., 50 FERC ¶ 61,011 (1990), *aff'd in part, vacated in part*, 962 F.2d 37 (D.C. Cir. 2016); *Tarpon Transmission Co.*, 41 FERC ¶ 61,044 (1987); *Alabama-Tennessee Nat. Gas Co.*, 38 FERC ¶ 61,251 (1987)).

[125] Mystic Reply Br. at 60-61.

[126] Mystic Initial Br. at 91 (citing Ex. CT-0009 at 120).

[127] *Id.* (citing Opinion No. 414, 80 FERC at 61,658).

argument that Exelon indirectly holds the entire membership interest in ExGen is also irrelevant.[128]

46. Mystic argues that NESCOE's proposal to use a double leveraged capital structure is directly contrary to long-standing Commission precedent.[129] Mystic asserts that utilizing a double leverage capital structure is infeasible and relies excessively on the use of unsupported assumptions. Mystic adds that neither Exelon nor ExGen have any incentive to use double leveraging to manipulate the capital structure of ExGen. Mystic states that ExGen generally owns merchant generation that is not cost-of-service regulated and ExGen must recover its costs and a return on its investment in those facilities in the market. Mystic argues that, if Exelon lends ExGen equity that was raised through lower cost debt, there is no benefit to Exelon or ExGen because ExGen does not earn regulated ROE for the vast majority of its assets.

47. Mystic claims that opposing participants' experts incorrectly base their proposed capital structures on dates other than December 31, 2017, the end of the test period. In response, Mystic points to the Commission's policy of using the evidence concerning a company's capital structure for the test period.[130]

d. <u>Determination</u>

48. We find that Mystic's proposal to use ExGen's capital structure for ratemaking purposes is unjust and unreasonable. The Commission's policy is to use the capital structure of the rate applicant if the applicant issues its own non-guaranteed debt, has a bond rating, and has an equity ratio within the historical range approved by the Commission.[131] Participants agree that, under this test, Mystic's capital structure cannot

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[128] *Id.* (citing *Panhandle Eastern Pipeline Co.*, 74 FERC ¶ 61,109, at 61,359 (1996) ("Since PEC owned all of Panhandle's stock and Panhandle's stock was not traded publicly, the manner in which Panhandle obtained its debt financing determines whether it did its own financing.").

[129] *Id.* at 93 (citing *Williams Nat. Gas Co.*, 80 FERC ¶ 61,158, at 61,682 (1997), *order on reh'g*, 86 FERC ¶ 61,232, at 61,858-59 (1999); *Conn. Yankee Atomic Power Co.*, 10 FERC at 65,098, *aff'd in relevant part*, 13 FERC ¶ 61,154 (1980); *Mountain Fuel Res., Inc.*, 13 FERC ¶ 63,056, at 65,328 (1980), *aff'd in relevant part*, 16 FERC, at 61,072 (1981)).

[130] *Id.* at 92 (citing *Enbridge Pipelines (KPC)*, 102 FERC ¶ 61,310, at P 88 (2003)).

[131] Opinion No. 414, 80 FERC at 61,667; Opinion No. 414-A, 84 FERC at 61,415.

be used. However, when moving to the next alternative, we agree with opposing participants that Mystic has not shown that adopting ExGen's capital structure for ratemaking purposes will result in just and reasonable rates.

49. We agree with Mystic that, when an applicant's capital structure cannot be used, the Commission's policy has been to look at the capital structure of the organization that does the financing for the regulated entity, provided the result is a just and reasonable rate.[132] However, this policy does not require the use of the immediate parent's capital structure for ratemaking purposes. In reviewing a proposed capital structure, the Commission seeks to achieve a balance between its obligation to protect consumers with its obligation to ensure that a regulated entity has a reasonable opportunity to attract capital and earn a fair return on its investment.[133] Here, Mystic has not demonstrated that ExGen's capital structure will result in just and reasonable rates. Instead, we require the use of the capital structure of the ultimate parent of Mystic, Exelon, because it is more consistent with the capital structures previously approved by the Commission for publicly-traded companies.

50. Participants provide varying views of the Commission's test for finding a proposed capital structure to be anomalous. Contrary to Mystic's assertions, the Commission does not hold "the absolute policy requiring that, if the [applicant's] equity ratio falls within the range of equity ratios of the proxy companies utilized for the DCF analysis, the [applicant's proposed] equity ratio automatically will be used."[134] Thus, although Mystic notes that ExGen's capital structure is within the range of capital structures for its selected proxy companies, we do not find this outcome a sufficient showing that ExGen's capital structure will result in a just and reasonable rate, as ExGen's capital structure is excessively skewed toward equity such that it is not reflective of the industry. As Trial Staff notes, as reported by *Value Line*, only two electric utilities have equity ratios higher than 59 percent.[135]

51. Further, the fact that the Commission accepted relatively higher equity ratios in *Pac. Gas Transmission Co.* does not support adopting those ratios here. Most significantly, the Commission decided *Pac. Gas Transmission Co.* prior to Opinion No. 414, in which the Commission developed its current test for whether a capital

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[132] Opinion No. 414-A, 84 FERC at 61,415; *Enbridge Pipelines (KPC)*, 100 FERC ¶ 61,260, at PP 173, 184-185.

[133] Opinion No. 414-A, 84 FERC at 61,415.

[134] Opinion No. 414-A, 84 FERC at 61,415.

[135] Trial Staff Reply Br. at 19.

structure is just and reasonable. Additionally, as participants have noted, *Pac. Gas Transmission Co.* concerned the highest equity ratio accepted by the Commission in a litigated proceeding[136] and involved four natural gas proceedings in 1993 in circumstances that are very different from the case before us here. Thus, it is thus less instructive for evaluating actual, market-tested capitalization of the electric industry today. Accordingly, we do not find this precedent applicable to Mystic.

52. For these reasons, we direct Mystic to adopt its corporate parent, Exelon's, capital structure for ratemaking purposes. We agree with NESCOE that the specific equity ratio used should be based on the most recent data, which sets the capital structure at 52.4 percent debt and 47.6 percent equity, based on June 2018 data. However, we decline to adopt NESCOE's request to adopt a double leveraged capital structure for ExGen because we agree with Mystic that the use of a double leveraged capital structure is contrary to long-standing Commission precedent and relies excessively on the use of unsupported assumptions.[137] Exelon's capital structure is consistent with the structures approved by state commissions and accepted by this Commission.[138] Moreover, we find that Exelon's capital structure better reflects what publicly-traded companies consider the optimal mixture of debt and equity financing to be raised in current capital markets. We also direct Mystic to use Exelon's actual long-term debt cost rate for ratemaking purposes.

B. Mystic 8 and 9 Cost-of-Service

1. Mystic 8 and 9 Gross Plant-in-Service

a. Proposal

53. Mystic's proposed rate base reflects gross plant in service as of December 31, 2017 of $1,021,103,968. Mystic's base rate is also based on the purchase price of Mystic 8 and 9. Mystic asserts that its net plant-in-service value based on the purchase price is lower than the net plant-in-service value based on the net original cost methodology.[139]

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[136] *See, e.g.*, Trial Staff Initial Br. at 50; Connecticut Parties Initial Br. at 68.

[137] *Williams Nat. Gas Co.*, 80 FERC at 61,682, *order on reh'g*, 86 FERC at 61,858-59; *Conn. Yankee Atomic Power Co.*, 10 FERC ¶ 63,018, at 65,098 (1980), *order on reh'g*, 13 FERC ¶ 61,154 (1980); *Mountain Fuel Res., Inc.*, 13 FERC ¶ 63,056, at 65,328, *order affirming initial decision*, 16 FERC ¶ 61,040, at 61,072 (1981).

[138] Ex. CT-0001 at 19.

[139] Ex. MYS-0020 at 9.

Mystic provides the calculation of the net book value of Mystic 8 and 9 based on original cost to construct Mystic 8 and 9 in 2002, plus capital expenditures, less depreciation, based on a 45 year life.[140]

b. <u>Opposing Briefs</u>

54. ENECOS and Massachusetts AG explain that the Commission's long-standing policy on property acquisitions is to set the revenue requirement at the lesser of: (1) the depreciated original cost; or (2) the actual purchase price.[141] ENECOS and Massachusetts AG argue that, rather than applying this policy, Mystic proposes to set the gross plant and net plant of Mystic 8 and 9 using two successive "fair value" exercises conducted by Duff & Phelps. ENECOS states that these analyses do not show the purchase price paid, but rather the results of Duff & Phelp's fair value analysis conducted several months after Mystic 8 and 9 were purchased by Constellation.[142] ENECOS also asserts that Mystic's original cost calculations are insufficient under Commission precedent.

55. ENECOS and NRG argue that Mystic's proposal contravenes the Commission's original cost principle by attempting to: (1) restore previously taken impairment charges, contrary to generally accepted accounting principles (GAAP) and Commission precedent; and (2) characterize acquisition premiums as plant costs, contrary to Commission precedent rejecting acquisition premiums for merchant generating assets converting to cost-of-service rates.[143] NRG and Massachusetts AG contend that the calculations of gross and net plant values in service provided by Mystic's witness, Mr. Heintz, are not reasonably verifiable.[144] ENECOS asserts that the correct application of the Commission's original cost principle to determine net plant in this case yields a net plant value of approximately $105,686,480 (or negative $379,300,585 with additional

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[140] Ex. MYS-0037 at 2.

[141] ENECOS Initial Br. at 21 (citing *Locust Ridge Gas Co.*, 29 FERC ¶ 61,052, at 61,114-115 (1984)); Massachusetts AG Initial Br. at 6.

[142] ENECOS Initial Br. at 26; Massachusetts AG Initial Br. at 8.

[143] ENECOS Initial Br. at 30-31; NRG Initial Br. at 9; Industrial Energy Consumers Initial Br. at 6; Ex. ENC-0030 (revised) at 16, 28-63; Ex. ENC-0048 (Revised).

[144] NRG Initial Br. at 8; Massachusetts AG Initial Br. at 12.

impairment offsets) before adjustments for Accumulated Deferred Income Taxes (ADIT) and excess Deferred Income Tax.

56. NESCOE contends that Mystic seeks to recover the full net plant value without taking into consideration any impairment charges,[145] while Mystic asserts that no impairment charge is necessary because ExGen's group of New England assets showed positive cash flows into the future based on long-term market rule changes. NESCOE argues that Mystic's assertion based on its asset group impairment analysis may not sufficiently rebut the need for an impairment charge for Mystic 8 and 9. NESCOE argues that, in the absence of a stand-alone impairment analysis, Mystic has not demonstrated that it is entitled to earn a rate of return based on the full investment value of Mystic 8 and 9, rather than on the impaired value of those units. NESCOE claims that Mystic should have performed a stand-alone impairment assessment for Mystic 8 and 9 in order to develop an accurate value for these units on which consumers are being asked to provide a return.[146] NESCOE adds that ISO-NE has not, to date, proposed any market rule changes, contradicting an assumption that was made in Exelon's asset group impairment analysis.

57. NRG argues that Mystic operated Mystic 8 and 9 at significantly lower net plant value than what is proposed under the Agreement, creating a substantial disparity in net plant at the expense of ratepayers, which creates a windfall for Exelon.[147] NRG adds that the Commission should not allow Mystic's proposed acquisition premium that is reflected in its proposed rate absent a showing of specific ratepayer benefits.[148] NESCOE claims that Mystic has not explained why it is reasonable to group assets for purposes of assessing impairments when Mystic is seeking cost-of-service regulation solely for Mystic 8 and 9.[149]

58. In response to Mystic's arguments that impairments should not be deducted from net plant because they were taken before Exelon acquired Mystic 8 and 9, ENECOS notes that, in *Cove Point LNG LP*, the Commission required an acquiring utility to recognize the impairments take by the previous owner of the asset. ENECOS also notes that Mystic does not provide Commission precedent supporting its contention that it

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[145] NESCOE Initial Br. at 10-11.

[146] *Id.* at 13.

[147] NRG Reply Br. at 7-8.

[148] *Id.* at 10-11.

[149] *Id.* at 6.

should not have to account for impairments that would not have been recognized if the units were under cost-of-service regulation.[150]

c. **Supporting Briefs**

59. Mystic contends that ENECOS does not contest the costs to construct the facilities nor the capital expenses that were incurred since construction.[151] Mystic asserts that the remaining dispute is whether impairments taken under GAAP accounting by prior owners must be reflected in Mystic 8 and 9's depreciated original cost net plant values. Mystic argues that ENECOS mixes concepts that cannot be mixed. Mystic claims that, while the Commission requires that rate base be determined by the lower of an original cost or fair value accounting, ENECOS seeks to combine aspects of both tests for determining rate base. Specifically, Mystic argues that ENECOS's witness, Mr. Steffen, seeks to modify the original cost test by selectively including within it two impairments recognized only under GAAP accounting, impairments which would not have occurred if the units were under cost of service ratemaking.[152] Mystic claims that this produces one-way ratcheting in which every reduction to fair value taken under GAAP is recognized without recognizing any upward changes to market value.

60. Mystic argues that Mr. Steffen's approach is inappropriate for four reasons. First, if the assets had been regulated on a cost-of-service basis, there would not have been an impairment.[153] Second, a policy that allows for cherry-picking impairments for assets that require a short-term transition from market-based rates to cost-of-service ratemaking would undermine the Commission's ability to ensure reliability through the use of temporary, reliability must-run agreements, while a market-based solution is pending. Third, the application of impairments to Mystic 8 and 9's depreciated original cost rate base is contrary to all applicable accounting standards. Lastly, Mystic argues that this approach would inappropriately create a rate base that bears no relationship to either the current book fair value or the depreciated original cost of the asset.

61. Regarding NESCOE's argument that a stand-alone impairment evaluation be conducted to determine the appropriate rate base, Mystic explains that, following its previous impairment assessment for its New England assets group, no impairment was

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[150] ENECOS Reply Br. at 23 (citing *Cove Point LNG LP*, 68 FERC ¶ 61,128, at 61,624 (1994)).

[151] Mystic Initial Br. at 22.

[152] Mystic Initial Br. at 22-23.

[153] *Id.* at 24.

taken.[154] Mystic explains that this result occurred, in part, because the Commission directed ISO-NE to implement a market-based fuel-security solution. Mystic adds that ExGen[155] believes that a market-based fuel-security solution will occur and will provide the missing money necessary to continue operation of Mystic 8 and 9. Mystic argues that this determination was appropriate under GAAP and that there is no basis to challenge this previous determination and conduct a stand-alone impairment assessment for Mystic 8 and 9.

62. Mystic contends that ENECOS and Massachusetts AG attempt to misstate the history of Mystic 8 and 9 and, in doing so, misapply accounting standards and the Commission's policy.[156] Mystic also asserts that the core of opposing participants' arguments is to modify the Commission's "lesser of" test from a comparison of the purchase to depreciated original cost to a comparison to the fair value of prior owners, which it argues is contrary to Commission precedent and applicable accounting standards.[157] Trial Staff disagrees with ENECOS's and NESCOE's contention that the net book value of Mystic 8 and 9 should be substantially lower than that proposed by Mystic, while agreeing with Mystic's arguments that NESCOE's request for a new impairment evaluation of Mystic 8 and 9 by asset is contrary to GAAP and should be rejected.[158]

d. <u>Determination</u>

63. It is longstanding Commission policy that, in a cost-of-service ratemaking context, a utility may only earn a return on (and recovery of) the lesser of the net original cost of plant or, when plant assets change hands in arms-length transactions, the purchase price of the plant ("original cost test").[159] We find that Mystic has not correctly applied this policy because: (1) Mystic used the incorrect depreciation accrual rate in its calculations; (2) Mystic's analysis appears to reflect capitalization of capital expenditures (rather than expensing of capital expenditures) during the term of the Agreement; and (3) Mystic did not incorporate prior purchases into its analysis. Therefore, we direct Mystic to

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[154] *Id.* at 40.

[155] Mystic explains that ExGen performs the impairment assessments. *Id.*

[156] Mystic Reply Br. at 22-25

[157] *Id.* at 24-31.

[158] Trial Staff Reply Br. at 6-7.

[159] *See Seaway Crude Pipeline Co.*, 154 FERC ¶ 61,070, at P 90 (2016).

recalculate the net original cost of the Mystic 8 and 9 units shown in Ex. MYS-0038, corrected for these deficiencies, in order to properly conduct the original cost test.

64. Specifically, we direct Mystic to use a depreciation accrual rate of 2.74 percent for the entire life of the Mystic 8 and 9 units for the reasons discussed below. We direct Mystic to reflect the impact of an original cost test for each time the Mystic 8 and 9 units changed ownership since the units were first devoted to public service, which we find to be in April and June of 2003.[160] For any such transaction, the excess of net original cost over the purchase price shall be added to accumulated depreciation, while excesses of purchase price over net original cost shall be regarded as acquisition premiums not includable in rates and ignored for the purpose of the test. The updated calculations will necessarily reflect the lesser of net original cost or purchase price and will be the gross plant-in-service and accumulated depreciation values (subject to true-up). Accordingly, we direct Mystic to make a compliance filing, within 60 days of this order, recalculating its cost-of-service study using the gross plant-in-service and accumulated depreciation values that reflect the results of the net original cost study.

65. Our instruction here is consistent with long-standing policy that the difference between the depreciated original cost and the purchase price represents a loss in service value that was not already recognized by the previous owner through depreciation.[161] Paragraph 30 of the *Pacificorp* Order cited by Mystic in its reply brief clearly states that "…there is no provision in the [Uniform System of Accounts (USofA)] for excluding depreciation accumulated on properties devoted to public service, regardless of the rate treatment afforded to the facilities prior to their acquisition."[162] Therefore, purchases of plant assets at amounts less than their net original cost should be permanently embedded in the net original cost of the plant assets regardless of the rate treatment afforded the plant assets at any given time. We acknowledge that the Mystic 8 and 9 units have not been subject to USofA bookkeeping throughout their histories, but we do not find this fact to be particularly relevant with respect to conducting the original cost test. The proper methodology for determining net original cost over time is to incorporate purchases into the net original cost analysis so that, for the purposes of setting rates here, we arrive at an appropriate benchmark for ratemaking that is premised on USofA accounting. In other words, we are calculating how the assets would be valued now if USofA accounting had been required throughout the assets' life.

66. We do not see any concern that reflecting USofA bookkeeping in the original cost test when USofA bookkeeping was not actually implemented creates an unreasonable

[160] Ex. ENC-0032 at 2.

[161] *Cent. Vermont Pub. Serv. Corp.*, 120 FERC ¶ 61,143, at P 8 (2007).

[162] *Pacificorp*, 124 FERC ¶ 61,046, at 61,248–49 (2008).

mismatch between theory and reality, such as suggestions that transactions may have occurred at different values had the USofA bookkeeping been required. First, while generators who participate in market-based rate environments generally seek and are granted waiver of USofA bookkeeping requirements, these two conditions are not mutually exclusive. There is no reason why a generator with market-based rates could not also keep USofA books. Second, as part of its due diligence, we expect that an entity that is considering acquiring generating assets that earn revenues under market-based rates would consider the revenue potential of converting to cost-based rate schemes as part of the valuation of the assets. This consideration would, in all likelihood, include a net original cost analysis, and would therefore be factored into the amount an entity is willing to pay to acquire the assets.

2. Mystic 8 and 9 Accumulated Depreciation

a. Proposal

67. Mystic argues that the actual accumulated depreciation on Mystic's books and records is the appropriate accumulated depreciation to utilize in determining net plant from the book fair value gross plant. In particular, Mystic utilized the 36.5 year useful life employed by Mystic's prior owner to the middle of 2010 and then the remaining 38 year useful life utilized by Constellation and Exelon from the middle of 2010 onward.[163] Mystic proposes accumulated depreciation amounts of $342,999,431; $379,286,440; and $415,573,449 for 2022, 2023, and 2024, respectively.[164]

b. Opposing Briefs

68. ENECOS and Massachusetts AG contend that Mystic's proposed accumulated depreciation may be based on the difference between two fair valuation studies, which are unrelated to depreciation.[165] They state that Mystic's calculations are based on the restoration of depreciation once recorded on Constellation's books, but eliminated in its 2013 fair value valuation.[166] They argue that determining depreciation reserves in such a

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[163] Mystic Initial Br. at 40-41.

[164] Ex. MYS-0050 at 1.

[165] ENECOS Initial Br. at 34; Massachusetts AG at 13.

[166] ENECOS Reply Br. at 30. ENECOS claims that Mystic's accumulated depreciation reserves were reset to zero when Constellation merged with Exelon, in contravention of Commission precedent. *Id.* (citing *Commonwealth Edison Co.*, 91 FERC ¶ 61,036, at 61,138 (2000)).

manner is contrary to the Commission precedent of required straight-line depreciation analysis. Additionally, ENECOS and Massachusetts AG note that the depreciation expenses provided by Mystic are "hard coded and are not linked to the data sources or plant items to which they pertain and from which they are derived."[167] Therefore, ENECOS and the Massachusetts AG argue that Mystic's proposed accumulated depreciation amounts are not reasonably verifiable.[168]

c. Supporting Briefs

69. Mystic argues that ENECOS and NESCOE confuse GAAP fair value and the depreciated original cost calculation.[169] Mystic explains that, under GAAP, gross plant is determined at the fair value on acquisition and net plant is calculated going forward based on the book depreciation expense. Therefore, Mystic asserts that accumulated depreciation incurred by prior owners based on a totally different fair value gross plant is irrelevant to the GAAP fair value determination.

d. Determination

70. We find that Mystic has not adequately supported its proposed depreciation rates. The Commission established the depreciation rates for Mystic 8 and 9 in Docket No. ER06-427-000,[170] and the record in this proceeding contains no indication that Exelon or any other entity filed to use different depreciation rates for Mystic 8 and 9. Accordingly, we direct Mystic to recalculate its accumulated depreciation consistent with our determination regarding Mystic 8 and 9's gross plant-in-service values assuming a 2.74 percent depreciation rate (i.e., a 36.5 year useful life) throughout the entire life of the plant, as well as any related cost-of-service elements (e.g., depreciation expense and ADIT) .

71. As a general matter, we disagree with arguments that impairments taken for GAAP accounting purposes must necessarily be reflected in accumulated depreciation for USofA purposes. Under the Commission's accounting regulations, an impairment loss is generally recorded after the Commission has made a finding as to whether utility plant

[167] ENECOS Initial Br. at 24 (citing ENC-0030 at 68:17-20).

[168] *Id.* at 34

[169] Mystic Reply Br. at 39.

[170] *Mystic Dev., LLC*, 118 FERC ¶ 61,144 (2007).

is impaired for ratemaking purposes.[171] In this case, the claimed impairments do not represent a write-off that was previously authorized by the Commission. Accordingly, we will not require Mystic to take into consideration previously recognized GAAP impairments.

3. Excess Deferred Income Taxes

a. Proposal

72. In its application, Mystic did not include a deferred regulatory liability for any excess deferred income taxes (EDIT) related to Mystic 8 and 9.[172] Mystic witness Mr. Heintz agreed on rebuttal with Trial Staff witness Ms. Latone and NESCOE witness Ms. Cannady that Mystic's EDIT liability should be amortized, beginning January 1, 2018, over Mystic's remaining depreciable life.[173] Mr. Heintz further agreed that the amount of the liability should be $44,451,330 and that the cost of service should include a reduction in the tax allowance for the EDIT amortization, grossed up for taxes, in the amount of $2,038,678.[174]

b. Determination

73. In calculating Mystic's revenue requirement, we find that it is appropriate for Mystic to include an amortization of EDIT (grossed up for taxes) and a rate base deduction for the unamortized portion of EDIT. However, we note that the amounts calculated by Trial Staff witness Ms. Latone were for illustrative purposes and that she noted that the Commission should require Mystic to use the Average Rate Assumption Method methodology to the fullest extent possible and the Reverse South Georgia Method otherwise.[175] We agree. Furthermore, as discussed elsewhere in this order, we direct Mystic to recalculate components of its revenue requirement that may impact the EDIT balance. Accordingly, we direct Mystic to submit a compliance filing, within 60 days of this order, recalculating the EDIT amortization and liability amounts consistent

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[171] *FirstEnergy Generation Corp.*, 141 FERC ¶ 61,239 (2012).

[172] NESCOE Initial Br. at 18.

[173] Industrial Energy Consumer Group and Massachusetts AG support the position taken by Ms. Latone. Industrial Energy Consumers Group Initial Br. at 7; Massachusetts AG Initial Br. at 13.

[174] Mystic Initial Br. at 41.

[175] Ex. S-0018 at 13-14.

with Ms. Latone's recommendation and along with the other directives contained in this order.

4. Cash Working Capital

a. Proposal

74. Mystic calculated cash working capital (CWC) using the 45-day convention, or one-eighth of operating and maintenance (O&M) expenses, less fuel expenses.

b. Opposing Briefs

75. NESCOE and Massachusetts AG argue that Mystic has not supported its use of one-eighth of O&M expenses as CWC in this case and that the Commission should disallow the inclusion of CWC requested from 2017 through the cost-of-service period for Mystic 8 and 9.[176] NESCOE contends that the one-eighth methodology is not appropriate in this circumstance, pointing out that the one-eighth method was originally developed as a proxy in the utility industry for determining CWC in the 1930s when lead/lag studies were burdensome to perform, particularly without the use of personal computers.[177] NESCOE adds that, although the Commission may accept one-eighth of annual O&M expenses in lieu of a lead/lag study, Exelon has not explained why an electric utility its size would not have such a study available.[178]

76. NESCOE also asserts that Mystic's request to expense all capital expenditures for Mystic 8 and 9 during the cost-of-service period greatly enhances Mystic's cash flow during this period, but doing so is not reflected in Mystic's one-eighth method. For these reasons, NESCOE argues that Mystic's CWC allowance in rate base should be zero.[179]

c. Supporting Briefs

77. Mystic argues that its proposed CWC allowance is just and reasonable and consistent with Commission precedent. Mystic contends that the Commission has expressly rejected importing the requirement for lead-lag studies from natural gas proceedings into electric proceedings. Mystic also asserts that its request to expense all capital expenditures during the term of the Agreement and its requested CWC allowance

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[176] Massachusetts AG Initial Br. at 13.

[177] *Id.*

[178] NESCOE Initial Br. at 19-21.

[179] *Id.*

reimburse Mystic for two completely different expenditures, and its request to expense all capital expenditures during the term of the Agreement should not be taken into consideration of its CWC needs.[180]

d. Determination

78. We agree with Mystic that its use of the 45-day convention is just and reasonable and consistent with Commission precedent. We are unpersuaded by NESCOE's argument that Mystic must explain why it did not have a lead-lag study available. Commission precedent does not require utilities to provide such an explanation. The 45-day convention is a rebuttable presumption that requires the party challenging the use of the convention to demonstrate that the results of using the convention are unjust or unreasonable.[181] NESCOE has failed to meet this threshold.

79. We also dismiss NESCOE's argument that Mystic's request to expense its capital expenditures during the cost-of-service period should be considered with respect to Mystic's CWC needs. We agree with Mystic witness Mr. Heintz that the receipt of the expenses associated with capital expenditures is not related to the timing and recovery of O&M and administrative and general (A&G) expenses.

5. Caps on Expenses

a. Opposing Briefs

80. NESCOE argues that overtime labor expenses should be capped at 21 percent of base pay based on a comparison of annual overtime percentage at comparable utilities and other factors. NESCOE compares Mystic's projected overtime labor expenses for Mystic 8 and 9, 35.78 percent, with the overtime rates of three comparable fully-integrated utilities operating in Texas over a four-year period. These utilities, which operate natural gas-fired generation resources similar to Mystic 8 and 9, had average overtime rates of 15.55 percent. NESCOE contends that Mystic's attempts to

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[180] Mystic Initial Br. at 41-46.

[181] "That is, the Commission adopted the 45-day rule because, *inter alia*, the Commission determined that in the first instance the 45-day rule produces reasonable results, and, if the filing utility decides to use the 45-day rule, it is entitled to rely on the 45-day rule and on this determination when it files its proposed rate increase. However, this is not to say that, if challenged, the filing utility need do no more, because the presumption is rebuttable and the challenging party is entitled to argue that in that particular case the 45-day rule does not produce reasonable results." *Calculation of Cash Working Capital Allowance for Elec. Utilities*, 54 FERC ¶ 61,193, at 61,581–82 (1991)

differentiate between labor costs in Massachusetts and those costs in Texas or elsewhere is unavailing because base salaries from state to state are not the issue.[182]

81. NESCOE asks the Commission to reject the approach of "punt[ing] to the true-up process any scrutiny regarding consumer obligations to fund employee bonus payments."[183] NESCOE recommends that the Commission cap the overtime labor expenses for Mystic 8 and 9 and Everett at 21 percent of base pay because this percentage is set to the highest annual overtime percentage that the comparable utilities studied by NESCOE's witness had reported. Similarly, NESCOE requests a cap on incentive pay at 13.3 percent of base pay for employees of Mystic 8 and 9 and Everett, which is the average incentive payments to these employees over the past six years. NESCOE also asks the Commission to disallow incentive pay based entirely on financial performance because such pay should be based on performance measures that benefit customers, not shareholders, as included in the NESCOE revisions.[184]

82. NESCOE asserts that Mystic has already escalated its O&M costs to take into account anticipated annual increases and has provided capital amounts that are based on specific expected projects.[185] NESCOE asserts that there is no mechanism under Mystic's proposed Schedule 3A to protect consumers against further, unexpected cost escalations or to incentivize Mystic to contain costs. NESCOE asks the Commission to require Mystic to adopt a limit on O&M cost recovery and suggests a 2 percent cap modeled on a similar limit under Indiana law. NESCOE argues that this cost cap will impose cost discipline on Mystic and help to prevent excessive costs passed through to consumers under the Agreement. NESCOE claims that its proposed revisions will: (1) ensure that Mystic will provide support for all components of rate base for which it seeks recovery from consumers under the Agreement, rather than a subset of rate base; (2) ensure that federal income taxes are also explicitly listed as a component subject to the true-up process; and (3) provide interested parties with the opportunity to review and challenge the true-up adjustments for this range of cost components that is broader than the range proposed by Mystic.[186]

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[182] NESCOE Initial Br. at 58-60.

[183] *Id.* at 60.

[184] *Id.* at 60-61.

[185] Ex. NES-0010 at 29-30.

[186] NESCOE Initial Br. at 61-63.

b. Supporting Briefs

83. Mystic argues that NESECOE's proposal to disallow incentive pay tied to financial performance of the company is unreasonable and contrary to Commission precedent. Mystic states that NESCOE's argument is inappropriate because it relies on state public utility commission precedent and a data response from an Entergy operating company in a Texas Public Utility Commission (Texas PUC) proceeding. Mystic asserts that Commission precedent supports the recovery of incentive pay, including incentive pay tied to the financial performance of the company.[187] Mystic further argues that the prudence of the bonuses allocated to Mystic 8 and 9 are subject to true-up to actual, incurred costs. Mystic adds that NESCOE witness Ms. Cannady does not provide much, if any, rationale in support of the proposition to cap all other incentive pay to 13.3 percent of base pay.[188]

84. Mystic also claims that NESCOE's request for caps for overtime labor expenses is unsupported.[189] Mystic asserts that NESCOE witness Ms. Cannady's comparison of overtime pay to base pay in Texas PUC retail rate filings is irrelevant because Ms. Cannady does not demonstrate that electric generation in Texas is comparable to a liquefied natural gas (LNG) facility in Massachusetts. Mystic also contends that a predetermined cap on recovery is unreasonable and contrary to the facts because the prudence of overtime expenses is subject to review when those costs are incurred and those costs are subject to true-up.[190] Mystic adds that Ms. Cannady fails to recognize that the use of less overtime labor will have to be substituted for by hiring more operators, which would be more expensive.

85. Mystic also argues that NESCOE's proposed caps on O&M are unsupported and unreasonable and are contrary to the July 13 Order, which found that Mystic "should be allowed to collect actual prudently incurred costs,…with the prudence of such costs to be reviewed in a future Commission proceeding when the costs are actually known."[191] Therefore, Mystic asserts that the actual costs that it prudently incurs should be trued-up, without being subjected to arbitrary caps based on an Indiana statute.

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[187] Mystic Initial Br. at 147 (citing *NRG Energy, Inc. v. Entergy Servs., Inc.*, 126 FERC ¶ 61,053, at PP 8-9 (2009) (*NRG Energy*)).

[188] *Id.* at 147-148

[189] *Id.* at 148.

[190] *Id.* at 149.

[191] *Id.* at 146 (citing July 13 Order, 164 FERC ¶ 61,022 at P 20 n.30).

c. Determination

86. We decline to adopt NESCOE's proposed caps on certain expenses. NESCOE's concerns regarding recovery of excessive expenses is a prudency challenge that is appropriately raised during the true-up process. The Commission's long-standing policy on cost recovery is to limit recovery of costs to those that are prudently incurred by the utility for the management and operation of the utility. NESCOE, or any other interested party, may challenge the prudence of the costs incurred by Mystic during the true-up process. We find that a pre-determined cap on cost recovery in this case is unnecessary; therefore, we decline to impose a cap on Mystic's O&M cost recovery.

87. With respect to NESCOE's proposed caps on incentive pay, we note that the Commission found in *NRG Energy, Inc.* that NRG was permitted to recover reasonable costs, including those associated with bonuses.[192] In *NRG Energy, Inc.*, the Commission also noted that "it is irrelevant how state commissions may treat such costs."[193] The Commission has previously held that the findings of states on ratemaking issues do not govern the Commission's review of jurisdictional rates.[194] Therefore, we disagree with NESCOE that state statutes and state public utility commission proceedings[195] support imposing caps on incentive pay in this proceeding.

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[192] *See NRG Energy*, 126 FERC ¶ 61,053 at P 32 n.25 ("Indeed, Commission precedent supports recovery of reasonable costs associated with bonuses").

[193] *Id.*

[194] *See, e.g.*, *Barton Village Inc. v. Citizens Utilities Co.*, 100 FERC ¶ 61,244, at P 12 (2002) ("Under the [FPA]…the Commission has exclusive jurisdiction over [] wholesale power sales rates . . . [t]hus, we have no legal obligation to review, much less rely on, the findings of the [state]."); *Louisiana Pub. Serv. Comm'n v. Entergy Serv., Inc.*, 76 FERC ¶ 61,168, at 61,955 (1996) ("a ratemaking methodology proposed at the retail level . . . does not govern the Commission's determinations of the appropriate ratemaking methodologies to be used in developing wholesale rates."), *reh'g denied*, 80 FERC ¶ 61,282 (1997), *rev'd on other grounds*, 184 F.3d 892 (1999); *see also Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004) (in a situation where "a federal regulatory action [] is purportedly interfering with a state's regulatory scheme," principles of federal preemption and the Supremacy Clause "operate to prevent the states from taking regulatory action in derogation of federal regulatory objectives")).

[195] Ex. NES-0010 at 16-17 & n.11 (citing state public utility commission precedent and a data response from an Entergy operating company in a Texas PUC proceeding);

88. We further note that incentive pay, like all expenses, must be prudently incurred to be recoverable from customers, as discussed above. However, incentive pay, like overtime pay, is only one component of a utility's overall labor expenses, and therefore, should not be viewed in isolation because this one component does not provide enough information about whether a utility's overall labor expenses are prudently incurred. For example, it could be just and reasonable for a utility with comparatively low base pay rates to pay relatively higher amounts of incentive pay, and vice versa. Moreover, Mystic witness Mr. Heintz explains that ratepayers may benefit from incentive pay, particularly when the incentives drive cost reductions and increased revenue that would be credited to customers.[196] Accordingly, it could be appropriate for ratepayers to bear these costs, if prudently-incurred, and thus we will not categorically exclude incentive pay here.

6. <u>Mystic Property Taxes</u>

a. <u>Proposal</u>

89. Mystic proposes to update taxes other than income taxes prior to the term in order to reflect its actual property taxes after the retirement of the Mystic 7 and the jet units, which is expected to occur prior to the term of the Agreement.[197] Mystic witness Mr. Heintz asserts that, after the Mystic 7 and jet units are retired, property taxes for the site are then only attributable to Mystic 8 and 9.[198] Mystic contends that the amount of property tax and the amount of the Mystic site land will likely change upon Mystic 7's retirement by some unknown amount.

b. <u>Opposing Briefs</u>

90. NESCOE asks the Commission to reject Mystic's proposal to recover its property tax expenses associated with the Mystic 7 site as part of the cost-of-service arrangement for Mystic 8 and 9. NESCOE argues that Mystic can sell the Mystic 7 land and equipment and use those profits to meet its property tax obligations. NESCOE claims that Mystic has the burden to establish that its recovery of property taxes from consumers is just and reasonable. NESCOE claims that Mystic has offered only the timing of the Agreement as the basis for recovery. NESCOE contends that its proposal to shift the

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NESCOE Initial Br. at 62, n.249 (citing as a model a similar limitation under Indiana state law); Ex. NES-0010 at 30:5-16 (same).

[196] Mystic Initial Br. at 147 (citing Ex. MYS-0037 at 21).

[197] *Id.* at 144, n.28.

[198] Ex. MYS-0006 (Revised) at 10-11.

property tax burden associated with Mystic 7 is the only just and reasonable outcome based on the record. NESCOE adds that, under the Mystic proposal, Mystic's shareholders would receive the financial benefit of the sale of the site while shifting the corresponding costs to consumers. NESCOE asserts that the property tax charges are unnecessarily incurred in relation to Mystic 8 and 9 and should be disallowed now.[199]

c. Supporting Briefs

91. Mystic states that NESCOE unnecessarily confuses the issue by stating that Mystic can pay for its property taxes for the Mystic 7 site with proceeds from the sale of Mystic 7 land.[200] However, Mystic notes that, if it sells the Mystic 7 land now, there would be no property taxes to pay on that land, and if the land is not sold when Mystic 7 retires, it would be unreasonable to allocate taxes to units that no longer exist. Since the actual amount of property taxes during the term of the Agreement are currently unknown, Mystic argues that the just and reasonable solution is to true up the actual property tax amount when costs are actually known.

d. Determination

92. NESCOE witness Mr. Bentz asserts that Mystic is able to sell the land associated with Mystic 7,[201] and there is nothing in the record showing that Mystic cannot sell this land separately from the land associated with Mystic 8 and 9. We find that this issue is moot if Mystic sells or otherwise disposes of the land associated with Mystic 7 (and therefore, no longer incurs property tax expenses associated with Mystic 7) prior to the cost-of-service period because property tax expenses are subject to true-up. Even so, we find that the Mystic 7 land is an avoidable part of providing service under the term of the Agreement because it can be sold separately from Mystic 8 and 9. Accordingly, including property taxes associated with the Mystic 7 land in the Mystic 8 and 9 revenue requirement is inappropriate under the "used and useful" standard of ratemaking.[202] This

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[199] NESCOE Initial Br. at 91-93, Ex. NES-0001 at 28.

[200] Mystic Reply Br. at 93-94.

[201] Ex. NES-0001 at 28.

[202] *See New England Power Co.*, Opinion No. 295, 42 FERC ¶ 61,016, at 61,078 (1988) ("In general, the used and useful standard provides that an asset may be included in a utility's rate base only when the item is used and useful in providing service," because "current ratepayers should bear only the costs incurred in providing service to them.") (citing *NEPCO Mun. Rate Comm. v. FERC*, 668 F.2d 1327 (D.C. Cir. 1981)); *see also Williston Basin Interstate Pipeline Co.*, Opinion No. 331-A, 50 FERC ¶ 61,420, at

finding is supported by the fact that the land for Mystic 7 does not appear to be included in rate base in the Mystic 8 and 9 revenue requirement calculations; to exclude the land from the revenue requirement calculation but include the property taxes associated with that land creates inconsistent ratemaking treatment. Accordingly, we find that Mystic may not recover property tax expenses associated with Mystic 7 land under the term of the Agreement.

7. Miscellaneous Capital Expenditures

a. Proposal

93. Mystic proposes to recover certain contested capital expenditures. Specifically, Mystic proposes to recover a $12 million capital expenditure to move the auxiliary steam boiler from Mystic 7 to the Mystic 8 and 9 site. Mystic also proposes to include certain capital expenditures related to compliance with NERC critical infrastructure protection requirements (CIP) in its revenue requirements calculations. Mystic explains that ISO-NE has designated Mystic 8 and 9 as resources needed to ensure reliability for the region for a period longer than one year.[203] Mystic states that, under NERC Reliability Standard CIP-000.-5.1a Requirement R1.1, Mystic 8 and 9's classification will automatically change from "low impact" to "medium impact" BES Cyber System and will be subject to all of the key cybersecurity controls mandated by the CIP Reliability Standards.[204]

b. Opposing Briefs

94. NESCOE argues that the Commission should not permit Mystic to recover the $12 million expenditure to relocate the Mystic 7 auxiliary steam boiler to the Mystic 8 and 9 site.[205] It argues that Mystic did not consider other options that may have been the least-cost alternative to moving the auxiliary steam boiler.[206] Although Mystic proposes to defer discussions on the recovery of expenses related to the auxiliary boiler to the

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62,286 (1990) (pipeline prohibited from including in its rate base cost of storage basins that were not used and useful to its customers).

[203] Ex. MYS-0001 at 21:14-19.

[204] *Id.*

[205] NESCOE Initial Br. at 93-98.

[206] *Id.* at 96.

proposed Schedule 3A process, NESCOE argues that the process does not allow Mystic to recover costs that are disallowed as a matter of law.[207]

95. NESCOE also opposes the inclusion of NERC compliance costs related to Mystic's expected designation as a medium-impact facility. NESCOE contends that the record does not support Mystic's assertion that ISO-NE will take the necessary actions to cause Mystic 8 and 9 to be reclassified as medium impact facilities.[208] NESCOE explains that, for a generator to be classified as medium impact, ISO-NE must: (1) designate a generation facility as necessary to avoid an Adverse Reliability Impact in the planning horizon of more than one year; and (2) inform the generator owner that it has so designated the generation facility.[209] NESCOE argues that, contrary to Mystic's claims, ISO-NE has neither designated Mystic 8 and 9 as necessary to avoid an Adverse Reliability Impact in the planning horizon of more than one year nor informed Mystic of any such designation.[210] NESCOE argues that, until ISO-NE designates Mystic 8 and 9 as medium impact and informs Mystic of that designation, Mystic should not undertake the expenditures necessary to comply with requirements applicable to medium impact units.[211] NESCOE adds that, if Mystic decides to undertake such expenditures anyway, it is appropriate for shareholders to bear such optional expenditures.

c. **Supporting Briefs**

96. Mystic disputes NESCOE's intimations that Mystic 8 and 9's designation as a medium impact facility is unlikely and, consequentially, any compliance costs associated with this designation should be disallowed.[212] Mystic argues that the very nature of this

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[207] *Id.* at 98 (citing *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1043 (D.C. Cir. 1991); *NAACP v. FPC*, 425 U.S. 662, 666-668 (1976) (FPA requires the disallowance of rates based on illegal or unnecessary charges)).

[208] NESCOE Initial Br. at 98-102.

[209] *Id.* at 99-100 (citing Reliability Standard CIP-002-5.1a (Cyber Security-BES Cyber System Categorization), at 2, https://www.nerc.com/pa/Stand/Reliability%20Standards/CIP-002-5.1a.pdf).

[210] *Id.* at 100 (citing Ex. NES-0051 at 18) ("In response to a latter data request, ISO-NE repeated that it 'does not have a position on, whether operation of Mystic 8 and 9 during the Cost-of-Service Agreement period is necessary to avoid an Adverse Reliability Impact.").

[211] *Id.* at 102.

[212] Mystic Reply Brief at 95.

proceeding, to ensure reliability and prevent outages of the electric grid, suggests that NESCOE's prediction is wrong. Additionally, Mystic notes that, under Schedule 3A, it will have the burden of demonstrating that such expenditures, if they occur, are reasonably determined to be the least-cost commercially reasonable option consistent with Good Utility Practice to meet the obligations of the Agreement. Accordingly, Mystic argues that it should be allowed to recover the costs associated with moving the auxiliary boiler and NERC CIP compliance if they meet this standard. Mystic notes that interested parties will have ample opportunity to subsequently challenge these expenditures if they believe the standard is not met.

d. Determination

97. We are not convinced by NESCOE's arguments that Mystic cannot recover the capital expenditure associated with relocating the boiler from Mystic 7 to Mystic 8 and 9. Accordingly, we dismiss NESCOE's argument that Mystic should not be entitled to recover *any* of the proposed capital expenditures. Similarly, based on the record, we are not convinced that Mystic failed to consider other options.

98. Because Mystic's costs are subject to true-up, we will not at this time disallow cost recovery for projected costs that, at least in part, Mystic is entitled to recover. NESCOE, or any other interested party, may challenge the prudence of Mystic's costs during the true-up procedure. We point out, however, that as NESCOE asserts, Mystic appears to have chosen to pursue a higher-cost option when lower-cost options are available and provided no justification for rejecting the lower-cost options. If such a decision were challenged, such a choice must be supported with a specific and credible explanation of measurable benefits for ratepayers.[213]

99. Regarding the NERC compliance costs associated with Mystic 8 and 9, we will similarly review this issue during the true-up process, at which point Mystic will need to demonstrate that ISO-NE has designated Mystic 8 and 9 as medium impact facilities and notified Mystic as such in order for Mystic to recover these costs. According to NERC CIP Standards, Mystic must ensure that Mystic 8 and 9 are designated and notified by its Planning Coordinator or Transmission Planner as medium impact facilities during the term of the Agreement, as noted in the NERC CIP Standards.[214]

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[213] *New England Power Company*, Opinion No. 231, 31 FERC ¶ 61,047, *reh'g denied*, Opinion No. 231-A, 32 FERC ¶ 61,112 (1985), *aff'd sub nom. Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986) (setting forth standard for prudently incurred expenses).

[214] ISO-NE is registered with NERC as Planning Coordinator and Transmission Planner. NERC CIP standard discussed in CIP-002-5.1a. *See* Reliability Standard CIP-

C. Fuel Supply Charge

1. Overview and Jurisdiction

a. Proposal

100. During the term of the Agreement, Mystic proposes that Mystic 8 and 9 will receive fuel from Everett and be charged a cost-based rate for that fuel by Everett owner Constellation LNG, pursuant to Schedule 3 of the Agreement. Mystic states that this rate uses the traditional cost-of-service formula and is based on a historical 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 Everett will be recovered separately through the Fuel Supply Charge. Mystic explains that, 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 Everett to make economic third-party sales to boost fuel reliability in the region and to reduce net service costs of Mystic. However, in its transmittal, Mystic states that both it and ISO-NE will adopt a 100 percent margin credit if directed by the Commission—that is, all the margin earned on forward sales will be credited against the Fuel Supply Charge.[215] In addition, Mystic states that 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.

101. 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 Everett, 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, Constellation LNG 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.

102. Finally, Mystic explains that the Fuel Supply Charge in Schedule 3 provides for an Actual Fuel Cost Adjustment, which credits or debits any differences between the fuel

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002-5.1a (Cyber Security-BES Cyber System Categorization), *available at* https://www.nerc.com/pa/Stand/Reliability%20Standards/CIP-002-5.1a.pdf).

[215] *See* Mystic Transmittal Letter at 19-20.

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 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.[216] However, 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 natural 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.[217]

b. <u>Opposing Briefs</u>

103. NextEra and FirstLight assert that Mystic's proposed Fuel Supply Charge asks the Commission to exceed its jurisdiction under the FPA.[218] They argue that the FPA does not confer jurisdiction upon the Commission over LNG sales or LNG terminal facilities themselves. While the Commission previously noted that the FPA does not prohibit "any" recovery of a Fuel Supply Charge for Everett's costs in connection with a jurisdictional service, NextEra and FirstLight contend that that authority cannot extend to Constellation LNG's fixed cost recovery and the return on and of capital related to third-party LNG sales and associated LNG procurement by Constellation LNG.[219]

104. NESCOE witness Mr. Wilson proposes to replace the Fuel Supply Agreement with what he describes as a more straightforward fuel supply relationship. In particular, Mr. Wilson proposes a Fuel Supply Agreement that entails three main charges: a demand charge for fixed costs associated with supplying Mystic, a commodity charge for natural gas taken, and a reliability charge for various additional costs and risks related to

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[216] 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.

[217] *See* Mystic Transmittal Letter at 20-21.

[218] NextEra and FirstLight Initial Br. at 29-31.

[219] *Id.* at 30-31 (citing July 13 Order, 164 FERC ¶ 61,022 at P 35).

providing firm, reliable, and flexible fuel supply to Mystic.[220] Mr. Wilson's proposal regarding a reliability charge includes provisions to address tank management and penalties should Constellation LNG fail to provide fuel security.[221] In addition, Mr. Wilson's proposal allows Constellation LNG to serve other customers on a commercial basis,[222] retaining all profits from this service. Mr. Wilson explains that this approach would lead to more efficient operation of Everett and lower costs passed through to consumers than Mystic's proposed Fuel Supply Agreement. EDF states that the Commission should adopt the recommendations explained by NESCOE witness Mr. Wilson to ensure the most valuable use of the Everett Facility's LNG supply.[223]

c. **Supporting Briefs**

105. Mystic states that the Commission has ample jurisdiction to review the inclusion in rates of Mystic's fuel costs.[224] Mystic contends that opposing participants confuse the Commission's inability to set rates for sales from Everett with jurisdiction over the ability to determine Mystic's costs, including its fuel cost. Mystic argues that the Commission's policy regarding affiliate sales is informative here. The Commission has previously stated that its review of affiliate contracts and affiliate relationships is a function of its jurisdiction over the regulated entity, and ensuring that resulting rates of the regulated entity are just and reasonable, not an exercise of jurisdiction over an affiliate selling a non-jurisdictional product or service to the jurisdiction entity.[225] Mystic argues that the Commission's review of the Fuel Supply Charge is similar here.

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[220] *See* Ex. NES-0028 at 7; NESCOE Initial Br. at 39-46.

[221] NESCOE Initial Br. at 45-46.

[222] *Id.* at 42-43.

[223] EDF Initial Br. at 41-42 (citing Ex. EDF-006 at 11:16-17).

[224] Mystic Initial Br. at 65.

[225] *Id.* at 66 (citing *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity, and Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 177 (2007) (subsequent history omitted); *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, at PP 23-24, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 at PP 24-27 (2008)).

d. Determination

106. As discussed further below, we find that Mystic has not shown that its proposed Fuel Supply Charge is just and reasonable. We disagree with NextEra and FirstLight that the Fuel Supply Charge is beyond the Commission's jurisdiction. As explained in the July 13 Order, the fact that Everett is an LNG facility does not render the costs unrecoverable by Mystic, in light of the extremely close relationship between Everett and Mystic 8 and 9.[226] However, the Commission clarified that this finding of jurisdiction does not entitle Mystic to recover all costs that it claims in connection with Everett.[227] Moreover, the Commission affirmed that whether individual components of a cost-of-service rate, including fuel-related costs, are recoverable turns on whether they are just and reasonable.[228] As discussed further below, we find that certain components of the Fuel Supply Charge are unjust and unreasonable. Although the Fuel Supply Agreement is not before us, we find that it is unjust and unreasonable for Mystic to recover certain components of the Fuel Supply Charge. Accordingly, we direct Mystic to revise the Agreement at issue here to disallow recovery of costs under those aspects of the Fuel Supply Agreement that we find unjust and unreasonable, as discussed below.

107. We decline to adopt NESCOE witness Mr. Wilson's alternative proposal to change the nature of the existing Fuel Supply Agreement. The proposal that Mystic filed with the Commission is to recover its costs of operating Mystic 8 and 9 and to recover its cost of fuel from Everett through the Fuel Supply Agreement (which, as noted above, was not filed with the Commission under FPA section 205). In the July 13 Order, the

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[226] July 13 Order, 164 FERC ¶ 61,022 at P 36.

[227] *Id.* P 37.

[228] *Id.* (citing *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.")).

Commission accepted the Agreement subject to further proceedings,[229] and, in this order, we are making further findings as to the justness and reasonableness of certain aspects of Mystic's proposal to recover costs. While we find it unjust and unreasonable for Mystic to recover certain of Everett's costs, we do not find the proposed arrangement whereby Mystic will pay Everett on a cost-of-service basis to be unjust and unreasonable. Mystic has shown that it is just and reasonable to include a Fuel Supply Charge that ensures that its sole source of fuel continues operating and recovers the majority of its costs.

2. ROE for Everett

a. Proposal

108. Mystic proposes that Everett collect the same ROE as Mystic because Everett has similar or more risk than Mystic 8 and 9, when compared to the proxy group of companies. Mystic argues that, therefore, it is just and reasonable to place Everett within the range of reasonable results. Mystic also asserts that Everett's ROE should not have a different placement than Mystic within the range of DCF results.[230]

b. Opposing Briefs

109. Multiple participants argue that, if the Commission adopts Mystic's proposal for recovery of 100 percent of Everett's costs, then Everett would face virtually no business or financial risk.[231] Accordingly, they request that Everett's ROE should be set at the low end of the range of implied cost of equity for the proposed proxy group. If however, the Commission adopts ENECOS's proposed reduced allocation of costs, ENECOS proposes that the ROE for Everett be set at 8.72 percent. Massachusetts AG and Trial Staff ask the Commission to reject Mystic's proposed 10.71 percent ROE for Everett, instead accepting an ROE no higher than 8.22 percent.[232]

c. Supporting Briefs

110. In response to ENECOS's arguments that Everett will face virtually no financial or business risk if all of its costs are passed through the Agreement, Mystic notes that

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[229] *Id.* P 11.

[230] Mystic Initial Br. at 110.

[231] ENECOS Initial Br. at 58; Industrial Energy Consumer Group Initial Br. at 10; Massachusetts AG Initial Br. at 31-32.

[232] Trial Staff Initial Br. at 73

Everett will have expenses, including significant capital expenditures, to operate during the Agreement and ExGen, Everett's immediate parent, may have to raise capital to fund those expenditures.[233] Additionally, Mystic notes that the mere fact that Mystic 8 and 9 and Everett are operating for two years under the Agreement does not change their risk relative to that of integrated utility operations from an investor standpoint.

d. **Determination**

111. We find that it is just and reasonable for the Fuel Supply Agreement to include for Everett the same ROE as Mystic. The Commission previously found that Everett and Mystic are highly integrated because each depends on the other to operate economically.[234] Additionally, ISO-NE argued in the waiver proceeding that Everett and Mystic share similar operational risks; therefore, it was likely that, if Mystic retired, Everett would be forced to retire as well.[235] Accordingly, we find that, because Mystic and Everett are highly integrated, they should receive the same ROE, pending the results of the paper hearing directed herein.

112. Opposing participants argue that, if the Commission allows Everett to recover 100 percent of its fixed and variable costs through Mystic, Everett should receive a lower ROE than Mystic.[236] As discussed below, however, Mystic will not recover 100 percent of Everett's costs. Accordingly, we also find that it is just and reasonable to allow Everett to collect the same ROE as Mystic because there is a higher level of risk associated with operating Everett than assumed by opposing participants.

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[233] Mystic Initial Brief at 11

[234] July 13 Order, 164 FERC ¶ 61,022 at P 36.

[235] *See* Waiver Order, 164 FERC ¶ 61,003 at P 11 ("In addition to the risks posed by the retirement of Mystic 8 and 9, ISO-NE explains that, because the [Everett] Facility is economically reliant on the continued operation of Mystic 8 and 9, its largest customers, the retirement of these units could set in motion a series of events that would endanger the continued operation of the [Everett] Facility and further compound fuel security risks in the region.") (citing Levitan Testimony at 11-12; Petition for Waiver at 3)).

[236] *See, e.g.*, Massachusetts AG Initial Br. at 31-32.

3. Cost Recovery of Everett and Incentive

a. Proposal

113. Mystic proposes to recover through its rates 100 percent of the costs of the ownership and operation of Everett by including these costs in the Agreement.[237] Mystic requests full recovery of Everett's costs, asserting that Everett meets the Commission's definition of fuel supply.[238] Mystic acknowledges that allowing it to pass 100 percent of the Everett costs through the Agreement would reduce Everett's incentive to sell LNG to third parties other than Mystic, which, in turn, would reduce the fuel security benefit that Everett provides to the region. Mystic states that, in response to ISO-NE's request, the Agreement also includes a revenue crediting mechanism to incentivize third-party sales.[239] Specifically, Mystic proposes to allow Everett to keep 50 percent of the revenue associated with forward sales of LNG to third parties rather than crediting all of that revenue back to ratepayers.[240]

b. Opposing Briefs

114. Many participants express concern about Everett continuing to act as a competitive supplier of natural gas to the region during the term of the Agreement. NRG argues that Everett is critical to the reliability of the electric and natural gas markets in the Northeast.[241] Several Participants contend that allocating 100 percent of Everett's

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[237] Specifically, Mystic proposes to amend ISO-NE's *pro forma* cost-of-service agreement in Schedule 3, which provides for a Supplemental Capacity Payment that is equal to a traditional cost-of-service Annual Fixed Revenue Requirement plus a monthly Fuel Supply Cost as defined in the Fuel Supply Agreement between Constellation LNG and Mystic. *See* Ex. S-0001 at 14:6-10.

[238] Mystic Initial Br. at 110 ("Everett is simply the fuel supply for Mystic, just like any onsite fuel supply facility. . . . Indeed, it is because Mystic 8 [and] 9 have a fuel supply from Everett, rather than the interstate pipeline system, that Mystic 8 [and] 9 are indispensable to fuel security.").

[239] Mystic Initial Br. at 119.

[240] Forward sales are defined in the Fuel Supply Agreement as three months in advance. Mystic proposes that short-term or spot sales (less than three months in advance) would still be credited 100 percent back to ratepayers. *See* ISO-NE Initial Br. at 5; Mystic Initial Br. at 118-125.

[241] NRG Initial Br. at 21.

costs to Mystic 8 and 9 removes the incentive to efficiently and prudently operate Everett in a manner that benefits the region and minimizes ratepayer costs.[242] Connecticut Parties maintain that regional fuel security requires not only securing Mystic's fuel supply but also maintaining or increasing Everett's sale of vapor or LNG to third parties.[243]

115. Many participants argue that Mystic's proposal to include 100 percent of Everett's costs would require the Commission to rule on matters outside its jurisdiction and violates the Commission's cost causation principles. NextEra and FirstLight assert that Mystic's recovery of the portion of Everett's costs that are unrelated to serving Mystic 8 and 9 is outside of the Commission's jurisdictional authority because those costs are not incurred in connection with "the transmission of electric energy in interstate commerce" or "the sale of electric energy at wholesale in interstate commerce," as required by the FPA.[244] NextEra and FirstLight maintain that Everett and Mystic are unlike other facilities with on-site fuel tanks that are used exclusively to supply fuel to a generator. NextEra and FirstLight claim that, instead, Everett includes interconnections to two interstate pipelines and a natural gas local distribution company in addition to providing a direct connection to Mystic 8 and 9. NextEra and FirstLight contend that the Commission's authority does not extend to Constellation LNG's fixed cost recovery and return on investment related to third-party LNG sales and associated LNG procurement by Constellation LNG.[245] Massachusetts AG argues that cost causation principles require that customers be charged rates that track the costs for which they are responsible.[246] Connecticut Parties similarly assert that Everett was not developed in response to Mystic 8 and 9; rather Mystic 8 and 9 were built adjacent to Everett to take advantage of Everett's pre-existing LNG service.[247]

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[242] Massachusetts AG Initial Br. at 33 (citing CT-010 at 7:10-8:18); EDF Reply Br. 5-7; New England LDC Reply Br. at 2-4.

[243] Connecticut Parties Initial Br. at 83.

[244] NextEra and FirstLight Initial Br. at 26 (citing FPA section 201(b), 16 U.S.C. § 824(b)); NextEra and FirstLight Reply Br. at 5.

[245] NextEra and FirstLight Initial Br. at 28-31; NextEra and FirstLight Reply Br. at 4.

[246] Massachusetts AG Initial Br. at 32 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 63,030, at P 227 (2006)).

[247] Connecticut Parties Initial Br. at 82.

116. Regarding the costs attributable to Mystic and third-party sales, many participants argue that these costs should be allocated based on historical demand and/or sales volume.[248] NRG contends that Mystic has not provided sufficient support to justify recovering 100 percent of Everett's costs through the Agreement, noting that there is no evidence in the record showing how much of Everett's costs have been historically recovered from Mystic compared to the amount recovered from third-party sales.[249] NRG asserts that, without such evidence, Everett should only be allowed to recover a percentage based on the historical record. Repsol claims that, even if the Commission allowed Mystic to depart from historical sales, the record does not support reducing the allocation of costs to third parties to zero.[250]

117. Opposing participants present a wide spectrum of methods for determining what percentage of Everett's costs are related to serving Mystic 8 and 9. ENECOS argues that, based on the ratio of Mystic peak natural gas demand to Everett peak natural gas delivery, Everett should recover no more than 25.7 percent, the percentage of vapor natural gas that Mystic can take from Everett at peak times.[251] Industrial Energy Consumers Group agrees that no more than approximately 25 percent of Everett's costs should be passed to ratepayers.[252] NRG contends that, based on Mystic's total daily consumption as a share of Everett's total capacity, the Commission should allow Everett to recover, at most, 39.16 percent[253] of its costs from Mystic; this percentage reflects what Mystic has historically been eligible to receive from Everett as per Everett's 2001

[248] *See* ENECOS Initial Br. at 65 (citing *So. Cal. Edison Co.*, Opinion No. 62, 8 FERC ¶ 61,198, at 61,682 (1979), *order on reh'g*, Opinion No. 62-A, 10 FERC ¶ 61,260 (1980), *aff'd sub nom. Anaheim, Cal. v. FERC*, 669 F.2d 799 (D.C. Cir. 1981)); Repsol Initial Br. at 5; Trial Staff Initial Br. at 77-80; NextEra and FirstLight Reply Br. at 7.

[249] NRG Initial Br. at 18.

[250] Repsol Initial Br. at 6.

[251] According to ENECOS, Mystic 8 and 9's peak gas demand is approximately 250 Mcf/d and Everett's peak simultaneous delivery capability is approximately 972 Mcf/d. ENECOS Initial Br. at 20 and 65.

[252] Industrial Energy Consumers Group Initial Br. at 10.

[253] We note that, although NRG refers to 39.6 percent in its brief, we believe that this number is a typographical error because NRG's brief refers to the calculation performed by NESCOE witness, Mr. Wilson, who states in his testimony that the amount is 39.16 percent; therefore, we use 39.16 percent here. *See* NRG Initial Br. at n. 6 (citing Ex. NES-0028 at 7:10-12). *See also* Ex. NES-0028 at 26:21-27:7.

FERC certificate.[254] Massachusetts AG concurs and adds that ratepayers should only pay for 39.16 percent of Everett, the percentage of the benefits they receive from the facility.[255] Connecticut Parties add that only a small portion of Everett's natural gas delivery facilities are dedicated to Mystic's exclusive use.[256] Trial Staff argues that, based on publicly available historical average sales, Everett should be allowed to recover 91 percent of its fixed costs, the percentage associated with non-liquid deliveries, the remainder being liquid natural gas sales via Everett's LNG truck refueling station, which do not benefit Mystic 8 and 9.[257] Industrial Energy Consumers assert that Everett should only be allowed to recover a portion of Mystic's costs and that the proposed cost of service improperly includes the LNG Vehicle Refueling Station.[258] While not supporting a specific percentage, NextEra and FirstLight contend that the Agreement should allocate Everett's costs between those attributable to serving Mystic 8 and 9 and those attributable to serving third parties.[259] New England LDCs do not support a specific cost recovery percentage, but ask the Commission to carefully balance costs and reliability in a way that maximizes the availability of the Everett facility.[260]

118. While many participants agree that there should be some incentive for Everett to continue or expand its third-party sales, they oppose Mystic's proposed 50/50 profit sharing mechanism. Multiple participants point out that Mystic and ISO-NE did not provide any supporting rationale or analysis for the proposed 50/50 profit sharing mechanism. Multiple participants argue that neither Mystic and ISO-NE nor other participants have sufficiently analyzed this incentive.[261]

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[254] According to NRG, Mystic 8 and 9 can consume 280,000 MMBtu/d on a daily basis and Everett's total capacity is 715,000 MMBtu/d. NRG Initial Br. at 17.

[255] Massachusetts AG Initial Br. at 33.

[256] Connecticut Parties Initial Br. at 82-85.

[257] Trial Staff Initial Br. at 76-78 (citing Ex. S-0006).

[258] Industrial Energy Consumer Group Initial Br. at 9.

[259] NextEra and FirstLight Initial Br. at 32.

[260] New England LDCs Initial Br. at 5.

[261] *See, e.g.*, Eversource Initial Br. at 13-14; National Grid Initial Br. at 16;, NextEra and FirstLight Initial Br. at 45; NRG Initial Br. at 24; National Grid Initial Br. at 16 (citing NES-0028 at 43:3-7).

119. Opposing participants argue that, instead of Mystic's proposed 50/50 revenue sharing mechanism, there should be some amount of Everett's cost recovery put at risk, which would reduce or eliminate the need for a revenue sharing mechanism. NextEra and FirstLight contend that the Commission should eliminate the 50/50 revenue sharing mechanism in exchange for Exelon's bearing the risk of an allocated portion of Everett's fixed costs.[262] NextEra and FirstLight maintain that Constellation LNG should be able to retain 100 percent of the profits or losses from its separate business of importing and selling LNG to third parties, adding that, if the costs of Mystic and Everett are separated, so too are the profits.[263] Repsol agrees that, if cost recovery for Everett is appropriately limited to only those costs associated with serving Mystic 8 and 9, then it would be appropriate to allow Constellation LNG to retain 100 percent of the revenue generated from third-party sales.[264] Connecticut Parties state that only allocating a proportional share of Everett's costs to Mystic and allowing Exelon to retain all third party sales margins is consistent with cost causation.[265] NRG asserts that Everett should only be allowed to recover 39.16 percent of its fixed costs, while retaining 100 percent of its third-party sales in order to recover the remaining 60.84 percent of its costs.[266] If Everett is unwilling to accept the inherent risk of this arrangement, NRG proposes that the Commission allow Everett to enter into an arrangement that would allow an independent party to manage sales and take market risks on Everett's behalf.[267]

120. Trial Staff proposes a combination of the recovery of 91 percent of Everett's costs (i.e., full cost recovery less the 9 percent associated with liquid natural gas sales) and a sliding scale revenue sharing mechanism. Specifically, Trial Staff proposes a sliding scale incentive for third-party sales in which the first 10 million MMBtus are credited 90 percent to Mystic (i.e., back to ratepayers) and 10 percent to Constellation LNG, the next 30 million MMBtus are credited 80 percent to Mystic and 20 percent to Constellation

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[262] NextEra and FirstLight Initial Br. at 34.

[263] *Id.* at 27.

[264] Repsol Initial Br. at 7.

[265] Connecticut Parties Initial Br. at 17-21; Connecticut Parties Reply Br. at 15-16.

[266] NRG Initial Br. at 4. We note that this is also a typographical error – since NRG meant Everett should be allowed to recover 39.16 rather than 39.6 of its fixed costs associated with serving Mystic 8 and 9, then it also meant that the percentage of fixed costs to be recovered from third parties is 60.84 percent (i.e.,100 - 39.16) rather than 60.4 percent (100-39.6).

[267] NRG Initial Br. at 4 (citing Ex. ENC-0002).

LNG, and so on until all deliveries above 60 million MMBtus are credited 50/50 as initially proposed by Mystic.[268] Trial Staff argues that participants' proposals to allocate costs based on the capacity of the vaporization system at Everett is flawed because it is based on only one system.[269] It argues that there is nothing to indicate that vaporization system capacity is a reasonable method to allocate all the fixed costs at Everett including costs associated with the storage tanks and the liquid trucking facilities.

121. NRG claims that there is no requirement for Mystic to maintain records of third-party sales, as would be necessary to monitor Mystic's 50/50 revenue sharing proposal.[270] NextEra and FirstLight contend that monitoring would also be difficult due to the definitions of forward margins in the Fuel Supply Agreement that could create the potential for gaming.[271] Specifically, NextEra and FirstLight note that the definitions of certain inputs to the ex-ante profit calculations have not yet been finalized or are vague and open to various interpretations. The ambiguity, according to NextEra and FirstLight, could create the potential for Constellation LNG to favor opaque transactions that provide better potential margins over other transactions that are easier to analyze and lead to lower margins, but that would be more profitable after the fact.[272] Connecticut Parties assert that the proposed margin-sharing provisions give Exelon only an attenuated incentive to make third-party forward sales and virtually no incentive to make sales less than 90 days in advance, except those made at a loss to make room for new LNG deliveries when Everett's tank is full.[273]

122. NextEra and FirstLight contend that, if the Commission approves 100 percent cost recovery for Everett, it should at the very least prohibit the margins from third-party forward sales from being calculated ex ante (based on cost estimates before the sale) and should instead calculate them ex post (based on actual costs after the sale).[274] NextEra and FirstLight state that the complex structure, vague terms, and lack of correlation to sales contracts with third parties create opportunities for gaming by Exelon and the

[268] Trial Staff Initial Br. at 92-94.

[269] Trial Staff Reply Br. at 45.

[270] NRG Initial Br. at 25.

[271] NextEra and FirstLight Initial Br. at 38-41.

[272] *Id.* at 37-41.

[273] Connecticut Parties Initial Br. at 84.

[274] NextEra and FirstLight Initial Br. at 34.

recovery of profits that are realized in a hypothetical but not real world, making monitoring by ISO-NE difficult, if not impossible.[275]

123. In response to Mystic's contention that the July 13 Order approved the Agreement's revenue sharing incentive mechanism and that other incentive structures are beyond the scope of this proceeding, several participants note that the Commission expressed concern that Mystic's proposal was "excessive" and did not foreclose consideration of fixed-cost proposals such as those presented in hearing by participants.[276] NESCOE also contends that Mystic fails to identify any Commission precedent for assigning 100 percent of a facility's costs to a single customer that uses less than 100 percent of the facility's service. NESCOE and Connecticut Parties argue that Mystic's reference to previous reliability must-run proceedings are not analogous in that none of these proceedings involved imposing the full cost of a fuel supply that also serves other customers onto electric ratepayers.[277] NESCOE also notes that cost causation principles require that the "'burden is matched with benefit,' so that [the Commission] 'generally may not single out a party for the full cost of a project, or even most of it, when the benefits of the project are diffuse.'"[278]

124. Trial Staff argues that Mystic makes an erroneous leap in logic to conclude that electric ratepayers must pay 100 percent of Everett's costs as part of the package of retaining Mystic 8 and 9 for fuel security.[279] First, Trial Staff notes that Everett is more than just a typical fuel source and is capable of delivering its entire output to pipelines rather than serving Mystic 8 and 9.[280] Second, Trial Staff highlights Mr. Schnitzer's statements that Exelon would have acquired Everett regardless of the Agreement and that the costs of acquiring Everett could be considered a sunk cost for Exelon.[281] Trial Staff also argues that Mystic's generalized claim that Everett is the cheapest alternative does

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[275] NextEra and FirstLight Initial Br. at 34-35.

[276] NESCOE Reply Brief at 15 (citing July 13 Order, 164 FERC ¶ 61,022 at P 38); EDF Reply Brief at 7-8; Trial Staff Reply Br. at 46.

[277] Connecticut Parties Reply Br. at 12.

[278] NESCOE Reply Brief at 17 (citing *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1255 (D.C. Cir. 2018)).

[279] Trial Staff Reply Br. at 41.

[280] *Id.* (citing Ex. S-0076; Ex. S-0003 at 1).

[281] Trial Staff Reply Br. at 41.

not support the pass-through of 100 percent of the costs of Everett, particularly when the record reflects that Everett will have other purposes beyond supplying Mystic 8 and 9.

c. Supporting Briefs

125. ISO-NE does not take a position on Mystic's proposal to recover 100 percent of Everett's costs under the Agreement.[282] However, if the Commission does approve 100 percent recovery of Everett's cost through the Agreement, ISO-NE states that the Commission should adopt the proposed margin-sharing mechanism to incentivize third-party natural gas sales. In response to participants arguing that the proposed 50/50 revenue sharing split is unjustified without supporting quantitative evidence, ISO-NE notes that the Commission does not have to base its decisions on empirical data and may appropriately rely on economic theory to justify its decisions.[283]

126. ISO-NE argues that, regardless of how profits from forward sales of natural gas or LNG are divided, the determination of whether a forward transaction is profitable, and to what extent, should be determined on the information available to Exelon at the time it enters into the sales agreement (i.e., sale profits should be calculated on an ex ante basis).[284] ISO-NE explains that the profit sharing will be "calculated as the contract revenue minus the incremental cost of the fuel minus expected tank congestion management costs."[285] ISO-NE asserts that, while the contract revenue and the LNG cost will be known at the time any contract is entered into, the actual tank congestion costs cannot be known at that time and are ultimately dependent on information about how fuel might have been utilized in absence of entering into the contract. However, ISO-NE notes that the tank congestion costs are an appropriate component of Exelon's calculation that it must perform at the time of contracting because it needs to determine if, and to what extent, a contract will be profitable. ISO-NE states that it and Exelon will jointly develop a model that determines expected tank congestion costs, which it expects to develop about six months before the Mystic Agreement becomes effective.[286]

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[282] ISO-NE Initial Br. at 6.

[283] ISO-NE Reply Br. at 4-5 (citing *ISO New England Inc.*, 158 FERC ¶ 61,138, at P 43 (2017)).

[284] ISO-NE Initial Br. at 33.

[285] *Id.* at 33-34.

[286] *Id.* at 34 (citing Ex. MYS-0016; Ex. ISO-001).

127. ISO-NE rebuts assertions from other participants that the sale profits should be calculated *ex post* because doing so would result in a more accurate picture of profitability.[287] ISO-NE contends that calculating sale profits ex post is impractical and unreasonable because it would require a counterfactual determination—specifically, what tank congestion costs would have been if Exelon did not enter into a given contract. As an example of the impracticality, ISO-NE notes that the analysis would require the evaluator to replay the entire winter of Everett operations under the assumption that the contract was not in place with each day's natural gas management strategy determined using only the information available on that date.[288]

128. Mystic argues that the Commission has already approved the margin-sharing incentive mechanism and the July 13 Order narrowly set for hearing the issue of how much of an incentive margin there should be.[289] It argues that opposing participants who take issue with the proposed margin-sharing incentive appear to do so to justify their alternative cost allocation proposal. However, Mystic notes that no participant presents an argument that the proposed approach is outside the zone of reasonableness. In fact, Mystic notes that each of opposing participants' witnesses argues that if their proposed allocation alternative is rejected, the margin-sharing incentive mechanism be retained but the amount of the margin be reduced.[290]

129. Mystic states that opposing participants' alternative incentive proposal comes down to whether the incentive mechanism should: (1) apply to short-term sales, in addition to forward sales; and (2) be calculated *ex post*, rather than *ex ante* because they believe it would be better to base the incentive on actual profits, rather than profits expected at the time of the transaction.[291] Mystic argues that such proposal may skew incentives toward uneconomic gas management. Regarding proposals to apply the incentive to short-term sales, Mystic argues that such proposals could create an incentive to favor self-scheduling Mystic 8 and 9 or diverting LNG cargo rather than absorbing a 10 percent loss on an unprofitable sale of gas. Additionally, Mystic argues that a proposal in favor of an *ex post* margin calculation would create an incentive to uneconomically burn gas at Mystic to avoid losses on margin, even if the loss on the sale

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[287] *Id.* at 35.

[288] *Id.*

[289] Mystic Initial Br. at 120 (citing July 13 Order, 164 FERC ¶ 61,022 at P 38).

[290] *Id.* at 123 (citing Ex. NEE-001 at 42-43; Ex. S-0001 at 22-23; Ex. DEF-001 at 12-13; Ex. NES-028 at 43; Ex. ENC-0024 at 14).

[291] *Id.* at 122.

of gas would be less than the loss on the sale of energy from Mystic. Mystic also notes that for Mr. Cavicchi's proposed *ex post* margin calculation, the prudence of Constellation LNG's actions would be assessed based on what a reasonable person would do in light of the information available at the time of the sale—i.e., on an *ex ante* basis. Mystic argues that basing the incentive mechanism on a backward-looking calculation of actual profits would be to hold Constellation LNG's traders to a standard of perfect foresight that they cannot meet.

130. Mystic argues that the proposed margin-sharing mechanism strikes an appropriate balance.[292] It finds that the proposal provides a profit incentive on a forward basis, far enough in advance to influence decisions on the scheduling of LNG cargos. It also believes that the proposal avoids the biases of opposing participants' proposals regarding how gas will be used. Mystic underscores that ISO-NE has and will exercise its audit rights and will have the benefit of observing three years of merchant operation before the term of the Agreement to discern how all these Constellation LNG actions are carried out in a competitive environment.

131. Mystic states that its proposal to recover 100 percent of Everett's costs through the Agreement is supported by both cost causation and beneficiary pays principles.[293] Mystic states that no witness provides a cohesive argument that Everett's costs are caused by anyone other than Mystic. Although Everett is capable of supplying fuel to third parties, Mystic argues that any allocation of Everett's costs to third party sales would be speculative because there is no evidence that there will be such sales, much less to whom or in what quantities or at what price.[294] Accordingly, Mystic argues that there is no evidence that such allocation is warranted on a beneficiary-pays basis. Because there are no identifiable beneficiaries of third party sales, Mystic contends that opposing participants are advocating for Everett's costs to be allocated to Exelon's shareholders, and that Exelon's shareholders would get a credit if third party sales are successfully and profitably made. Mystic argues that a theory of cost allocation based on creating risk for the asset owner runs contrary to this fundamental precept of cost-of-service ratemaking that the service provider has the right to recover all of the costs associated with the services it provides.[295]

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[292] *Id.* at 124.

[293] *Id.* at 139.

[294] Mystic Reply Br. at 80.

[295] *Id.* at 79.

132. Mystic argues that this is not a matter of cost allocation, but rather risk-shifting. It argues that it is entirely speculative to assume that Constellation LNG will be able to make sufficient third party sales, with sufficient margin above variable costs, to recover those costs disallowed from the Agreement and that imposing such risks on Exelon would result in rates that are unjust and unreasonable. Moreover, Mystic notes that the ability to retain profits—not any particular cost allocation—is what creates the profit motive for Constellation LNG to make third party sales.[296] Mystic explains that putting recovery of Everett's fixed costs at risk does nothing to increase Constellation LNG's desire to earn any profits permitted through profit-sharing. Mystic argues that its proposal is consistent with the precedent of RMR agreements: allocating costs to the customers who benefit from the reliability service and, to the extent there are successful third-party sales, providing a credit back to the customers to whom the costs were allocated.

d. <u>Determination</u>

133. We adopt Trial Staff's proposal and direct Mystic to amend the Agreement to provide that it will recover 91 percent of the costs of Everett as Mystic fuel costs. While there is no bar to the Commission's exercising jurisdiction to allow Mystic's recovery of 100 percent of Everett's fixed costs,[297] we are persuaded by participants' arguments that, to ensure that the rates under the Agreement are just and reasonable, we must require some portion of Everett's costs to be borne by the third-party customers who also benefit from the Everett terminal.[298] As noted above, estimates of how much of Everett's costs

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[296] *Id.* at 76-77.

[297] ISO-NE has previously stated that: (i) Mystic 8 and 9 are needed for fuel security; (ii) Mystic 8 and 9 cannot continue operation without Everett; and (iii) Everett could cease to operate unless it recovers all of its operating costs through the generator's cost-of-service rate. *See* Brandien Testimony at 26-27. The Commission similarly found in the July 13 Order that Everett "is fully integrated with Mystic 8 and 9, and each depends on the other to operate economically," and "[u]nder the Commission's general practice regarding cost-of-service rates, the Commission reviews . . . a generator's purported costs of fuel, including purchase, transportation, handling, and on-site storage. We find that the relationship between [Everett] and Mystic 8 and 9 places costs related to operation of [Everett] within this general practice for purposes of this proceeding." *See* July 13 Order, 164 FERC ¶ 61,022 at P 36 (citing to 18 C.F.R. pt. 101, § 501 (2018)).

[298] In the July 13 Order, the Commission explained that its finding that it could exercise jurisdiction over all costs related to Everett "does not mean that Mystic is entitled to recover all costs that it claims in connection with [Everett]. Whether individual components of a cost-of-service rate, including fuel-related costs, are

are incurred to serve third-party customers range from 9 percent (per Trial Staff) to 74.3 percent (per ENECOS), as do the methods by which those amounts should be measured (the percentage of vapor natural gas that Mystic can take from Everett at peak times, Mystic's total daily consumption as a share of Everett's total capacity, etc.).[299] All participants recognize, however, that some portion of Everett's costs are incurred to serve third-party customers rather than Mystic 8 and 9; thus, principles of fairness and cost causation require that New England ratepayers and those third-party customers should share those costs.[300] Trial Staff argues that Everett should be allowed to recover 91 percent of its costs, since 91 percent is the amount of Everett's fixed costs associated with non-liquid deliveries. The remaining 9 percent is associated with liquid natural gas sales via Everett's LNG truck refueling station, and since Mystic 8 and 9 can only accept vapor gas, that nine percent of costs clearly does not benefit Mystic 8 and 9.[301]

134. To incentivize Everett to make third-party sales, Trial Staff proposes a sliding-scale incentive in which revenue from the first 10 million MMBtus are credited 90 percent to Mystic (i.e., back to ratepayers) and 10 percent to Constellation LNG, revenue from the next 30 million MMBtus are credited 80 percent to Mystic and 20 percent to Constellation LNG, and so on until revenue from all deliveries above 60 million MMBtus are credited 50/50 as initially proposed by Mystic.[302] We find that Trial Staff's proposal is reasonable because it both allocates costs to third-party customers that do not benefit Mystic 8 and 9 at all *(i.e.*, the costs associated with liquid natural gas sales) and excludes the revenues associated with those fixed costs from the revenue requirement calculation.[303] Accordingly, we direct Mystic to modify the Agreement consistent with

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recoverable turns on whether they are just and reasonable, not whether the Commission has regulatory authority over all aspects of those rate components." July 13 Order, 164 FERC ¶ 61,022 at P 37 (citations omitted).

[299] *See supra* P 115.

[300] *Pennsylvania Elec. Co. v. FERC*, 11 F.3d 207, 211 (D.C. Cir. 1993) ("Utility customers should normally be charged rates that fairly track the costs for which they are responsible"); *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1260 ("the cost-causation principle requires 'comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party") (citing *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368), *reh'g denied*, 905 F.3d 671 (D.C. Cir. 2018).

[301] Trial Staff Initial Br. at 76-78 (citing Ex. S-0006).

[302] *Id.* at 92-94.

[303] As a general rule, the equitable treatment of costs *vis-à-vis* revenue credits is as follows: if certain costs are included (or excluded) in the revenue requirement, then

Trial Staff's proposal and to include a provision for maintaining a record of third-party sales for the purposes of verifying how revenues are credited.

135. With respect to the proposed 50/50 margin, we agree with participants that Mystic has not shown it to be just and reasonable. Indeed, ISO-NE reports that the "50-50 margin was agreed to largely as a placeholder with the understanding that it would be further reviewed."[304] In contrast, we find Trial Staff's proposed sliding-scale incentive to be just and reasonable because it balances the goals of refunding to rate payers as much as possible while still providing an incentive for Mystic to pursue forward third-party sales. We note that the final stage of the sliding-scale is at 60 million MMBtus, which Trial Staff has shown to be approximately 50 percent of the historical average volume of third-party sales.[305] We agree that this level provides a justifiable point at which to apply 50/50 crediting.

136. Regarding *ex ante* calculations, we accept Mystic's proposal to calculate third-party revenues for the purpose of the margin sharing on an *ex ante* basis. While we acknowledge participants' concerns that ambiguity in the Agreement potentially incents gaming of the system, we find that these concerns do not merit additional action at this time because ISO-NE and the IMM have already committed to monitoring Mystic and Everett's behavior under the Agreement in comparison to their behavior as merchant generators. As discussed below with regard to tank congestion charges, we expect ISO-NE and Mystic to continue to refine the terms of the Agreement with respect to third-party sales and revenue sharing. We also expect Mystic's reporting of third-party sales as described above to use well-defined terms.

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revenue credits associated with those costs should be included (or excluded) as well (and *vice versa*). If costs are included but related revenue credits are excluded, then the resulting rate results in double-recovery. If costs are excluded but related revenue credits are included, then the resulting rate is not fully compensatory to the utility. *See, e.g.*, *Minnesota Mun. Power Agency*, 68 FERC ¶ 61,060, at 61,208 n.3 (1994) ("Typically, a utility allocates all of its costs among its firm customers and then reduces the allocated transmission cost-of-service by the amount of revenues related to nonfirm transmission services. If the utility excludes a firm customer from the cost allocation and simply credits the firm service revenues to the cost-of-service, other customers will subsidize the transaction if the revenues credited are less than the cost responsibility that should be allocated to that service.").

[304] Ex. S-0003 at 7.

[305] Ex. S-0006 at 2.

4. Proposed Rate Base

a. Proposal

137. Mystic proposes a starting gross and net plant-in-service value of $60 million for Everett.[306] Mystic argues that its proposal meets each prong of the Commission's "substantial benefits test." First, Mystic asserts that Everett will provide a new service (fuel security support) and, absent the Fuel Supply Agreement, Mystic 8 and 9 would not receive natural gas supply from Everett beyond September 2018. Second, Mystic contends that Everett will provide substantial quantifiable benefits to ratepayers, namely the least cost fuel supply for Mystic 8 and 9. Third, Mystic claims that the purchase of Everett was an arm's-length transaction.[307]

138. Regarding accumulated depreciation, Mystic's revised cost-of-service study assumes a zero balance for accumulated depreciation in 2017.[308] Mystic assumes the same remaining useful life for Everett as for Mystic 8 and 9 because Everett's main function is to supply Mystic 8 and 9.[309] Mystic proposes an accumulated depreciation balance that reflects additional depreciation that will accrue each year based on the GAAP gross plant value, utilizing the remaining useful life until 2047.[310]

139. Mystic argues that, for the same reasons it provided with respect to CWC for Mystic 8 and 9, Mystic should be allowed use of one-eighth of its O&M expenses as CWC allowance in its rate base for Everett.

b. Opposing Briefs

140. Many opposing participants agree that it would be consistent with Commission policy and GAAP accounting principles to allow Mystic to use the lesser of depreciated

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[306] *See* MYS-008 at 13 (Schedule K, p. 1). Everett's total proposed rate base is $100,947,996 in 2022, $98,067,362 in 2023, and $95,259,729 in 2024, subject to true-up and one eighth O&M cash working capital. Mystic Initial Br. at 97.

[307] Mystic Initial Br. at 105-109 (citing *Seaway Crude Pipeline Co.*, 154 FERC ¶ 61,070 at P 92).

[308] Ex. MYS-0050 at 30.

[309] Ex. MYS-0006 at 14.

[310] Mystic Initial Br. at 109-110.

original cost or the actual purchase price.[311] Opposing participants disagree as to what this value should be.[312]

141. Many opposing participants favor using the depreciated original cost. Opposing participants provide a range of values that they argue should be used in place of Mystic's proposed value.[313]

142. Regarding treating Everett as an acquisition premium under the substantial benefits test, opposing participants assert that acquisition of Everett fails: (1) the first prong because the purchase does not change Everett's existing public use; and (2) the second because Mystic has not met its burden of providing clear and convincing evidence that its acquisition of Everett will provide substantial and quantifiable benefits to ratepayers and that it was not an arm's length transaction.[314]

143. Turning to other aspects of rate base, Industrial Energy Consumers Group opposes including LNG fuel inventory in the proposed rate base for Everett.[315] Trial Staff also argues that the value of certain facilities unrelated to operation of Mystic 8 and 9 should be excluded from Everett's rate base and cost-of-service. Specifically, Trial Staff proposes modifying the fuel inventory in Everett's rate base so that the assumed natural gas price for the June 1, 2011 through May 31, 2024 period is trued up for the actual average daily price of LNG in inventory in whichever series of months is covered by each of the three final true-up filings.[316]

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[311] *See, e.g.*, Massachusetts AG Initial Br. at 25 (citing *Locust Ridge Gas Co.*, 29 FERC ¶ 61,114 (1984)); ENECOS Initial Br. at 55; NRG initial Br. at 12 (citing *Southwest Power Pool*, *Inc*. 120 FERC ¶ 61,297, at P 22 (2007)).

[312] Ex. MYS-001 at 6:3-20; NESCOE Reply Br. at 11; NRG Initial Br. at 13; NESCOE Initial Br. at 30; Connecticut Parties Reply Br. at 6; NESCOE Reply Br. at 11.

[313] Industrial Energy Consumers Group Initial Br. at 9; ENECOS Initial Br. at 55; NESCOE Initial Br. at 34; Trial Staff Initial Br. at 60; Massachusetts AG Initial Br. at 25 (citing *Locust Ridge Gas Co.*, 29 FERC ¶ 61,114); NESCOE Initial Br. at 24 (citing NES-0024 at 1-2).

[314] Massachusetts AG Initial Br. at 29-30, ENECOS Initial Br. at 55-57; NESCOE Initial Br. at 32; Industrial Energy Consumers Group Initial Br. at 9.

[315] Industrial Energy Consumers Group Initial Br. at 9.

[316] Trial Staff Initial Br. at 67, 71 (citing S-0022 at 18:3-6).

144. NESCOE objects to Mystic's proposed use of one-eighth of annual O&M expenses for Cash Working Capital for Everett.[317] NESCOE argues that Mystic's request to expense all capital expenditures for Everett during the term of the Agreement greatly enhances Everett's cash flows during this period.

145. Industrial Energy Consumers Group contends that the accumulated depreciation proposed for Everett is incorrect and unjust and unreasonable because it ignores past impairment charges and seeks to recover an acquisition premium with respect to a facility previously operated on a merchant basis.[318]

146. Regarding Everett's Cash Working Capital, NESCOE claims that, for the reasons it provided with respect to CWC for Mystic 8 and 9, Mystic has not supported its use of one-eighth of its O&M expenses as CWC in rate base for Everett.[319]

c. Supporting Briefs

147. Mystic reiterates that opposing participants suggested values are against Commission policy and precedent Mystic contends that the arms-length price paid for the facility is the fair value in this case and the analysis of the gross plant can end there.[320] Mystic disputes participants' arguments that Mystic's proposal alternative to treat the purchase price as an acquisition premium fails the Commission two-prong test for such treatment.[321]

d. Determination

148. The question before us is whether it is just and reasonable for Mystic to pay for ExGen's original investment in Everett through the Fuel Supply Charge. We find that ExGen's original investment in Everett was intended to satisfy its prior capacity supply obligations and not to meet Mystic's fuel supply obligations under the terms of this Agreement. As Mystic witness Mr. Berg stated repeatedly, ExGen purchased Everett in

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[317] NESCOE Initial Br. at 35.

[318] Industrial Energy Consumers Group Initial Br. at 9.

[319] NESCOE Initial Br. at 35-36. NESCOE additionally argues that there is no justification for the additional amount that Mystic originally proposed to add for "fuel lag," but notes that Mystic has conceded to remove this amount from Everett's rate base.

[320] Mystic Reply Br. at 66.

[321] *Id.* at 73-74.

order to satisfy ExGen's existing CSOs prior to the term of the Agreement.[322] When ExGen purchased Everett, it did so as a merchant generator seeking the least cost means to avoid potential penalties for failing to meet its CSO. We do not contest Mystic's statements that purchasing Everett was the least-cost option for Mystic's fuel supply, and therefore we find that certain costs related to Everett are properly recoverable under the Agreement. As stated in the July 13 Order, the relationship between Everett and Mystic 8 and 9 may support recovery of Everett's costs under the Agreement, provided that they are just and reasonable.[323] Indeed, as discussed above, we are allowing Mystic to pay, through the Fuel Supply Charge, 91 percent of Everett's operating costs. However, we find it unjust and unreasonable for Mystic to pass through Everett's gross plant-in-service value, whatever that value may be, given that ExGen purchased Everett to ensure that it could comply with ExGen's existing CSOs, and not for Everett to provide service to ISO-NE ratepayers during the term of this Agreement.

149. ExGen's proposed plant-in-service value for Everett reflects, to some extent, ExGen's unwillingness to incur penalties, not merely the value of the asset. While the value of the plant may be greater than zero, we find that, under cost causation principles, the beneficiary of the *purchase* of Everett was ExGen. The cost of this purchase should properly be recovered in the period prior to the Agreement (i.e., the period for which the purchase was initially made). We also note that, in the absence of the Commission's determination that Mystic 8 and 9 are needed for fuel security, ExGen would have had to absorb the cost of the purchase during the terms of its existing CSOs, which ExGen knew at the time that it made the purchase. For the purposes of Mystic's cost-of-service rate, therefore, it is just and reasonable to only allow Everett to pass through the incremental capital costs associated with Everett providing fuel service to Mystic during the term of the cost-of-service Agreement, i.e., capital expenditures (whether capitalized or expensed) incurred for the purpose of satisfying the Agreement. The price of acquiring the asset itself is not one of those costs.

150. We also deny Mystic's alternative request to treat Everett's purchase as an acquisition premium. Applying the substantial benefits test here, we find that the purchase of Everett fails the first prong because Everett is neither newly jurisdictional nor will it be engaged in a new public use.

151. Further, we find that it is unjust and unreasonable to include in rate base or cost-of-service any cost unrelated to the operation of Mystic. Accordingly, we direct Mystic to identify these costs and exclude them from Everett's gross plant-in-service and accumulated depreciation when calculating the Fuel Supply Charge. We further direct

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[322] MYS-0001 at 11.

[323] *See* July 13 Order, 164 FERC ¶ 61,022 at P 37.

Mystic to adopt Trial Staff witness Ms. McComb's proposal related to gross plant-in-service for Everett.[324]

152. Regarding the inclusion of fuel inventory in rate base, we disagree with Mystic that this issue is outside the scope of this proceeding per the July 13 Order. In the July 13 Order, the Commission found that it had jurisdiction over the entire Fuel Supply Charge. Nevertheless, the Commission clarified that Mystic is not necessarily entitled to recover all of its proposed costs and that recovery would turn on whether these costs, including fuel-related costs, were just and reasonable.[325] We agree with Trial Staff that truing up the assumed natural gas price and the actual average daily price of LNG will reasonably account for the volatility of natural gas prices and will result in a more accurate computation of Everett's rate base.[326] Accordingly, we direct Mystic to include as part of its true-up filings an accounting of the assumed and actual average daily price of LNG for the purposes of truing up the fuel costs it pays to Everett.

153. Regarding accumulated depreciation, we find that Mystic's proposal to match Everett's useful life to Mystic 8 and 9's useful life is reasonable in this circumstance because Mystic has shown that Everett's main function is to act as a source of fuel for Mystic 8 and 9. We note, however, that, as we direct Mystic to assume a useful life of 36.5 years, we also direct Mystic to recalculate its Everett costs to reflect this assumption.

154. Regarding CWC, for the reasons previously stated for Mystic 8 and 9, we find that Mystic's use of the 45-day convention (with amounts related to fuel lag removed) is just and reasonable.[327]

5. <u>Fuel and Tank Management Costs</u>

a. <u>Proposal</u>

155. Mystic explains that management of Everett's tank requires a complex inventory management process. Mystic states that ensuring there is sufficient fuel available for Mystic 8 and 9 to operate when called upon to run and also to fulfill obligations for gas sales to third parties requires a "tricky balancing act" due, in part, to the physical limitations of the Everett LNG storage tank.[328] Mystic states that, to curb fuel costs, it

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[324] Trial Staff Initial Br. at 66-70 (citing Ex. S-0001 at 20:6-11; Ex. S-0007).

[325] July 13 Order, 164 FERC ¶ 61,022 at P 37.

[326] Trial Staff Initial Br. at 71.

[327] *See supra* P 78.

[328] Mystic Initial Br. at 116.

schedules LNG shipments in advance of the date the shipment is needed. Mystic also states that, in order to accept a typical LNG delivery, the Everett LNG storage tank must be almost empty because the average shipment and the tank are nearly the same size.

156. Mystic explains that, in order to manage this complex task, the Agreement and the Fuel Supply Agreement contain provisions to reflect the cost of managing Everett LNG storage tank's inventory (e.g., section 3.4 of the Agreement allows Mystic to include in its energy offers the opportunity cost of Everett's limited supply of stored LNG and the opportunity cost of more economic uses of this available fuel). Mystic explains that, if Mystic's tank is running low before a cargo of LNG is delivered, gas could be conserved by offering Mystic's output into the market at a higher, opportunity cost price, which is developed by the IMM and ISO-NE.[329] Mystic adds that, alternatively, if Mystic's tank is full when a delivery is due, the Agreement allows Constellation LNG to make spot sales into the market at a loss, pay a fee to divert the cargo, or let Mystic self-schedule and burn fuel uneconomically.[330] We note that the Fuel Supply Agreement also allows for a tank congestion charge, as discussed further below.

157. Mystic states that, to ensure that Mystic and Everett manage tank inventory in accordance with the Agreement, ISO-NE will scrutinize any material change to Everett's operations during the term of the Agreement compared to the period when Mystic and Everett are operating on a merchant basis.[331] Mystic argues that the Commission should not review the tank congestion charge. Mystic contends that the Commission has jurisdiction to review and evaluate the fuel costs associated with the cost-of-service Agreement but the Fuel Supply Agreement is itself not Commission-jurisdictional and not on file with the Commission. Mystic asserts that section 3.9 of the Agreement requires Mystic to notify ISO-NE of any material changes to the Fuel Supply Agreement and nothing more is necessary or appropriate.[332]

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[329] *Id.* at 117.

[330] *Id.*

[331] *Id.* at 118.

[332] *Id.* at 116.

b. Opposing Briefs

158. NESCOE proposes an alternative approach to including opportunity cost in the stipulated variable cost: under certain conditions, Constellation LNG would apply a bifurcated price offering to Mystic.[333]

159. Opposing participants generally support Mystic's proposed tank congestion charge but argue that the Commission should require Exelon to file with the Commission the final version of the tank congestion charge.[334] Opposing participants state that the tank congestion charge, which is located within the Fuel Supply Agreement, is a "charge" for purposes of FPA section 205 and that any changes to the Fuel Supply Agreement must be filed at the Commission pursuant to FPA section 205.[335]

c. Supporting Briefs

160. According to ISO-NE, tank congestion management becomes more difficult with third-party sales. ISO-NE explains that each third-party contract is expected to increase the cost of managing tank congestion because it will increase the need to schedule additional LNG cargos, each of which increases the risk of tank congestion. ISO-NE adds that third-party withdrawals are uncertain because Exelon expects that most, if not all, of these forward contracts will be option agreements rather than firm commitments to buy.[336] ISO-NE argues that, because ratepayers also share a percentage of the margin on third-party sales, they should be required to cover some of the losses that result from tank congestion.[337]

161. To address this challenge, ISO-NE explains that Schedule A of the Fuel Supply Agreement provides a conceptual methodology to develop a mathematical approach to determine a tank congestion charge associated with each third-party contract. ISO-NE states that it has agreed with Exelon to terms that reflect that the margin on third-party sales (subject to sharing) will be the amount a third-party buyer paid minus the delivered

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[333] NES-0028 at 6. EDF supports this proposal. *See* EDF Initial Br. at 41-42 (citing Ex. EDF-006 at 11:16-17).

[334] ENECOS Initial Br. at 66-7.

[335] NESCOE Initial Br. at 90-91; ENECOS Initial Br. at 66.

[336] ISO-0001 at. 27 and ISO-NE Initial Br. at 10.

[337] Ex. ISO-0001 at 30.

cost of the gas and the expected increase in tank congestion management costs.[338] ISO-NE states that, six months before the Agreement becomes effective (approximately when Mystic will begin evaluating third-party contracts), it will approve a finalized method of calculating the tank congestion charge using current pricing data.[339] ISO-NE adds that it will assign the dollars associated with the tank congestion charge in excess of what is used to pay for the actual commodity to pay down the Annual Fixed Revenue Requirement to the benefit of ratepayers and are used to offset the actual tank congestion costs.[340]

162. ISO-NE commits to refining its tank congestion charge methodology over the three years of merchant operation that will take place before the start of the Agreement. ISO-NE adds that ISO-NE and the IMM will also compare Mystic's behavior over the three-year merchant period with its behavior over the cost-of-service period.

d. <u>Determination</u>

163. We acknowledge Mystic's proposal to develop with ISO-NE a tank congestion charge six months prior to the delivery year and encourage Mystic to work with ISO-NE to refine this charge. We decline to adopt NESCOE and EDF's proposed modifications because the Agreement adequately addresses tank management and congestion costs. We also deny ENECOS's request that the charge be filed with the Commission. While the Commission has jurisdiction to review and evaluate fuel costs associated with the Agreement as part of its overall obligation under the FPA to ensure that all rates, terms, and conditions of service are just and reasonable, the Fuel Supply Agreement itself, including any provisions related to the tank congestion charge, are not a rate on file with the Commission.[341]

164. While we have found it appropriate for Constellation LNG to retain a percentage of the margin on third-party sales in order to encourage such sales,[342] we share ISO-NE's concern regarding the difficulty of determining tank congestion charges for third-party

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[338] ISO-NE Initial Br. at 10-11.

[339] *Id*.

[340] ISO-NE states that the total tank congestion charges will be known at the end of the season but the incremental costs of any individual contract will not be known because it is built on a counterfactual (i.e., what would the tank congestion costs have been without this contract?). Ex. ISO-001 at 28-29.

[341] *See* July 13 Order, 164 FERC ¶ 61,022 at P 37 n.54.

[342] *Id.* P 38.

sales. We note that ISO-NE and the IMM have committed to continued monitoring of Everett and Mystic operations and that ISO-NE commits to refining its tank congestion charge methodology prior to the start of the Agreement. We find that the prudency of these individual sales is more appropriately reviewed during the true-up process, including whether Mystic reasonably recovered the variable costs of third-party natural gas sales in accordance with the Agreement.

D. True-Up and Cost Review

1. True-Up Provision

a. Proposal

165. In response to the Commission's directive,[343] Mystic proposes a series of annual filings beginning in 2021 to update projected expenses prior to the term of the Agreement and true-up those expenses to actual, prudently incurred costs after each calendar year for the following cost of service components: (1) capital expenditures; (2) O&M; (3) A&G; (4) cash working capital; (5) return; and (6) taxes.[344] Mystic also proposes protocols modeled on the formula rate protocols for transmission owners in MISO,[345] which consist of a series of annual filings. Mystic states that, beginning in 2021, it will update its projected expenses prior to the next term; then it will true-up those projected expenses to the actual, prudently incurred costs after each calendar year.[346]

b. Opposing Briefs

166. Trial Staff proposes revisions to Mystic's proposed true-up mechanism to address Mystic's incentive to delay capital projects into the term of the Agreement, which would

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[343] *Id.* P 20 ("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 be reviewed in a future Commission proceeding when the costs are actually known. . . . [W]e direct the participants to present evidence regarding the appropriate design of the true-up mechanism in the Agreement").

[344] Mystic Initial Br. at 144 (citing Ex. MYS-37 at 24-25); *see also* Ex. No. MYS-0006 at 10-11.

[345] Mystic Initial Br. at 144.

[346] *See* MYS-0037 at 24-25. Mystic also provided its formula rate template, and added several clarifying changes on rebuttal. *See* Ex. MYS-0050 at 12-18, 40-46; Mystic Initial Br. at 144, 146.

unfairly shift costs to ratepayers. Trial Staff contends that such a delay would benefit Mystic because, if the capital projects commence before the term of the Agreement, Mystic will only be able to recover a portion of its capital project expenses from ratepayers, as opposed to delaying them until the term of the Agreement and receiving full recovery for these expenses under the Agreement. Trial Staff's witness Mr. Fejka recommended amending Mystic's proposal to require Mystic to provide, and allow interested parties to seek, information regarding the timing of a capital project's completion. Specifically, Mr. Fejka points to part II, section 2 of the Agreement that requires Mystic to provide information regarding the need for and costs of a capital expenditure to be incurred during the term of the Agreement. Mr. Fejka recommends amending section 2 to require Mystic to demonstrate that neither of the following occurred: (i) the project was scheduled for before the term of the Agreement but delayed into the term; or (ii) the project is scheduled during the term but should have been completed prior to the term.[347] Mystic witness Mr. Heintz disagrees with this suggestion on the basis that the information sought is vague and unnecessary and would require revealing the timing of capital projects.[348] Trial Staff points out, however, that Mystic does not object to Mr. Fejka's proposed section 3 amendment, which contains nearly identical language; the only difference between the two sections is that section 3 allows interested parties to seek this information from Mystic, while section 2 requires Mystic to provide the information to such parties. Trial Staff recommends that the Commission adopt both of Mr. Fejka's proposed amendments to the true-up mechanism to give such parties the ability to raise these concerns under the true-up protocol's challenge procedures and thus reduce the risk that Mystic will unfairly shift capital expenses to ratepayers.[349]

167. Eversource claims that Mystic's proposal does not fully comply with the Commission's directive to recover its actual prudently-incurred costs on a formulary basis because a formula rate should true up all costs Mystic incurs, except those cost components of the revenue requirement that may only be changed with an FPA section 205 or 206 filing (such as ROE). Eversource asks the Commission to direct Mystic to amend its true-up proposal accordingly.[350] Trial Staff adds that it should not be controversial to true up all items except Mystic's ROE and that such a true-up would not

[347] Trial Staff Initial Br. at 100 (citing Ex. S-0014 at 13:13-22; Ex. S-0016 at 2-3).

[348] *Id.* at 102 (citing Ex. S-0044).

[349] *Id.* at 102, 105.

[350] Eversource Initial Br. at 11-12.

increase the risk of litigation or the uncertainty of recovery that Mystic fears.[351] Noting that Mystic has agreed to make certain changes, Trial Staff asks the Commission to direct these changes to the true-up template. Trial Staff also asks the Commission to require that, to the extent the sum of individual line items do not equal the total, Mystic should correct the formulas embedded within the true-up template.[352] Trial Staff notes multiple changes that Mystic has agreed to make.[353]

168. NESCOE asks the Commission to direct Mystic to revise its proposed Schedule 3A to ensure that: (i) consumers have timely information about expenses for which Mystic is seeking recovery under the Agreement; (ii) a process is in place so that consumers can understand and, as necessary, challenge these expenses; and (iii) certain categories of costs are limited and not subject to true-up.[354] NESCOE asserts that, prior to the cost-of-service period, the Commission should require Mystic: (1) to make informational filings with the Commission, detailing the capital expenditures made for Mystic 8 and 9 and Everett over the preceding calendar year. NESCOE asks the Commission to require Mystic to provide timely notification of the capital expenditures incurred before the cost-of-service period; and (2) to provide that capital expenditures incurred prior to the cost-of-service period will be subject to the Information Exchange and Challenge Procedures, as NESCOE suggests.[355]

169. NESCOE states that in both current sections II.3.A and II.3.B the information exchange and document requests are limited to "what is necessary to determine" various items and criteria related to the true-up filing, and NESCOE asks the Commission to direct Mystic to amend this language to limit information exchange and document

[351] Trial Staff Reply Br. at 3.

[352] Trial Staff asks the Commission to the removal line items for "Lobbying," "Asset Impairment," "CIAC/CIAM," "Allowance/Bad Debt," "O&M Non-Consolidated Affiliate," and "Codeblock Map Error." Trial Staff further states that line items for "Intercompany Operating Costs" on Schedule L, lines 113-14 on page 15 of Exhibit No. MYS-0021 appear to be double counted and only one line item should be listed because no other items have subtotals. Trial Staff asks the Commission to direct Mystic to revise Schedule L, lines 113-14 of Exhibit No. MYS-0021 so that only one line item is listed on the true-up template. *See* Trial Staff Initial Br. at 115 (citing Ex. S-0034 at 10:5-14).

[353] Trial Staff Initial Br. at 113-115.

[354] NESCOE Initial Br. at 54.

[355] NESCOE Initial Br. at 56-57 (citing NESCOE Revisions, Attachment C at 2-3, section I.B).

requests to "what may be reasonably necessary to determine" those items and criteria. NESCOE claims that Mystic's proposed language could result in customers having to demonstrate that certain information is necessary, without having the benefit of that information. NESCOE asks the Commission to direct three changes to the Challenge Procedures in section II.4 of Mystic's proposed Schedule 3A: (1) require the addition of language in section II.4.A to eliminate Mystic's unreasonable restrictions on the filing of formal challenges; (2) direct Mystic to delete section II.4.D because the scope of informal and formal challenges is already set forth in sections II.4.B and II.4.C; and (3) allow interested parties until November 15th, rather than October 15th, to submit a formal challenge with the Commission. With this one-month extension, NESCOE would no longer seek to accelerate the date by which Mystic has to make its annual update filings and would agree to the April 1 date that Mystic has proposed.[356]

170. Industrial Energy Consumers and Massachusetts AG argue that the proposed true-up mechanism is not just and reasonable because it is: (1) limited to capital expenditures and O&M, A&G, and property tax expenditures; and (2) lacks any provisions pertaining to determining, auditing, or otherwise justifying costs incurred or revenues earned and reasonably available to Everett. Industrial Energy Consumers further assert that the true-up should include caps and limitations, including: (1) a cap on the overtime labor expense for Mystic 8 and 9 and Everett of 21 percent; (2) a prohibition on incentive pay that is primarily based on financial performance measures that benefit shareholders, capped at 13.3 percent of base pay; and (3) an overall 2 percent cap.[357] Trial Staff and other opposing participants add that the true-up mechanism should apply to the entire Agreement, except ROE.[358]

171. ENECOS and New England LDCs ask the Commission to require Exelon to engage an independent asset manager to operate Everett because asset managers have resources and market knowledge not necessarily available to natural gas capacity holders.[359]

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[356] NESCOE Initial Br. at 63-66. National Grid supports NESCOE's proposals. *See* National Grid Initial Br. at 14-15.

[357] Industrial Energy Consumers Initial Br. at 12; Massachusetts AG Initial Br. at 39.

[358] Trial Staff Initial Br. at 17-20.

[359] ENECOS Initial Br. at 66; New England LDCs at 6-7; ENECOS Reply Br. at 62-63.

c. Supporting Briefs

172. Mystic asks the Commission to reject NESCOE's proposed changes to the Agreement because NESCOE suggested those changes at a point in the proceedings when Mystic could no longer respond to them.[360] Mystic also states that NESCOE's proposal to give interested parties until November 15th, rather than October 15th, to file a formal challenge with the Commission is unnecessary because the Agreement's protocols provide for information exchange 60 days from the date of the informational posting.[361] Separately, Mystic claims that EDF's proposal to true-up various types of revenues that Mystic may earn is inconsistent with the Commission's prior finding 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 be reviewed in a future Commission proceeding when the costs are actually known."[362]

173. Mystic disagrees with Trial Staff witness Mr. Fejka's concern that Mystic may have an incentive to delay capital projects into the term of the Agreement as a solution without a problem noting that, in response to those concerns, Mystic witness Mr. Heintz proposed revisions to Schedule 3A to remove any ambiguity as to the recovery of capital expenditures and make other changes proposed by Mr. Fejka.[363] Mystic contends that it has adequately addressed Trial Staff's concern with enhanced information and sharing mechanisms on timing to the extent timing is relevant to whether a capital expense is necessary to meet the reliability need. Mystic argues that Trial Staff's proposal to change the standard for recovery of capital expenses is not just and reasonable because Mystic's proposal already removes any incentive to delay projects.[364] Mystic adds that it agrees to ISO-NE's proposed changes to section 4.4.2 and Schedule 3 and that it has proposed a change to section 4.4.3 that is uncontested. Mystic states that, while arguments for after-the-fact review of individual sales and LNG scheduling decisions should be rejected, Exelon is willing to provide state authorities, under confidential seal, information similar to the information that will be provided to ISO-NE.[365] Mystic asks the Commission to

[360] Mystic Reply Br. at 99-100 (citing to NESCOE's requests to edit sections II.3.A and II.3.B and delete section II.4.D).

[361] *Id.* at 100-101.

[362] *Id.* 97-98 (citing the July 13 Order, 164 FERC ¶ 61,022 at P 20).

[363] *Id.* at 101.

[364] *Id.* at 103.

[365] *Id.* at 104-108.

reject NESCOE's proposed changes to sections 2.2 and 7.1.2(b).[366] Mystic also asserts that the Commission should not require Mystic to submit an FPA section 205 filing to modify the Fuel Supply Agreement because the Fuel Supply Agreement is not a jurisdictional rate filed under FPA section 205.[367] Mystic also asks the Commission to explain how the changes it is authorizing comport with *NRG Power Marketing, LLC v. FERC*.[368]

d. **Determination**

174. We accept, in part, Mystic's proposed true-up mechanism. However, we require two revisions to provide greater information sharing regarding capital expenditures. We direct Mystic to make changes to sections 2 and 3 of part II of the Agreement as discussed below, requiring a demonstration that Mystic is not delaying projects until the term of the Agreement that it would otherwise have undertaken sooner with the purpose of recovering excessive costs from ratepayers under the Agreement. We clarify that the true-up mechanism applies to all items with the exception of items that are fixed or must be modified by filing an FPA section 205 filing (i.e., ROE).[369]

175. In the July 13 Order, the Commission found that a true-up mechanism was needed due to the "inherent difficulty in projecting costs in advance of the Agreement's effective date."[370] The Commission further found that "a true-up mechanism is necessary to ensure that the rates established reflect actual costs incurred."[371] True-up provisions

[366] *Id.* at 112.

[367] *Id.* at 116.

[368] *Id.* at 116-120 (citing *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017)).

[369] As stated above, the ROE input will be dependent on the Commission's determination on the ROE in *Coakley*. However, Mystic must also include components of the capital structure, such as the cost of debt and equity, as subject to the true-up mechanism.

[370] July 13 Order, 164 FERC ¶ 61,022 at P 20.

[371] *Id.*

ensure that Mystic appropriately recovers its actual prudently incurred costs of providing service under the Agreement in the manner required by the Commission.[372]

176. Mystic proposes a formula rate that allows Mystic to make "cost adjustments which are computed in accordance with the formula" without making a new FPA section 205 filing for each adjustment.[373] But Mystic only proposes to true-up a subset of these formula inputs: (1) capital expenditures; (2) O&M; (3) A&G; (4) cash working capital; (5) return; and (6) taxes.[374] Mystic has provided its formula template and based its true-up protocols on protocols previously accepted by the Commission for MISO transmission owners.[375]

177. We disagree with Mystic's narrow interpretation of the July 13 Order and direct that the true-up mechanism apply to the entire Agreement, with the exception of the ROE, as discussed above.[376] Mystic does not explain why only its narrow sub-set of variable expenses are inherently difficult to project more than three years in advance as opposed to the remainder of its future expenses. We find that Mystic's proposal to true-up a narrow subset of items produces an unreasonable result and unreasonably lacks transparency.[377] Indeed, in the *MISO* proceeding upon which Mystic based its protocols,

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[372] *See* Trial Staff Initial Br. at 17.

[373] *See Public Utils. Comm'n of State of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (citing *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990)).

[374] Mystic Initial Br. at 144 (citing Ex. MYS-0037 at 24-25).

[375] Ex. MYS-0037 (Heintz Rebuttal) at 29:10-12 (stating that the protocols are based on those approved by the Commission for the MISO transmission owners in their formula rate true-up process in Docket No. ER13-2379-000) (citing *Midcontinent Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 83 (2013) (*MISO*)).

[376] *Trans-Allegheny Interstate Line Co.*, 121 FERC ¶ 61,009, at P 9 n.13 (2007) ("When the Commission sets for hearing the justness and reasonableness of rates, it sets for hearing all issues – other than those summarily disposed of by the Commission or which the Commission has explicitly refused to set for hearing – that are relevant to assessment of justness and reasonableness.").

[377] Ex. S-0034 at 5:21-6:3 (Miller) (explaining that a full true-up will allow Mystic "to collect actual prudently incurred costs, on a formulary basis subject to true-up, with the prudence of such costs to be reviewed in a future Commission proceeding when the costs are actually known.").

the Commission explained that to be just and reasonable a formula rate and its inputs must be transparent.[378] Providing greater transparency will allow the rate to be "sufficiently clear that all parties can determine what costs go into the rate and how it will be calculated."[379]

178. We also do not agree with Mystic's argument that the Commission should limit the true-up to Mystic's narrow subset of costs because a true-up of all items would lead to additional litigation.[380] Mystic's proposed true-up protocols already require a dispute resolution provision that aims to reduce formal litigation. For example, Mystic is required to provide "sufficient support for all inputs" to allow interested parties to verify inputs and bring an "informal challenge" without litigation.[381] If these informal dispute resolution measures prove unsuccessful, Mystic's protocols then allow interested parties to bring "formal challenges," culminating in a complaint under FPA section 206.[382] We find that these protocols are reasonable and that Mystic must true up all items that may be modified without filing an FPA section 205 filing (i.e., ROE). We further find that such a design does not unreasonably increase the risk of litigation or uncertainty of recovery for Mystic.

179. Similarly, we do not agree with Mystic's argument that the true-up does not require revenues to be included in addition to costs. Mystic's argument is undercut by the purpose of a true-up mechanism: to ensure that the utility recovers its actual costs, which must be viewed in relation to the amount of revenue that the utility recovers from its customers.[383] When a utility's revenue requirement is recalculated with only its actual operating data pertaining to costs, it may, in isolation, suggest that the utility under-recovered its costs. But this under-recovery may be offset or exacerbated to the extent

[378] *See MISO*, 143 FERC ¶ 61,149 at P 83 ("Both a formula rate and its inputs must be transparent; it is essential to their being just and reasonable.").

[379] *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,053, at P 120 (2005). *See also Maine Yankee Atomic Power Co.*, 42 FERC ¶ 61,307, at 61,923 (1988); *MISO*, 143 FERC ¶ 61,149 at P 81 (finding "that MISO's formula rate protocols provide insufficient transparency with respect to information about the transmission owners' costs and revenue requirements" and directing revisions to provide greater transparency).

[380] *See* Mystic Initial Br. at 152-54.

[381] *See id.* at 155; Ex. MYS-0020 at 7-8.

[382] *See* Mystic Initial Br. at 152-55.

[383] *See, e.g.*, Ex. S-0034 at 5:21-6:3.

that the utility earned more or less revenue than anticipated. The opposite is true when a revenue requirement recalculated with actual operating data suggests an over-recovery. If Mystic were to only true-up its costs and ignore revenues already recovered from customers, then additional revenue provided by ratepayers to Mystic could exceed Mystic's actual revenue requirement when added to the revenue already provided by ratepayers (when the true-up suggests an under-recovery), and the actual resulting rate would likely be unjust and unreasonable. Accordingly, we direct Mystic to include revenues in the true-up process to ensure both that the rates ultimately charged by Mystic are just and reasonable and that Mystic recovers its prudently incurred costs, as required in the July 13 Order.[384]

180. We also direct Mystic to implement two revisions that will allow the true-up mechanism to provide greater information sharing and that will require Mystic to demonstrate that it is not delaying projects until the term of the Agreement so as to recover more of the costs of those projects from ratepayers under the Agreement. Specifically, these revisions will:

> (1) provide information to interested parties and allow interested parties to seek information regarding the timing of a capital project's completion; and
>
> (2) require Mystic to demonstrate that neither of the following occurred: (a) the capital expenditure project was scheduled before the term of the Agreement but delayed until the term of the Agreement, or (b) the project is scheduled to be completed during the term of the Agreement but should have been completed prior to the term of the Agreement.[385]

181. The kind of information that Mystic could use to demonstrate that it is not unduly delaying a project could vary from case to case. For a capital project that Mystic seeks to fully expense and recover during the term of the Agreement, Mystic could provide information as to whether the project was originally scheduled before the term of the Agreement (information that Mystic has already compiled as to capital projects it currently anticipates) and, if necessary, an explanation as to why the project was delayed into the term. Mystic could also provide maintenance schedules or inspection reports to

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[384] July 13 Order, 164 FERC ¶ 61,022 at P 19 ("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.") (emphasis added).

[385] *See* Trial Staff Initial Br. at 102-03.

demonstrate that the project did not need to be scheduled prior to the term of the Agreement.[386]

182. Mystic states that there are circumstances in which a capital expenditure could be incurred outside of the term of the Agreement but would have been incurred in order to fulfill the Agreement, and it argues that a capital expenditure should be recovered if Mystic can demonstrate "why the capital expenditure is necessary in order to meet the reliability need identified by the ISO," as provided in the Tariff.[387] But the information that we are here requiring Mystic to provide does not speak to whether or not a capital expenditure meets the Tariff's definition of recoverable costs. Rather, providing the information as to timing that we are requiring here will enable interested parties to ensure that Mystic recovers the costs of a capital expenditure from the users who benefit from it.[388]

183. Finally, we do not adopt ENECOS' and New England LDCs' proposal to require Exelon to engage an independent asset manager to operate Everett.[389] ENECOS and New England LDCs do not cite to any Commission precedent in which the Commission has imposed a requirement that the operations of a facility be involuntarily turned over to an independent asset manager. Without further evidence or additional precedent, we decline to do so here.

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[386] *Id.*

[387] Mystic Initial Br. at 156 (citing ISO-NE Tariff § III.13.2.5.2.5.2(b)).

[388] *See* Trial Staff Initial Br. at 104 ("[A] capital project that should have been completed prior to the RMR term according to maintenance schedules could, with a small investment of labor or money, be delayed one more year into the RMR agreement. That project could be needed for reliability and be the least-cost commercially reasonable option regardless of whether it was completed before or during the RMR period, but pushing it into the RMR period would unfairly shift the burden of the costs to RMR ratepayers.").

[389] ENECOS Initial Br. at 66; New England LDCs Initial Br. at 6-7.

2. Cost Review

a. Proposal

184. The Agreement requires that, in advance of each winter, Mystic confer with ISO-NE on how Constellation LNG and Mystic will operate both Everett and Mystic.[390] Mystic maintains that it has no reason to deviate from good utility practice because it owns very few resources in ISO-NE beyond Mystic, which it argues should alleviate certain supply side market power concerns. Mystic contends that there are no vertical market power concerns here because, in a 2008 order concerning an entity that controlled both Everett and Mystic and owned more generation in ISO-NE than Exelon does currently, the Commission found that the combined ownership of the Mystic units plus affiliated New England generation did not create vertical market power.[391]

185. Mystic opposes additional auditing provisions. First, Mystic points out that the proposed audits and management procedures would not be covered through the Agreement and instead would be expenses that Exelon's shareholders would bear.[392] Mystic next notes that any additional audit requirements, beyond those performed by ISO-NE, increase the potential to have costs struck and thus increase the risks associated with entering into the Agreement.[393]

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[390] ISO-NE Initial Br. at 30-33 (citing section 3.9 of the Agreement which requires Mystic to confer with ISO-NE in advance of each winter regarding Mystic's plan for procuring LNG).

[391] *See* Mystic Initial Br. at 167-168 (citing *SUEZ Energy N. Am., Inc*., 125 FERC ¶ 61,188, at PP 27, 34 (2008) ("We agree with Applicants that they do not own or control assets that would allow them to exert vertical market power in wholesale power markets. We disagree with Norwich that Applicants' combination of generation and natural gas storage will harm vertical competition.")).

[392] *Id.* at 173 ("Mr. Winterfeld proposes that Exelon pay the auditor, at Exelon's own expense, not just for its own expenses, but also that it make incentive payments so that the auditor does not ignore Exelon's business interests.") (citing Ex. ENC-0024 at 14).

[393] *Id.* at 9.

b. Opposing Briefs

186. Opposing participants argue that, while ISO-NE has the right to audit Mystic at its discretion,[394] these audits are not required.[395] Specifically, they argue that ISO-NE will not have full access to the information related to Everett that would be needed to provide a meaningful audit.[396] Some opposing participants request that ISO-NE provide to the New England state commissions any forthcoming audit report from ISO-NE and the underlying data, as controlled for confidentiality.[397] New England LDCs also contend that the ability to file an FPA section 206 complaint to address imprudent conduct by Mystic will be hampered if interested parties do not have enough information to do so.[398] Opposing participants point out that, without this information, participants will not have the needed information to file a meaningful complaint on the prudency of the expenses incurred.[399]

187. EDF asks the Commission to direct Exelon to incorporate into Schedule 3A the reporting requirements supported by its witness Mr. Lander, which would require Exelon to detail revenue opportunities pursued and not pursued. EDF asserts that this requirement would provide valuable information to the Commission and the market about whether Everett is being utilized as an efficient fuel security asset. EDF also asks the Commission to adopt a minimum LNG landing requirement of 22.4 Bcf during the proposed December 14 through March 14 winter period because it would ensure that Everett meets both the requirements of Mystic for fuel and maintain the same level of fuel security as it has during the past four winters.[400]

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[394] ISO-NE is permitted to review the operation of Mystic to see if it operates within Good Utility Practice and if Exelon appropriately continues to sell LNG to third parties or reject fuel shipments. ISO-NE and Mystic note that ISO-NE will be able to compare operations under the Agreement to three years of competitive operation before the contract goes into effect. ISO-NE Initial Br. at 11-12; Mystic Initial Br. at 117-118.

[395] NextEra and FirstLight Reply Br. at 28.

[396] Connecticut Parties Initial Br. at 40-42.

[397] NESCOE Reply Br. at 28; New England LDCs Reply Br. at 6-7.

[398] New England LDCs Reply Br. at 6-7.

[399] NextEra and FirstLight Initial Br. at 46-56.

[400] EDF Initial Br. at 40-41.

188. Connecticut Parties ask the Commission to direct ISO-NE to release a public, redacted version of any audit report while providing a complete version, subject to any appropriate confidentiality and disclosure restrictions, to the New England state commissions. Connecticut Parties similarly ask the Commission to require Exelon to make available to New England state commissions any data that it makes available to ISO-NE in connection with an audit, pursuant to section 6.2 of the Agreement, subject to appropriate confidentiality and disclosure restrictions.[401] Connecticut Parties further ask the Commission to direct two management audits of Mystic 8 and 9 and Everett by an auditor contracted and paid for by ISO-NE and selected in coordination and consultation with the state utility commissions of the six New England states.[402] Connecticut Parties assert that referrals to the Commission's Office of Enforcement or litigation by customers are insufficient to ensure oversight of Mystic's tank management practices because interested parties may not know violations are occurring. Connecticut Parties add that it is critical to have access to the data Exelon uses in making its decisions to determine whether Exelon has complied with its obligation to choose the least-cost method of tank management.[403]

189. Eversource and National Grid ask the Commission to impose additional oversight and reporting requirements for both Mystic 8 and 9 and Everett to address the potential for market power and affiliate abuse. Eversource and National Grid ask the Commission to require ISO-NE to retain an outside auditor to monitor electric and natural gas operations, including fuel supply management and third-party transactions, under the Agreement and the Fuel Supply Agreement and to clarify the audit standards, audit scope, and procedures for periodic dissemination of audit results.[404]

190. NESCOE asks the Commission to provide for states and other consumer-interested parties to review, assess, and provide input on the operations and costs of Mystic 8 and 9 and Everett. NESCOE argues that ISO-NE's right to audit Mystic is not sufficient to protect consumers.[405] NextEra and FirstLight contend that the Agreement and the Fuel Supply Agreement do not provide any guidelines or standards with respect to LNG cargo management and do not provide customers with meaningful protection against LNG over-procurement because: (1) Constellation LNG has no obligation to provide

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[401] Connecticut Parties Initial Br. at 40-42.

[402] *Id.* at 43; Connecticut Parties Reply Br. at 24-25.

[403] Connecticut Parties Initial Br. at 30-36.

[404] Eversource Initial Br. at 14; National Grid Initial Br. at 17-22.

[405] NESCOE Initial Br. at 75-78.

documents about its efforts to resell natural gas; and (2) ISO-NE has no ability to inspect the records of Constellation LNG's sales of LNG to third parties. NextEra and FirstLight therefore propose an annual prudence review to evaluate fuel procurement decision-making and costs and allow for potential disallowance of cost recovery if imprudent fuel supply management decisions are made.[406] EDF and Industrial Energy Consumers also support audits and adjustments to Mystic's rates, as appropriate.[407]

191. On reply, NextEra and FirstLight note that, contrary to ISO-NE witness Mr. Ethier's testimony, the Agreement does not give ISO-NE access to Constellation LNG's records regarding its decision of whether or not to take an LNG delivery or make a sale to a third party. NextEra and FirstLight claims that section 6.2 of the Agreement does not ensure that ISO-NE will have access to Constellation LNG's records because section 6.2 only requires Constellation LNG to use "reasonable efforts" to obtain the consent of third parties to provide copies of contracts for the sale and supply of LNG between Everett and those parties. NextEra and FirstLight add that, while section 6.2 authorizes ISO-NE to obtain documentation of the margin earned on any third-party sales of LNG, it does not require ISO-NE to do so.[408] Opposing participants reiterate that a prudence review is necessary and ISO-NE should hire an independent and knowledgeable expert to conduct those reviews.[409] ISO-NE responds by stating that it will have extensive oversight over Mystic and Everett during the Agreement and does not support a prudence review or management audit to which it has limited expertise. ISO-NE notes, however, that the Commission could order reports to state regulators that might address those regulators' concerns.[410]

c. Supporting Briefs

192. ISO-NE states that it will have the ability to review Exelon's copies of any contracts for sales of fuel between Everett and third parties during the term of the Agreement, any affiliate fuel supply agreements involving Everett, and documentation of

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[406] NextEra and FirstLight Initial Br. at 46-56.

[407] EDF Initial Br. at 36; Industrial Energy Consumers Initial Br. at 12-13.

[408] NextEra and FirstLight Reply Br. at 28.

[409] Eversource Reply Br. at 10; New England LDCs Reply Br. at 6; NextEra and FirstLight Reply Br. at 29-30.

[410] ISO-NE Reply Br. at 9-11.

the margin earned on any third-party sales of LNG re-gasified through Everett.[411] ISO-NE also states that it plans to conduct routine and frequent audits of reports, statements, invoices, charges, or computations under the Agreement. For example, ISO-NE testified that it "expect[s] [it] will be hiring an outside person or people to do regular examinations of the transactions and the books and records of Exelon."[412] ISO-NE notes that these audits will include audits on a broad range of matters related to the Agreement and consultation on LNG procurement and forward contracting and whether the fuel supply costs incurred by Mystic were prudently incurred and correctly accounted for. Therefore, ISO-NE asserts that additional management audits or prudence reviews are unnecessary.[413] ISO-NE also does not support requiring a third-party expert to conduct audits.[414] ISO-NE points to the incentives built into the Agreement to dictate appropriate behavior.[415] ISO-NE argues that, if there are additional concerns, a party could file an FPA section 206 complaint with the Commission to seek disallowance of any imprudently incurred expenses.[416]

d. <u>Determination</u>

193. We find persuasive ISO-NE's commitment in this proceeding that it will "audit and verify the accuracy of all reports, statements, invoices, charges, or computations under the Mystic Agreement."[417] Therefore, we will not require Mystic to undergo

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[411] Section 6.2 of the Agreement provides ISO-NE with the right to examine, audit, and verify Exelon's and Mystic's "books and records . . . to the extent necessary to audit and verify the accuracy of all reports, statements, invoices, charges, or computations pursuant to this Agreement." Ex. MYS-0080 at 22; ISO-NE Initial Br. at 38. *See also* Ex. ISO-0001 at 7 (explaining "provisions afford the ISO audit rights on a broad range of matters related to the agreement and consultation on LNG procurement and forward contracting"); Tr. 1049:6-25; Tr. 1052:22-1053:17.

[412] Tr. at 1057:12-15; ISO-NE Initial Br. at 39.

[413] ISO-NE Initial Br. at 37-40.

[414] *Id.* at 36.

[415] Ex. No. ISO-0001 at 7; Tr. 1049:6-25; 1052:22-1053:17.

[416] ISO-NE Initial Br. at 39-40.

[417] *See* Ex. MYS-0080 at 22 (section 6.2 of the Agreement provides ISO-NE with the right to examine, audit, and verify Exelon's and Mystic's "books and records . . . to the extent necessary to audit and verify the accuracy of all reports, statements, invoices, charges, or computations pursuant to this Agreement."). *See also* ISO-NE Initial Br. at

additional audit processes or procedures. However, to the extent that there is information that Everett possesses that ISO-NE may not access under section 6.2 of the Agreement,[418] we direct Mystic to expand this provision to allow ISO-NE to access all information in Everett's possession as well as allowing ISO-NE to more accurately perform its audit.

194. Moreover, we will not require ISO-NE to make this audited information public or send the reports to state public utility commissions because ISO-NE has explained that public access to such information is already possible. Consistent with its Information Policy, ISO-NE will allow redacted versions of its reports to be publicly available and allow less redacted versions to be available to state commissions and other administrative non-participant bodies.[419] We find that this current level of information sharing that will be applied to the Agreement is just and reasonable because it balances the audit burden placed on Mystic with the need for transparency into the prudency of Mystic's recovered costs.

195. Our determination here is consistent with Commission precedent. In *Mirant Kendall, LLC*, a protestor argued that an RMR unit should provide additional cost information to the public and that an individual protestor should have the right to audit.[420] The Commission denied these two requests. First, the Commission found that the cost information supporting the RMR unit's rates was already available through the Commission's proceeding.[421] Moreover, the Commission found the agreement provided

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39-40 ("ISO-NE plans to audit and verify the accuracy of all reports, statements, invoices, charges, or computations under the Mystic Agreement. Further, ISO-NE expects to conduct such audits on a routine basis, throughout the term of the agreement.").

[418] Section 6.2 currently includes rights for ISO-NE to review: (1) Exelon's copies of any contracts between Exelon or Everett and third parties for the sale of fuel from the Everett during the term of the Mystic Agreement and any contracts between Exelon/ Everett and third parties for the supply of fuel to the Everett during the Mystic Agreement; (2) copies of any affiliate fuel supply agreements involving Everett in effect during the Mystic Agreement; and (3) documentation of the margin earned on any third-party sales of LNG re-gasified through Everett for purposes of verifying the crediting of such margin against the cost of the Mystic's fuel supply from Everett. *See* Ex. MYS-0080 at 22 (Mystic Agreement § 6.2).

[419] ISO-NE Initial Br. at 40, n.116 (citing Tr. 1059:3-1060:5).

[420] *Mirant Kendall, LLC*, 110 FERC ¶ 61,272, at P 19 (2005).

[421] *Id.* P 20.

a sufficient safeguard because it allowed ISO-NE "to audit and verify reports, statements, invoices, charges, or computations pursuant to the agreement."[422]

196. Similarly, here, ISO-NE will make its reports available and has represented that it will also audit and verify all reports, statements, invoices, charges, or computations pursuant to this Agreement. To the extent that section 6.2 of the Agreement does not cover information that Everett possesses that ISO-NE may not access, we direct Mystic to expand this provision to allow ISO-NE to access all information in Everett's possession as well to ensure ISO-NE has sufficient information to meaningfully exercise its audit rights and inform both the public and state public utility commissions consistent with its Information Policy.

3. Clawback Provision

a. Proposal

197. A clawback mechanism would require Mystic to refund specified monies that it received under the Agreement to ratepayers should it choose to participate in ISO-NE's markets after the Agreement terminates. Although Mystic does not propose a clawback mechanism, it states that it would be amenable to such a mechanism, as long as it does not apply if Mystic continues under a new or revised cost-of-service agreement or if Mystic continues to operate in a restructured market in which Mystic is needed for fuel security. Mystic argues that, if Mystic 8 and 9 are still needed for fuel security after the term of the Agreement, any money spent during the terms of the Agreement should be spent in providing fuel security. Mystic adds that the ratepayers who covered the cost of these investments are the same ratepayers who will benefit from the retention of Mystic.[423]

198. Mystic cites Commission precedent, in which the Commission found that a clawback would be inefficient and harmful to ratepayers. Mystic notes that these proceedings lead to the development of the FCM, which did not include clawbacks.[424]

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[422] *Id.*

[423] Mystic Initial Br. at 162-3.

[424] *Id.* at 141. *See, e.g.*, *Mystic Dev., LLC*, 114 FERC ¶ 61,200 (2006), *order accepting settlement*, 118 FERC ¶ 61,144 (2007); *Mirant Kendall, LLC*, 109 FERC ¶ 61,227, *reh'g denied*, 110 FERC ¶ 61,272 (2005), *order approving settlement*, 114 FERC ¶ 61,020 (2006).

b. **Opposing Briefs**

199. Trial Staff and other opposing participants argue that, to address the possibility that Mystic 8 and 9 will stay in commercial operation beyond 2024, the Agreement must include a clawback provision to be just and reasonable. Trial Staff recommends that the Commission require Mystic to adopt the clawback provision set forth in the MISO Tariff for a portion of capital expenditures that are fully expensed during the term of the Agreement in the event that Mystic 8 and 9 return to service under market-based rates after that service period.[425]

200. Trial Staff explains that the MISO language would claw back (i.e., require a refund with interest of) certain costs that are needed to continue the operation of Mystic 8 and 9 as resources for fuel security during the term of the Agreement in the event that Mystic: (1) decided not to retire Mystic 8 and 9 or Everett; (2) decided not to suspend them; or (3) decided to return to service after operating them as resources retained for fuel security or retiring them. Trial Staff argues that this provision would discourage toggling between cost-of-service recovery and market-based rates if Mystic 8 and 9 returned to the market at a future date. Trial Staff contends that a clawback is fair to ratepayers because it matches the costs and cost recovery with the customers who receive the benefits of the repaired and rehabilitated generating unit.[426] Trial Staff states that the clawback provision will also prevent the inequitable recovery from ratepayers of repairs that provide significant benefit beyond the term of the Agreement if Mystic 8 and 9 are returned to regular utility service.[427]

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[425] Trial Staff Initial Br. at 105. MISO's relevant clawback language includes: "(ii) The Market Participant that owns or operates an SSR Unit [System Support Resource, MISO's equivalent term for an RMR generator] must refund to the Transmission Provider with interest at the FERC approved rate, all costs, less depreciation, for repairs and capital expenditures that were needed to continue operation of the Generation Resource or SCU [Synchronous Condenser Unit] and to meet applicable regulations and other requirements (including environmental) while the Generation Resource or SCU was subject to an SSR Agreement if the owner: (1) rescinds its decision to Suspend or to Retire the unit while it is designated a SSR; (2) rescinds its decision to Suspend following its previous designation as an SSR Unit; or (3) returns a unit to service following its previous designation as an SSR Unit and later retirement of the unit." *See* Ex. S-0022.

[426] Trial Staff Initial Br. at 107 (citing Ex. S-0022 at 10:8-12).

[427] Trial Staff Initial Br. at 107-108.

201. Trial Staff agrees with Mystic that a clawback provision should not be triggered if the Agreement is extended because ISO-NE saw a continuing need to retain Mystic 8 and 9 for reliability purposes. Trial Staff asks, however, that the Commission deny Mystic's second, proposed clawback exception: that the clawback not apply if Mystic 8 and 9 continue to operate in a restructured market in which they are needed for fuel security. Trial Staff argues that this exception does not address certain ratepayer fairness issues addressed in Opinion No. 556, in which the Commission found that the main intent of a clawback provision is to prevent the inequitable recovery from customers for repairs that provide significant benefits beyond the term of the agreement should the generator later return to regular utility service.[428]

202. Other opposing participants agree with Trial Staff that Mystic should be required to include a clawback provision, although with some variation as to what should be included and whether it should be modeled on MISO's or New York Independent System Operator, Inc. (NYISO)'s clawback provision.[429] NESCOE asserts that the Agreement must include a clawback mechanism that protects consumers' economic interests while not discouraging an efficient generator from continuing to operate. NESCOE witness Mr. Bentz has developed a clawback provision which NESCOE states would appropriately balance generator and customer interests.[430] In responding to Mystic witness Mr. Schnitzer's argument that the clawback might discourage Mystic from re-entering the market under those circumstances and that this choice would operate to customers' detriment, NESCOE asserts that, to the contrary, this exception would allow Mystic to simply wait for the market to improve and then re-enter, in contravention of the Commission's policy against toggling. Similarly, NESCOE asserts that it would be unjust and unreasonable to allow Mystic to profit from the capital expenditures that

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[428] *Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 556, 161 FERC ¶ 61,059, at P 59 (2017).

[429] *New York Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,076 (2016), *order on rehearing*, 161 FERC ¶ 61,189 (2017) (*NYISO*).

[430] NESCOE's proposed clawback provision includes the following features: (1) it would apply to Mystic 8 and 9 and Everett; (2) the amount would be based on any capital expenditures made during the cost-of-service period and costs for repairs that provide significant benefits beyond the end of that period; (3) it would provide a formula for Mystic to calculate a refund amount; (4) it would require Mystic to file the refund amount calculation no less than three months prior to the end of the Agreement term; (5) Mystic would amortize the refund amount over a four-year straight-line period; and (6) it would provide separate provisions to terminate the clawback provisions for Mystic 8 and 9 and for Everett. NESCOE Initial Br. at 69-70, 72.

consumers fund during the cost-of-service period only to extend these profits without any payback or at the very least some consideration in any future cost-of-service agreement.[431]

203. ENECOS and NRG also support a clawback provision, arguing that Exelon should refund Mystic 8 and 9 customers the higher of: (1) the capital expenditures less depreciation that were expensed and paid by Exelon during the term of the Agreement; or (2) the revenues received by Exelon in excess of its going-forward costs, with the repayment period within the shorter of 36 months or the duration of the Agreement. ENECOS and NRG argue that, for purposes of this calculation, capital expenditures for Everett should be included in part (1) of the "higher of" test.[432]

204. Connecticut Parties claim that the clawback provision proposed by Mystic and Trial Staff is insufficient because it would not include the possibility of the refund (with interest) of above-market payments that Mystic received during the term of the Agreement, when those payments exceed the amount associated with the refund of capital expenditures less depreciation. Instead, Connecticut Parties ask the Commission to adopt the clawback provision in *NYISO*, which provides that refundable above-market RMR revenues would be the difference between the revenues received pursuant to the Agreement and the greater of: (a) the total market-based revenues, including uplift revenues, the generator would have received during the term of an RMR agreement; or (b) the generator's going-forward costs for RMR service.[433] The Massachusetts AG also supports such a clawback mechanism as a Commission-recognized way to eliminate or minimize incentives for a generator needed for reliability to toggle between receiving RMR compensation and market-based compensation for the same unit.[434]

c. Supporting Briefs

205. Mystic argues that the rationale underlying applying a clawback provision in a traditional RMR agreement does not apply to a unit retained for fuel security purposes.

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[431] NESCOE Initial Br. at 73-75.

[432] ENECOS Initial Br. at 68-69; NRG Initial Br. at 28-34. Eversource and National Grid support NESCOE's clawback provision. Eversource Initial Br. at 4-10; National Grid Initial Br. at 11-14. Industrial Energy Consumers also supports a clawback. Industrial Energy Consumers Initial Br. at 12.

[433] Connecticut Parties Initial Br. at 75-80 (citing *NYISO*, 155 FERC ¶ 61,076 at P 126).

[434] Massachusetts AG Initial Br. at 41.

Mystic notes that an RMR agreement ends in ISO-NE when the transmission security constraint has been addressed through a transmission upgrade. In that case, Mystic asserts that the capital improvements made to the resource no longer provide the same reliability benefits to the customers of ISO-NE as they are provided by the associated transmission upgrade.[435]

206. Mystic states that, even with a market-based solution, it is likely that the fuel security benefit from Mystic 8 and 9 will continue and that ratepayers will continue to benefit from the capital expenditures. Mystic asserts that no one has explained why, in this new context, it makes sense to erect a potentially insurmountable financial barrier to allowing ratepayers to continue to realize the benefit of their investment in fuel security.[436]

207. Mystic argues that Connecticut Parties' request to adopt the *NYISO* clawback provision would create a potentially insurmountable financial barrier to allowing ratepayers to continue to realize the benefit of their investment in fuel security. Mystic asks the Commission to not adopt the *NYISO* clawback methodology because it would hold Mystic responsible for the failure of future market-based rules to produce sufficient revenues, which would virtually assure retirement regardless of whether Mystic 8 and 9 are needed for fuel security. Mystic argues that a *NYISO*-style clawback would require the refund of "above-market" payments, perpetuating the failure of the market to economically value and price fuel security, and capping refunds to allow the resource to collect its going-forward costs would not keep any generator with risks similar to Mystic's in the market.[437]

d. <u>Determination</u>

208. Based upon the record, we find that the Agreement is not just and reasonable because it does not contain a clawback provision. We direct Mystic to revise the Agreement to include a clawback provision like the mechanism described in the MISO tariff, which specifies that a resource owner that re-enters the market after its cost-of-service agreement ends (i.e., it does not retire) is required to "refund to the Transmission Provider with interest at the FERC-approved rate, all costs, less depreciation, for repairs and capital expenditures that were needed to continue operation of the Generation

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[435] Mystic Reply Br. at 17.

[436] *Id.* at 18.

[437] *Id.* at 18-19.

Resource" during the term of the cost-of-service agreement.[438] We direct Mystic to clarify that the clawback mechanism will not apply if ISO-NE chooses to extend the Agreement but that the clawback mechanism would apply if Mystic chooses to return to the market after the term of the Agreement or after an extension.

209. We note that Mystic has agreed to accept such a clawback mechanism with two exceptions. We find that the first exception, if Mystic continues to operate under a new or revised cost-of-service agreement, is just and reasonable and, accordingly, accept it. We find the clawback provision should not apply in that instance because ISO-NE would find a continuing need for the Agreement for reliability purposes.

210. However, we deny Mystic's request for an exception if it seeks to re-enter a market that has been restructured in a way that values Mystic's fuel security benefits. We agree with Trial Staff that Mystic's request is too narrow of a reading of the purpose of a clawback mechanism. The Commission has found that a clawback mechanism is just and reasonable because it prevents both undesirable toggling and inequitable recovery from ratepayers for investments and repairs; while incurred during the term of a cost-of-service contract, these investments will benefit the resource for years after the contract ends.[439] We find unpersuasive the settlement agreements from 2006 and 2007 that Mystic cites as support for its contention that a clawback mechanism is unnecessary. In Opinion No. 556, the Commission discussed the role and necessity of a clawback provision for just and reasonable rates. There, the Commission explained that a clawback provision should not allow RMR owners to recover any total capital and repair expenses because they provide significant benefits beyond the term of the RMR agreement from customers, and that it is "the main intent of the [clawback] provision to prevent the inequitable recovery from SSR customers for repairs that provide significant benefits beyond the term of the SSR Agreement should the SSR later return to regular utility service."[440] Consistent with Opinion No. 556, we find that, in this instance, a clawback provision is necessary to ensure just and reasonable rates.

211. Mystic contends that relevant differences between circumstances when cost-of-service agreements are used for transmission purposes and circumstances when cost-of-service agreements are used for fuel security purposes merit different clawback treatment.

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[438] *See* Midcontinent Indep. Sys. Operator, Inc., FERC Electric Tariff Module C (53.0.0), § 38.2.7.e(ii).

[439] *See* Opinion No. 556, 161 FERC ¶ 61,059 at PP 55, 59 (finding the main intent of a clawback provision is "to prevent the inequitable recovery" from customers for expenses that provide significant benefits beyond the term of the RMR agreement).

[440] Opinion No. 556, 161 FERC ¶ 61,059 at P 55, 59.

We disagree. At the end of a cost-of-service agreement's term, the need for the unit to provide relief for a transmission constraint would be replaced by a transmission upgrade. In this case, the need for cost-of-service treatment for Mystic will have been replaced by a market-based mechanism for fuel security. Under a market-based mechanism, if Mystic is not the most economic alternative to meet a fuel security need, then Mystic will not be selected to provide capacity and/or fuel security. The clawback mechanism helps place Mystic on similar footing with other resources that would not have benefitted from a cost-of-service agreement in the new market-based mechanism.[441]

212. Previously, the Commission has accepted clawback provisions to address the concern that a retiring generator may enter into a reliability must-run cost-of-service agreement, recover the costs of significant upgrades under that agreement, and subsequently return to service without reimbursing ratepayers for those upgrade costs.[442] If Mystic 8 and 9 return to service after the term of the Agreement, we find that adopting the clawback provision described in the MISO tariff will resolve that concern here. While some commenters express a preference for a clawback mechanism based upon the NYISO provision, they do not explain why a clawback mechanism based on the provision the Commission accepted in MISO is not just and reasonable. Because we find that the MISO, rather than the NYISO, clawback provision is reasonable here, we will not address Trial Staff's or Mystic's concerns about the NYISO clawback provision.

E. Miscellaneous

1. Price Impacts of the Agreement on Northeast Natural Gas and Electric Markets

a. Opposing Briefs

213. NRG raises concerns relating to the potential for anticompetitive behavior and poorly-functioning natural gas and electric markets as a result of the Agreement.[443] NRG contends that, while the proper operation of Everett is critical to producing well-functioning electric and natural gas markets in the Northeast region of the country, the Agreement will incent Exelon to overschedule LNG deliveries and dump the excess

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[441] We note that, under the directed clawback mechanism, we do not require Mystic to pay back any depreciation expense recovered on the relevant investments, thus allowing Mystic to recover the portion of the capital expenditures associated with the Agreement as though the capital expenditures were originally capitalized.

[442] Opinion No. 556, 161 FERC ¶ 61,059 at P 55.

[443] NRG Initial Br. at 21-24.

supply in the local market, suppressing both natural gas and electricity prices.[444] NextEra and FirstLight similarly argue that, because the Agreement stipulates that Exelon would be faced with enormous penalties for any potential fuel unavailability but limited penalties for over-procurement, Exelon would have an incentive to over-procure LNG, hold that LNG in its tank to avoid penalties if Mystic is unavailable, and then dispose of excess LNG when the next shipment is due by either dumping the LNG in the market and/or burning natural gas uneconomically at Mystic 8 and 9 to make room in the Everett storage tank.[445]

214. NRG and Repsol claim that the incentive for Exelon to over-procure LNG will reduce the market's incentive to contract for LNG from other sources and will mask the value of investment in other solutions such as additional pipeline capacity. NRG, Repsol, and NextEra argue that, as a result of the Agreement, Mystic and Everett are planning to procure enough natural gas to meet a 1-in-50-year cold winter. NRG and NextEra contend that, under this plan, there is a 98-99.96 percent chance of excess LNG procurement.[446] NRG asserts that this LNG over-procurement will reduce the ability of the Northeast natural gas and electric markets to properly function.

215. NextEra and FirstLight also argue that lower natural gas and electric prices caused by the dumping LNG in the market and the uneconomic operation of Mystic 8 and 9 will result in lower market revenues for other natural gas and electric suppliers, which may lead to additional requests from other market participants for cost-of-service agreements.[447]

216. ENECOS contends that, under the Agreement, Exelon plans to reduce the amount of LNG that Everett imports, which could enable Exelon to exercise market power by withholding natural gas during times when pipelines are constrained, causing prices to spike in the natural gas markets and thereby harming competitors. ENECOS claims that, because all of Everett's fixed and variable costs are allocated to Mystic 8 and 9 under the Fuel Supply Agreement and will be paid for by ISO-NE's customers, Exelon has an

[444] *Id.* at 22-23.

[445] NextEra and FirstLight Initial Br. at 6.

[446] NRG Initial Br. at 22-23; NextEra Reply Br. at 15-16, 21; Repsol Initial Br. at 8-9, 11-13; Repsol Reply Br. at 6, 8.

[447] NextEra and FirstLight Initial Br. at 10-12.

incentive to only procure enough fuel for Mystic 8 and 9 to avoid the severe penalty exposure it faces for insufficient fuel supplies.[448]

b. Supporting Briefs

217. Mystic claims that the arguments concerning price suppression are unfounded.[449] Mystic argues that the Agreement will not result in the flooding of the natural gas market because the operations of Everett and Mystic will be co-optimized in ways that were not possible under the prior dual ownership structure. Mystic contends that this co-optimization will significantly reduce the need to dispose of natural gas uneconomically.

c. Determination

218. We find that issues raised about anticompetitive behavior and the general functioning of natural gas and electric markets are beyond the scope of this proceeding. Here, the Commission's review is limited to whether the rate, terms, and conditions of the Agreement are just and reasonable, including reviewing Everett's cost-of-service rate to ensure that imprudent costs are not passed through the Agreement.

219. Regarding participants' claims that Exelon may attempt to manipulate the natural gas and/or electricity markets, we note that the Commission will monitor the New England natural gas and electricity markets during the term of the Agreement. Further, in the event of such manipulation, the Commission has authority under section 4A of the Natural Gas Act to address market manipulation in the natural gas markets, particularly in connection with Commission-jurisdictional transactions.[450] In addition, ISO-NE and the

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[448] ENECOS Initial Br. at 59-61.

[449] Mystic Initial Br. at 125.

[450] Section 4A of the Natural Gas Act, 15 U.S.C. § 717c-1 (2012), makes it unlawful for "any entity" to utilize any "manipulative device or contrivance" "in connection with" Commission-jurisdictional transactions. Specifically, section 4A provides the following:

> It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) in contravention of such rules and regulations

IMM have stated that they will monitor Everett and Mystic's behavior during the term of the Agreement and compare it to the period prior to Agreement. We also note that there are additional procedural options available to participants to address these issues if they come to fruition including, but not necessarily limited to, bringing these issues to the attention of ISO-NE and ISO-NE's IMM, referring the matter to the Office of Enforcement, or filing a complaint under FPA section 206.

220. Regarding NRG's criticism of Mystic and Everett's plan to procure LNG to protect Everett (and by extension, Mystic 8 and 9) from facing LNG shortages, we remind participants that the Agreement is in place to provide regional fuel security during winter periods. Further, the Agreement includes additional performance obligations specific to the operation of Mystic 8 and 9. As such, it is reasonable for Everett to procure sufficient LNG to meet demand during colder than normal winters because doing so increases the likelihood that Mystic will not face non-performance penalties and increases the likelihood that the region will have sufficient LNG fuel supply to meet its fuel security needs.

2. Additional Proposed Changes to Agreement

221. NESCOE lists additional actions that it requests that the Commission direct Mystic to take, including: (1) ensuring that any excess positive Capacity Performance Payments associated with the Agreement should accrue to consumers, which NESCOE asserts is not covered in the Agreement; (2) giving ISO-NE greater flexibility to terminate the Agreement for unavailability and forced outages by adding a winter unavailability period (December through February of each year) as a termination trigger, employing a stricter operational metric by adjusting the threshold from 50 to 75 percent (i.e., ISO-NE would be able to terminate the agreement if Mystic operated at only 75 percent of its output under its CSO, rather than under 50 percent), and reinstating the requirement in ISO-NE's *pro forma* cost-of-service agreement that it notify ISO-NE if it anticipated a forced outage that would last for 10 days rather than the 25 days proposed by Mystic; (3) revising section 7.1.1 of the Agreement to prohibit Mystic from taking planned outages during the winter months; and (4) revising section 7.1.2(e) of the Agreement to require Mystic to use a "best effort" standard to minimize costs to recover from a forced outage or provide substitute service, as provided in the *pro forma* cost-of - service agreement, rather than a "commercially reasonable" effort.[451]

> as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.

[451] NESCOE Initial Br. at 78-89 (citing Ex. NES-001 at 14-20). NESCOE notes that Mystic has also agreed to delete section 2.2.1 and modify section 2.2 to require that "ISO-NE seek Commission approval to extend the Mystic Agreement beyond" the two-

222. With regard to NESCOE's proposals (1) and (3) above, Mystic does not speak to NESCOE's proposed change to section 7.1.1 to prohibit Mystic from taking planned outages during the winter months. As to the issue regarding excess positive Capacity Performance Payments, Mystic states that this issue would be resolved if the Commission agreed to Mystic's proposal to provide information to state commissions and NESCOE so that those entities could view the data showing how Everett is operating. However, with regard to NESCOE's proposal (2) above, giving ISO-NE greater flexibility to terminate the Agreement by adding a winter unavailability period as a termination trigger and employing a stricter operational metric, Mystic states that it negotiated the existing terms with ISO-NE and would require additional compensation now to agree to new terms in this regard. As to NESCOE's proposal regarding notifying ISO-NE if Mystic anticipated a forced outage that would last for 10 days rather than 25 days, Mystic asks the Commission to retain the 25-day period and give Mystic 25 days to cure a *force majeure* event because that is the amount of time that it typically takes to schedule a new cargo of LNG into Everett. Finally, as to NESCOE's proposal (4) above, Mystic states that changing the term "commercially reasonable" in section 7.1.2(e) to "best efforts" would require Mystic to spare no effort to address a forced outage, regardless of cost, which Mystic considers to contradict section 7.1.2(e)'s purpose of minimizing costs.[452]

223. With regard to proposal (1) raised by NESCOE, we note that ISO-NE has stated that it has determined that "the Mystic Agreement's crediting provisions in section 4.4 and Schedule 3 do not properly account for the over- and underperformance credits and charges in the manner expressly intended by Exelon and the ISO," and provides proposed changes to address this problem.[453] Mystic does not contest this statement, and NESCOE acknowledges that this change will address its concern.[454] Accordingly, we direct Mystic and ISO-NE to make this change in the Agreement. However, as to proposal (2) through (4), ISO-NE already requires FCM participants to request permission for "planned and maintenance outages taken by Generators with a capacity supply obligation,"[455] and

year term. NESCOE asks the Commission to ensure that Mystic makes these changes in a compliance filing. *Id*. at 78.

[452] Mystic Reply Br. at 108-109, 111-116.

[453] ISO-NE Initial Br. at 16-17 and ISO-NE Initial Br. Attachment A, "Proposed Modifications to the Mystic Agreement."

[454] NESCOE Reply Br. at 19.

[455] *See* ISO New England, *FCM Participation Guide, "Outage Coordination Requirements,"* https://www.iso-ne.com/markets-operations/markets/forward-capacity-market/fcm-participation-guide/outage-coordination-requirements.

NESCOE has not demonstrated that ISO-NE's existing procedures are insufficient to enable ISO-NE to ensure that outages are planned and scheduled so as to maintain reliability. Additionally, as noted above, Mystic has also agreed to delete section 2.2.1 and modify section 2.2 of the Agreement to require that "ISO-NE seek Commission approval to extend the Mystic Agreement beyond" the two-year term. Accordingly, we will not require Mystic and ISO-NE to make any of the other changes requested here by NESCOE.

3. Motion to Strike

a. Mystic's Motion to Strike

224. In its Initial Brief, Mystic moved to strike portions of the redirect testimony of ENECOS's witness Mr. Steffen from transcript page 1573, line 2, through page 1594, line 20 (Motion).[456] Mystic argues that Mr. Steffen testified on subjects and exhibits beyond the scope of Mystic's cross-examination and, therefore, violated Mystic's due process rights and prejudiced it as the participant with the burden of proof.[457] Mystic seeks to exclude Mr. Steffen's redirect testimony that explained how Duff & Phelps calculated the fair value of Mystic 8 and 9 in connection with the multiple changes in ownership from Boston Generation LLC to Constellation Energy and through Constellation's merger with Exelon and the internal accounting of Everett.[458] During the hearing, Mystic made multiple objections that Mr. Steffen's testimony was outside the scope of Mystic's cross-examination.[459] Mystic's counsel did not request further cross-examination of Mr. Steffen following his redirect testimony at issue here.[460]

b. ENECOS's Answer

225. ENECOS asks the Commission to reject the Motion for three reasons. First, ENECOS asserts that Mystic opened the door to Mr. Steffen's redirect testimony by asking Mr. Steffen questions regarding Duff & Phelps fair value valuations of Mystic 8

[456] Mystic Initial Br. at 181-186.

[457] *Id.* at 181.

[458] *See* Tr. 1573:2-1594:20.

[459] *See* Tr. 1573:9-11; Tr. 1575:8-12; Tr. 1580:6-8; Tr. 1584:4-8; Tr. 1592:6-7; Tr. 1614:17-1615:6 (objecting to Mr. Steffen's testimony).

[460] Tr. 1594:24-1595:17.

and 9 and the results of those valuations and the gross value of Everett and associated accounting books.[461]

226. Second, ENECOS argues that the Motion is untimely and barred by the equitable doctrine of laches.[462] ENECOS explains that the Motion was filed 28 days after the date of the testimony at issue and on the same day that other participants submitted their own initial briefs that relied on this testimony.[463] ENECOS contends that, as a result, a decision on the Motion would necessarily come after the briefing deadlines had passed, and an adverse ruling could undermine a participant's ability to present their case in this proceeding.[464]

227. Third, ENECOS argues that Mystic's Initial Brief contravenes Rule 2002 of the Commission's Rule of Practice and Procedure, which requires that a filing contain a heading that describes the filing because Mystic did not include its Motion in the caption heading.[465] ENECOS notes that the Commission has rejected requests when the filing does not contain a heading that "clearly identifies" the filing.[466] ENECOS argues that Mystic's Initial Brief does not comply with Rule 2002(d) because the heading, "Initial Post-Hearing Brief of Constellation Mystic Power, LLC," does not mention the Motion.

c. <u>Determination</u>

228. We find that Mystic has not met its burden to exclude the testimony of Mr. Steffen. The Commission generally disfavors motions to strike, stating that they will be denied, unless the moving party has carried its burden to establish that the

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[461] ENECOS Nov. 16, 2018 Answer at 5 (citing Tr.1535:20-1536:22; Tr.1537:2-6; 1538:16-1539:6; Tr. 1541:5-1544:3).

[462] *Id.* at 2-3.

[463] *Id.*

[464] *Id.* at 3.

[465] *Id.* at 8 (citing 18 C.F.R. § 385.2002).

[466] *Id.* at 8 (citing *City of Ottumwa*, 79 FERC ¶ 61,014, at 61,071 (1997) (rejecting a letter as a rehearing request because it "contained no heading that identified it as a rehearing request, nor did the text of the letter state that rehearing was being requested.")).

material has “no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party.”[467]

229. In the Presiding Judge’s evidentiary ruling on the record during the hearing, he found that Mystic’s counsel raised the general issue of fair value valuations on cross-examination and, therefore, Mr. Steffen’s testimony was relevant because it sufficiently related to his earlier testimony during cross-examination.[468] We agree with the Presiding Judge that this testimony is relevant and, if excluded, would “ignore the purpose of this hearing, and that is to gather facts in order to [allow the Commission to] make an informed and well-reasoned decision that is supported by record evidence.”[469]

230. For these reasons, we find that Mr. Steffen’s testimony is directly relevant to this proceeding. Accordingly, we deny the Motion. Because we deny the Motion on the merits, we do not address ENECOS’s additional procedural arguments.

The Commission orders:

(A) Mystic’s Agreement is hereby accepted, subject to condition, to become effective June 1, 2018, as discussed in the body of this order.

(B) We hereby direct Mystic to submit a compliance filing, within 60 days of this order, as discussed in the body of the order.

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[467] *Power Mining, Inc.*, 45 FERC ¶ 61,311, at 61,972 n.1 (1988) (citing C. Wright and A. Miller, *Federal Practice and Procedure, Civil* §1262 at 268-69 (1969); 2 A Moore’s *Federal Practice* ¶12.21 (1979)).

[468] *See, e.g.*, Tr. 1580:9-11; Tr. 1612:15-1614:9.

[469] Tr. 1614:6-9.

(C) We hereby direct the participants to submit supplemental briefs and additional written evidence, as discussed in the body of this order. Initial briefs are due 120 days from the date of this order. Responses to those initial briefs are due 90 days after the date of the initial briefs. No answers or additional briefs will be permitted.

By the Commission. Commissioner Glick is dissenting with a separate statement.
Commissioner McIntyre is not voting on this order.
Commissioner McNamee is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Constellation Mystic Power, LLC   Docket No. ER18-1639-000

(Issued December 20, 2018)

GLICK, Commissioner, dissenting:

Today's order marks the fourth time in six months that the Commission has addressed "fuel security" in New England. I continue to believe that, in the first order, the Commission took the region down a deeply misguided path when it prematurely seized control of the fuel-security debate by finding ISO-NE's tariff unjust and unreasonable on the ground that it did not give the ISO the authority to bail out resources that the ISO believes might, under the most conservative assumptions, be needed several years in the future.[1] That decision short-circuited what could have otherwise been a productive debate about how to ensure that New England remains fuel-secure.[2] That decision also further confined the fuel-security debate to options available under the Federal Power Act (FPA), even though it was evident at the time that the FPA is an inadequate vehicle for addressing many of the factors that go into fuel security.

I also dissented from the second fuel security order, which set Mystic's proposed cost-of-service agreement for an expedited hearing.[3] That order— issued just a week after the first order—proved the folly of the Commission's decision to co-opt the New England fuel security debate and force it within the confines of the FPA. The record revealed that ISO-NE's actual "fuel security" goal was to bail out the Everett LNG

[1] *ISO New England Inc.*, 164 FERC ¶ 61,003, at 3 (2018) (Glick, Comm'r, dissenting); *see also Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022, at 4-5 (2018) (Powelson, Comm'r, dissenting) (discussing a suite of potentially more cost-effective approaches to fuel security in New England and decrying the fact that "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").

[2] *ISO New England Inc.*, 164 FERC ¶ 61,003 at 3-4 (Glick, Comm'r, dissenting).

[3] *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at 1 (Glick, Comm'r, dissenting).

import facility, but to do so under the guise of the FPA. I explained that bailing out an LNG import facility under a statute enacted to regulate the wholesale sale and transmission of electricity was not only bad policy, but also a novel—and questionable—application of the Commission's statutory authority.[4] Indeed, that approach created exactly the kind of uncertainty one might think the Commission would want to avoid if it took the long-term fuel security of the region seriously.

Notwithstanding those concerns, I supported the third fuel security order, which approved ISO-NE's proposal to create a short-lived mechanism for retaining a generating resource[5] that may be needed for fuel security while the ISO develops a market-based approaching to valuing fuel-secure attributes.[6] Although I reiterated my conviction that the Commission erred in finding the ISO's existing tariff unjust and unreasonable, I concluded that the ISO's filing fell within the range of just and reasonable rates created by the FPA.[7] In other words, I concluded that, although it was not the best outcome, and still should not have been required in the first place, it would suffice for a couple of years while the region worked on a better approach.[8]

With today's order, my underlying concerns about the Commission's approach have now come to fruition. As explained below, the Commission is attempting to use the FPA to bail out an LNG import facility—certainly not the type of facility that Congress had in mind when it gave the Commission authority to regulate the wholesale sale and transmission of electricity. To provide a plausible jurisdictional hook for its actions, the Commission is also bailing out 1,700 MW of gas-fired generation, all at a price tag that will cost consumers hundreds of millions of dollars. I continue to believe that, had the Commission convened a process to examine fuel security in New England more

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[4] *Id.* at 2-3.

[5] ISO-NE, Transmission, Markets and Services Tariff § III.13.2.5.2.5A (discussing the "Fuel Security Reliability Review" as it applies to an "Existing Generating Capacity Resource,"); *id.* § I.2.2 (defining an "Existing Generating Capacity Resource" as "a type of resource participating in the Forward Capacity Market").

[6] *ISO New England Inc.*, 165 FERC ¶ 61,202 (2018) (Glick, Comm'r, concurring).

[7] *Id.* at 1-2; *see also Emera Maine v. FERC*, 854 F.3d 9, 23 (D.C. Cir. 2017) (explaining that the FPA creates a "'broad' range of potentially just and reasonable" rates").

[8] *Cf. Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) ("FERC is not required to choose the best solution, only a reasonable one.").

holistically, the region might well have produced a solution that is more effective, less costly, and on far firmer legal footing.

*   *   *

I dissent from today's order because I believe that the Commission cannot and should not use its authority over wholesale sales of electricity to bail out an LNG import facility. Section 205 of the Federal Power Act authorizes the Commission to ensure that "'[a]ll rates and charges made, demanded, or received by any public utility for or in connection with' interstate wholesale [electric] sales" as well as "'all rules and regulations affecting or pertaining to such rates or charges'" are just and reasonable.[9] The Supreme Court, however, has explained that a literal reading of the statute "could extend FERC's power to some surprising places," including the "inputs" used to produce electricity, such as "steel, fuel, and labor."[10] Accordingly, the Court concluded that the Commission's jurisdiction under section 205 extends only to rules or practices that "*directly* affect the wholesale rate."[11]

Today's order is inconsistent with that standard. The Commission concludes that it can use the FPA to bail out an LNG import facility simply because that LNG import facility has an undefined and unexplained "extremely close relationship" to the Mystic facility.[12] Relying entirely on that amorphous relationship, the Commission gives itself the authority to set the cost-of-service rate for a free-standing LNG import facility. Indeed, the Commission proceeds to determine not only the rules and regulations governing all of the Everett LNG import facility's costs, including its fixed costs, but also rules and regulations regarding that facility's sales to local distribution companies—*i.e.*,

[9] *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773 (2016), *as revised* (Jan. 28, 2016) (*EPSA*) (quoting 16 U.S.C. § 824d(a) (2012)).

[10] *Id* at 775.

[11] *Id.*; *see also id.* ("As we have explained in addressing similar terms like 'relating to' or 'in connection with,' a non-hyperliteral reading is needed to prevent the statute from assuming near-infinite breadth.").

[12] *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267, at P 106 (2018). In grasping for precedent to support its theory of jurisdiction, the Commission cites to the same cases it relied upon in its July 13 order summarily deciding the jurisdictional question. *Id.* n.230. As I explained in my dissent from that order, those cases are inapt. *See Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at 3 n.7 (Glick, Comm'r, dissenting).

third parties with no involvement in the electricity sector.[13] The only connection that those local sales of natural gas have to the wholesale sales subject to the Commission's jurisdiction is that they involve the same source of LNG.[14] I fail to see how that connection provides the type of "direct effect" that the Court required in *EPSA*.

The fact that Exelon, which owns Mystic, is also purchasing the Everett LNG import facility does nothing to bolster the Commission's theory of jurisdiction.[15] The bottom line is that the Commission is attempting to regulate the costs incurred and sales made by a non-jurisdictional facility—a legal defect that cannot be cured by bringing that non-jurisdictional facility under the same corporate parent as a jurisdictional one. All Exelon's purchase of the Everett LNG import facility achieves is to highlight what Commissioner Powelson aptly described as "an unprecedented exercise of market power."[16]

Equally concerning is the fact that the Commission's theory of jurisdiction lacks any principled limits. The Commission appears to conclude that, because Mystic can currently be supplied only by the Everett LNG import facility, any cost needed to support that facility is within the Commission's jurisdiction. It should go without saying that this thinking would extend FERC's power to some "surprising places."[17] Indeed, as noted, today's order regulates not just the inputs to the Mystic facility (e.g., the cost of natural gas), but also the inputs to those inputs, including the operations, maintenance, and fixed costs of the Everett LNG import facility, its sales to gas distribution companies, and even

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[13] *See, e.g.*, *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 at PP 106-107, 133-136, 163-164.

[14] Although not determinative in interpreting the FPA, it is notable that the Commission appears to lacks authority to regulate these sales of natural gas even under the *NGA* because they are "first sales" excluded from Commission regulation by Natural Gas Policy Act, 15 U.S.C. § 3301(21)(A) (2018). *Distrigas of Mass. LLC*, 124 FERC ¶ 61,039, at PP 15-18 (2008); *see* Initial Brief of NextEra Energy Resources, LLC & FirstLight Power Resources, Inc at 30 n.103. Regulating *natural gas* transactions under the *FPA* that are precluded from Commission regulation under the *NGA* should, at the very least, cause the Commission to take a harder look at its jurisdictional than it has to date.

[15] *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at P 21.

[16] *Id.* at 5 (Powelson, Comm'r, dissenting).

[17] *EPSA*, 136 S. Ct. at 775.

the incentives regarding how and when it accepts international shipments of LNG.[18]

Although it is true that the costs of the Everett LNG import facility will, in turn, eventually affect the costs that go into Mystic's production of wholesale electricity, "'an agency may not bootstrap itself into an area in which it has no jurisdiction.'"[19] The Commission's apparent belief that it can regulate an LNG import facility because the costs of that facility will affect the costs of an electric generation facility is simply too attenuated basis for exercising jurisdiction under the FPA. Taken to its logical conclusion, the Commission's jurisdictional theory would sanction using the FPA to require a generator to cover the cost of financing a natural gas pipeline or even the cost of operating a Russian LNG *export* facility.[20] The Commission's theory is, in other words, precisely the type of "hyperliteral reading" of section 205 that the Supreme Court explicitly rejected in *EPSA*.[21]

A more reasonable construction of the Commission's jurisdiction would be to limit its reach to the entities that can or actually do participate directly in the wholesale market for electricity. This provides the "sufficiently close relationship to the wholesale sale [of electricity]" that I believe is required to invoke Commission jurisdiction.[22]

Unfortunately for the majority, this construction will not achieve the its stated goals in this proceeding. As noted, the record indicates that the region's supposed fuel security need is not actually the Mystic facility, but rather the Everett LNG import facility, which provides an additional source of natural gas during periods when the

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[18] *See supra* note 13.

[19] *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (quoting *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

[20] *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at 3 n.6 (Glick, Comm'r, dissenting) (citing 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-lng-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.")).

[21] *EPSA*, 136 S. Ct. at 775.

[22] *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at 3 (Glick, Comm'r, dissenting).

region's natural gas pipeline capacity is fully utilized.[23] Although the Mystic facility provides the most direct means of burning that gas to produce electricity, it is not itself needed to maintain the reliability of the electricity grid. It may ultimately be that the Commission lacks any authority to achieve its goal of bailing out the Everett LNG Facility. But, if so, that is the result of Congress's statutory design and beyond our control to alter.[24]

* * *

On a broader level, the jurisdictional puzzle in which the Commission now finds itself only reinforces the fundamental mistake that the Commission made in rushing to seize control of the debate over fuel security in New England and dictate a particular outcome. That outcome, "[i]ndividual, ad hoc contracts with particular resources whose retirement might, under the most conservative assumptions, create a fuel security concern[,] is no way to address a region's long-term fuel security."[25] That is particularly true here, where the purported problem that the ISO is actually attempting to solve involves sources of fuel, not particular generation resources. The Commission—and all stakeholders save for Exelon—would have been far better served had the Commission taken a measured approach that provided the region time to examine more effective solutions, including new transmission facilities, gas demand response, and other options for addressing directly the source of the ISO's concerns. Each successive step that the

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[23] Potomac Economics Comments, ER18-1509-000, at 4-9. Indeed, ISO-NE's expert witness recognizes that the supposed fuel security benefit of the Mystic facility is entirely due to its use of LNG. In other words, it is the access to LNG, not the Mystic facility, that is valuable for ISO-NE. The Commission's only response is a single line about potential load shedding, which references a deterministic analysis that fails to explain its underlying assumption that the Everett LNG import facility would not operate in a significantly different manner without Mystic. *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 at P 8. Relying on the Everett LNG import facility's historical injections when Mystic was in service as a baseline for how it would operate without Mystic, its largest customer, is misleading. However, even using those flawed assumptions, ISO-NE's own analysis suggests that the Everett LNG import facility can increase its LNG injections and avoid load shedding. *See* Brandien Testimony at 43.

[24] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("As a federal agency, FERC is a 'creature of statute' . . . . In the absence of statutory authorization for its act, an agency's 'action is plainly contrary to law and cannot stand.'" (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

[25] *ISO New England Inc.*, 165 FERC ¶ 61,202 at 2 (Glick, Comm'r, concurring).

Commission takes in this direction only entrenches a misguided solution—one that customers will be left financing for many years to come.

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner