



NESCOE respectfully requests that the Commission reconsider the procedural deadlines it established, particularly its decision to establish hearing procedures that will be completed with the record to be certified by the Presiding Administrative Law Judge to the Commission by October 12, 2018 (Mystic Order at Ordering Paragraph D). NESCOE seeks expedited consideration of this request and requests a shortened answering period, in light of the pending schedule.

## **I. BACKGROUND**

### **A. The Tariff Waiver Order**

On March 23, 2018, Exelon notified ISO-NE of its intention to retire all of the remaining units at the Mystic generation station by June 1, 2022.<sup>3</sup> ISO-NE studied the retirements of Mystic 8 and 9 in that future year and determined that the loss of these units presented an unacceptable risk to regional fuel security.<sup>4</sup>

ISO-NE based its view that it is necessary to retain Mystic 8 and 9 under a two-year contract on its Operational Fuel Security Analysis (“OFSA”). As NESCOE explained in the Commission’s grid resilience matter, the OFSA has significant flaws.<sup>5</sup> ISO-NE has since indicated that the OFSA would illustrate trends, rather than form the analytical basis for informed decisions about long-term solutions to the region’s fuel security challenges: “While the [OFSA] was intended to illustrate the trend lines under various scenarios and measure such risks

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<sup>3</sup> Mystic Order at P 3.

<sup>4</sup> *See id.* at P 4.

<sup>5</sup> Reply Comments of the New England States Committee on Electricity, *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, Docket No. AD18-7-00 (May 9, 2018), at 10.

in terms of operational metrics, the ISO is not planning on the OFSA model being the basis upon which its market-based solution is built.”<sup>6</sup>

ISO-NE’s Transmission, Markets and Services Tariff (“Tariff”) currently permits retention of retiring units only for transmission security. Accordingly, on May 1, 2018, ISO-NE filed a petition for waiver of multiple provisions of its Tariff, seeking permission to retain Mystic 8 and 9 to “ensure the fuel security necessary for reliable operation of the New England electric grid.”<sup>7</sup>

On July 2, 2018, the Commission denied ISO-NE’s waiver request, finding that a waiver request is not the appropriate vehicle for considering an entirely new process that is not in the Tariff.<sup>8</sup> The Commission also simultaneously instituted a proceeding under section 206 of the Federal Power Act (“FPA”), preliminarily finding that ISO-NE’s Tariff may be unjust and unreasonable based on ISO-NE’s demonstration that its Tariff fails to address specific regional fuel security concerns.<sup>9</sup> The Tariff Waiver Order requires, among other things, that ISO-NE submit, by August 31, 2018, interim tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns or that ISO-NE show cause why its current Tariff remains just and reasonable. The interim tariff revisions are required to include an *ex ante* cost allocation proposal for resources retained under fuel security cost-of-service agreements.

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<sup>6</sup> ISO New England Memorandum regarding Responses to Operationally-oriented Questions on Fuel Security (July 18 2018), at 1, available at [https://www.iso-ne.com/static-assets/documents/2018/07/iso-ne\\_response\\_to\\_nescoc\\_fuel\\_security\\_operationally-oriented\\_questions\\_07\\_18\\_18.pdf](https://www.iso-ne.com/static-assets/documents/2018/07/iso-ne_response_to_nescoc_fuel_security_operationally-oriented_questions_07_18_18.pdf).

<sup>7</sup> Petition of ISO New England Inc. for Waiver of Tariff Provisions, *ISO New England Inc.*, Docket No. ER18-1509, at 4 (May 1, 2018) (“Tariff Waiver Petition” or “Petition”).

<sup>8</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003, at P 47 (2018) (“Tariff Waiver Order”).

<sup>9</sup> The Commission’s proceeding under section 206 is in Docket No. EL18-182-000.

## **B. The Mystic Order**

On May 16, 2018, Mystic submitted an executed Cost-of-Service Agreement among Mystic, Exelon, and ISO-NE that provides for the continued operation of the Mystic 8 and 9 units for the period June 1, 2022 to May 31, 2024. Mystic's proposed annual fixed revenue requirements are approximately \$219 million and \$187 million for the 2022/2023 and 2023/2024 capacity commitment periods, respectively. The Agreement contains, among other things, provisions governing capital expenditures and fuel supply charges related to imported LNG supplied by the Dstrigas Facility, to which Mystic is directly connected and which is Mystic's only source of fuel supply.

On July 13, 2018, the Commission accepted the Agreement for filing, suspended it for a nominal period subject to refund and subject to the outcome of the ongoing proceeding established in the Tariff Waiver Order, and established hearing procedures. The Commission directed participating parties to submit a joint schedule to the Presiding Judge within seven days of the issuance of the order and directed the Presiding Judge to certify the record to the Commission no later than October 12, 2018.<sup>10</sup> The Commission established deadlines of November 2, 2018 and November 16, 2018 for initial and reply briefs, respectively.<sup>11</sup>

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<sup>10</sup> Mystic Order at P 12.

<sup>11</sup> *Id.*

## **II. REQUEST FOR RECONSIDERATION, REQUEST FOR TARIFF WAIVER TO EXTEND DEADLINES, AND REQUEST FOR EXPEDITED CONSIDERATION AND SHORTENED ANSWER PERIOD**

### **A. The Commission’s Procedural Schedule Does Not Provide a Meaningful Opportunity To Engage in the Process on Equal Substantive Footing with Exelon.**

#### **1. Conducting Hearing Procedures and Certifying the Record in Less Than 90 Days Prejudices Intervenors.**

The extraordinarily accelerated discovery and litigation schedule established by the Commission will advantage only one party, the applicant. This is because Exelon alone possesses essentially nearly all of the information that all other parties and FERC Trial Staff require to participate effectively in this matter (with some critical information in the hands of Engie). The schedule inherently disadvantages parties, including states and other entities charged with representing consumer interests, whose effective participation relies upon adequate time to review information and prepare testimony and evidence to develop a record to facilitate the Commission’s understanding of the issues and ultimate decisions. Having determined that the Agreement may not be just and reasonable and that a hearing is necessary, due process requires that the hearing process give participants a meaningful opportunity to participate.

The Commission’s procedural schedule here is not consistent with the Commission’s own procedural time standards for hearing cases. As the Commission is aware, the hearing date for a “simple case,” *i.e.*, a Track I case, is nineteen and one-half weeks from the order designating the Presiding Judge. In a “complex case,” a Track II case, the hearing date would be thirty-two weeks from the date of that order. In this case, in order to meet the October 12 deadline, the hearing must be scheduled approximately *ten weeks* from the order designating Presiding Judge Sterner – approximately half the time of a Track I case. Yet the issues in this case are far more complex than many Track II cases. To put this in perspective, the return on

equity (“ROE”) for Mystic and for the LNG facility are just two of the more than fifty issues raised by protestors in their pleadings; NESCOE alone identified approximately forty issues, and there were approximately twenty parties that submitted comments and protests to the filing, some just as or even more detailed than NESCOE’s). As a point of reference, several years ago, the Chief Judge established a Track II schedule for the New England Transmission Owners hearing where sole issue involved the ROE.<sup>12</sup> Although NESCOE is not aware of many Track I cases, it understands that Track I schedules have been established when, for example, there is a limited single issue.<sup>13</sup> That is certainly not the case here.

The Commission also does not address how parties and FERC Trial Staff will be able to obtain information about the costs of the Distrigas Facility itself given that the transaction, in which Exelon is acquiring the Everett LNG terminal, will not close until the fourth quarter of 2018. If parties need to resort to subpoenas to obtain such information, it will take even more time than the typical discovery process — time which is simply not available in the Commission’s unusually expedited process.

**B. ISO New England’s Tariff Does Not Provide for Cost-of-Service Agreements To Ensure Fuel Security, and the Same States and Stakeholders Charged with Advancing Consumer Interests in This Matter Must Do So Simultaneously in the Fast-Tracked ISO-NE Stakeholder Process To Develop Tariff Authority.**

The Mystic Order’s timeframe is especially unworkable given the very short timeframe in which the same states and stakeholders must participate on an accelerated schedule to develop the tariff provisions FERC ordered ISO-NE to file by August 31, 2018 in order to provide the

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<sup>12</sup> *Martha Coakley et al. v. Bangor Hydro, et al.*, Order of Chief Judge Terminating Settlement Judge Procedures, Designating Presiding Administrative Law Judge And Establishing Track II Procedural Time Standards, Docket Nos. EL11-66-000, -001 (Aug. 2, 2012).

<sup>13</sup> *See, e.g., Southwestern Public Service Co.*, Order of Chief Judge Establishing Modified Track I Procedural Schedule and Scheduling Prehearing Conference, Docket Nos. ER06-274-007, -003 (Feb. 5, 2008) (hearing on the appropriate methodology for a demand cost allocator).

legal basis upon which to retain retiring resources for fuel security.<sup>14</sup> ISO-NE argued in its comments in this docket that, *if* the Commission grants the ISO-NE Petition, Exelon is entitled to its cost-of-service, pursuant to the ISO-NE Tariff, for providing the required reliability services.<sup>15</sup> The Commission, however, did not grant the Petition. Accordingly, the reasonableness of the Commission's schedule in *this* proceeding has to be viewed in the context of the timetable the Commission established in the Tariff Waiver Order proceeding (*i.e.*, the August 31, 2018 deadline for ISO to submit a tariff filing to retain resources for fuel security). Specifically, between July 17, 2018 and August 24, 2018, at least seven NEPOOL Committee meeting dates have been set up and dedicated to discuss tariff provisions that provide the legal vehicle through which the Commission may approve Mystic's proposed Cost-of-Service Agreement in this docket. Allocating time and resources to these tariff development discussions is not optional for states or stakeholders. These discussions include issues critical to consumers' economic interests such as development of the tariff triggers and cost allocation provisions. The Commission's expedited timeline in this matter fails to appreciate that an *ex ante* cost allocation proposal for this, or any other, cost-of-service agreement to ensure regional fuel security, has yet to be developed, nor have the beneficiaries of such an agreement been identified. Importantly, the forthcoming Tariff revisions have not been reviewed or considered by the Commission and the procedural schedule established in this proceeding affords little time for deliberation and reasonable notice to affected parties.

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<sup>14</sup> According to ISO-NE, its Tariff currently permits ISO-NE to retain retiring resources to resolve local transmission security issues but does not contemplate retention to address reliability risks related to fuel security. The Commission's initiation of a section 206 proceeding in Docket No. EL18-182-000 confirms that specific regional fuel security concerns are not sufficiently addressed by ISO-NE's Tariff.

<sup>15</sup> *Constellation Mystic Power, LLC*, Motion To Intervene and Comments of ISO New England Inc., Docket No. ER18-1639 (June 6, 2018), at 6 (emphasis added).

The calendar in this matter may also effectively preclude, or at minimum hinder, serious settlement discussions, which is contrary to what applicants themselves sought in their application. It seems impossible as a practical matter for most states and stakeholders to divide attention and resources during the same short time period between tariff development discussion, settlement opportunities, and fast-tracked litigation. This is contrary to the Commission's general practice of "encourage[ing] the parties to make every effort to settle their disputes *before* hearing procedures are commenced."<sup>16</sup> To the extent the Commission wishes to narrow the issues that require litigation through settlement discussions, the Commission's timeframes require adjustment.

**C. The Forward Capacity Auction Schedule Can and Should Be Adjusted To Accommodate a Reasonable Amount of Additional Time For This Proceeding.**

The accelerated schedule driver appears to be the Commission's desire to accommodate ISO-NE's schedule for the Forward Capacity Market auction process and Mystic's desire to have approval by a date certain. Just as the Commission *sua sponte* decided to provide Exelon with a limited extension of the deadline in the ISO-NE Tariff in order to postpone its retirement decision regarding Mystic 8 and 9 until January 4, 2019,<sup>17</sup> so too could the Commission here provide a three-month extension of the Forward Capacity Auction ("FCA") dates in order to provide the New England states and all stakeholders in the region, as well as FERC Trial Staff, a meaningful opportunity to respond to Exelon's proposed Cost-of-Service Agreement. To the extent the Commission wishes to conform to the Exelon-asserted timeframes in this matter, NESCOE respectfully requests that the Commission achieve that goal in a way that affords other

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<sup>16</sup> *Southwest Power Pool, Inc.*, Order Accepting and Suspending Filings, Establishing Hearing and Settlement Judge Procedures, and Consolidating Proceedings, 161 FERC ¶ 61,306, at P 33 (2017) (emphasis added).

<sup>17</sup> Tariff Waiver Order at P 59.

parties reasonable time and opportunity to engage in discovery and to prepare testimony and evidence to better inform the Commission's decision-making. Specifically, NESCOE requests that the Commission postpone all relevant dates in order to defer the operative FCA 13 by three months and conform associated FCA 14 dates and adjust the procedural and hearing schedule in this proceeding accordingly, rather than creating obstacles to meaningful settlement discussions and requiring parties to litigate on an unusually expedited fast-track while, at the same time, participating in ISO-NE's tariff development process stemming from the Tariff Waiver Order's directives. That approach would afford all parties, not just Exelon, sufficient time to effectively engage in hearing preparation and participation in the ISO-NE stakeholder process, without compromising the ultimate date by which ISO-NE has indicated that the region requires a fuel security solution in order to maintain system reliability.

To the extent necessary, NESCOE submits this request pursuant to Rule 207(a)(5), 18 C.F.R. § 385.207(a)(5). Although the Commission can act *sua sponte* to modify deadlines under the Tariff (as it did in the Tariff Waiver Order), if a tariff waiver is necessary, NESCOE submits that the Commission's standards are met here.<sup>18</sup> NESCOE is acting in good faith in its request that the Commission direct a waiver of the Tariff provision setting the FCA schedule.

NESCOE's motivation is to ensure that states and others have a meaningful opportunity to develop a record on which the Commission can base its decision in this case. The waiver is of limited scope — NESCOE seeks only a modification to the FCA schedule, which will remedy a concrete problem that prevents meaningful participation in the hearing. NESCOE submits that any potentially undesirable consequences of such FCA schedule modification would be minimal, as compared to the substantial harm that could result from the Commission ultimately making a

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<sup>18</sup> See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 14 (2016); *Calpine Energy Servs., L.P.*, 154 FERC ¶ 61,082, at P 12 (2016); *New York Power Auth.*, 152 FERC ¶ 61,058, at P 22 (2015).

decision based on a deficient record because of the limited time available in the procedural schedule — a decision that could cost New England consumers hundreds of millions of dollars — and because of the related ongoing process of developing revised tariff provisions to address the Commission’s directives in the Tariff Waiver Order.

**D. NESCOE Requests That the Commission Address this Request Expeditiously and Shorten the Time for Answers.**

Because of the very fast track of the procedural schedule for this complex proceeding, NESCOE respectfully requests that the Commission consider this request on an expedited basis and shorten the time for answers, so that any adjustment to the schedule would be granted in time for relevant dates to be extended appropriately.

**III. CONCLUSION**

For the reasons stated herein, NESCOE respectfully requests that the Commission (1) reconsider on an expedited basis, with a shortened period for answers, its decision to expedite the procedural schedule for this case to nearly half that of a Track I case, and instead extend the schedule by three months so that the record would be certified to the Commission by January 12, 2019; and (2) direct ISO-NE to take steps to postpone the relevant dates for FCA 13 by three months, to accommodate Mystic’s desire for a decision in advance of FCA 13, and grant any necessary tariff waivers.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Portsmouth, New Hampshire this ninth day of August, 2018.

Respectfully submitted,

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