

**PUBLIC VERSION**

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Constellation Mystic Power, LLC

)

Docket No. ER18-1639-000

**REPLY BRIEF OF THE  
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

**NOVEMBER 16, 2018**

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**GLOSSARY**

Agreement	Cost-of-Service Agreement
ARGA	Amended and Restated Firm Gas Sales and Purchase Agreement
CT Parties Initial Brief	Initial Brief of the Connecticut Public Utilities Regulatory Authority, the Connecticut Department of Energy and Environmental Protection, and the Connecticut Office of Consumer Counsel
CWC	Cash Working Capital
ENECOS Initial Brief	Initial Brief of the Eastern New England Consumer-Owned Systems
Engie	ENGIE Gas & LNG Holdings LLC
Everett or EMT	Everett Marine Terminal
ExGen	Exelon Generation Company, LLC
Exelon	Exelon Corporation
FERC or Commission	Federal Energy Regulatory Commission
FSA	Fuel Supply Agreement
Hearing Order	<i>Constellation Mystic Power, LLC</i> , 164 FERC ¶ 61,022 (2018).
ISO-NE or the ISO	ISO New England Inc.
ISO-NE Initial Brief	Initial Brief of ISO New England Inc.
LNG	Liquefied Natural Gas
Massachusetts AG Initial Brief	Initial Brief of the Attorney General of Massachusetts
MISO Formula Rate Order	<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 139 FERC ¶ 61,127 (2012)
Mystic	Constellation Mystic Power, LLC
Mystic 8 & 9 or Mystic Units	Mystic 8 and 9 units
Mystic Initial Brief	Initial Post-Hearing Brief of Constellation Mystic Power, LLC
National Grid Initial Brief	Initial Post-Hearing Brief of National Grid USA
NESCOE	The New England States Committee on

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	Electricity
NESCOE Initial Brief	Initial Brief of the New England States Committee on Electricity
NESCOE Revisions	NESCOE proposed revisions to Schedule 3A, Attachment C to NESCOE Initial Brief
NextEra & FirstLight Initial Brief	Initial Brief of NextEra Energy Resources, LLC and FirstLight Power Resources, Inc.
<i>NRG</i>	<i>NRG Energy, Inc. v. Entergy Servs., Inc.</i> , 126 FERC ¶ 61,053 (2009)
Presiding Judge	Presiding Administrative Law Judge
<i>Pro forma</i>	ISO-NE <i>pro forma</i> cost-of-service agreement (Appendix I to Section III of Market Rule 1 of the ISO-NE Open Access Transmission Tariff)
PUC	Public Utility Commission
ROE	Return on equity
RMR	Reliability-must-run
<i>Seaway</i>	<i>Seaway Crude Pipeline Co., LLC</i> , Opinion No. 546, 154 FERC ¶ 61,070 (2016)
Staff Initial Brief	Initial Brief of the Commission Trial Staff
Transmittal Letter	<i>Constellation Mystic Power, LLC</i> , Transmittal Letter, Docket No. ER18-1639-000 (May 16, 2018)

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NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

Pursuant to Rule 706 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),<sup>1</sup> the Commission’s July 13, 2018 order in the above captioned proceeding (“Hearing Order”),<sup>2</sup> and the Presiding Administrative Law Judge’s (“Presiding Judge”) July 27, 2018 Order Establishing Procedural Schedule and Rules of Procedure for Hearing, the New England States Committee on Electricity (“NESCOE”) respectfully submits its reply brief.<sup>3</sup>

**I. INTRODUCTION**

The Mystic Initial Brief seeks to paint this proceeding as just another run-of-the-mill rate case.<sup>4</sup> It is not. This case is extraordinary—in its breadth, its pace, and its implications for consumers and competitive markets. The issues presented are novel. The Mystic 8 and 9 units (“Mystic 8 & 9” or “Mystic Units”) are the only gas-fired generation resources in the country

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<sup>1</sup> 18 C.F.R. § 385.706.

<sup>2</sup> *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at P 12 (2018).

<sup>3</sup> NESCOE submitted its initial brief in this proceeding on November 2, 2018 (“NESCOE Initial Brief”). The NESCOE Initial Brief sets forth NESCOE’s perspective on the cost-of-service agreement (“Agreement”) that Constellation Mystic Power, LLC (“Mystic”) has filed in this proceeding as well as the record evidence developed during the hearing process. NESCOE’s silence on any issues raised in Mystic’s Initial Post-Hearing Brief, filed on November 2, 2018 in this proceeding (“Mystic Initial Brief”), or the briefs of other intervenors or participants should not be construed as agreement on those issues.

<sup>4</sup> *See, e.g.*, Mystic Initial Brief at 1 (contending that the Agreement “follows both traditional FERC ratemaking principles” and the ISO New England Inc. (“ISO-NE”) *pro forma* cost-of-service agreement at Appendix I to Section III of Market Rule 1 of the ISO-NE Open Access Transmission Tariff (referred to herein as the “*pro forma*”) and 186 (asserting that much of the record consists of “an effort to create issues where there are none” and that “[w]ith few exception, the issues in this case are readily resolvable based on precedent.”).

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that have a direct connection to a liquefied natural gas (“LNG”) import facility, its sole source of fuel.<sup>5</sup> There appears to be no precedent for Mystic’s proposal that a customer using less than 100% of a FERC-regulated natural gas facility would pay for the full 100% of that service.<sup>6</sup> This proceeding also marks the first instance in which the Commission is asked to approve a cost-of-service agreement to address fuel security concerns. The Agreement itself differs materially from the *pro forma* and includes a complex interplay with a separate Fuel Supply Agreement (“FSA”) between Mystic and its corporate affiliate, Constellation LNG.<sup>7</sup> The Agreement further seeks a two-year recovery period for substantial capital expenditures,<sup>8</sup> and it creates the first-of-its kind protocol process to true-up expenditures and implement challenge procedures for an reliability-must-run (“RMR”) agreement.<sup>9</sup>

There is no precedent for the speed of this proceeding. The accelerated timeframe that has permeated this case began with Exelon Corporation’s (“Exelon”)<sup>10</sup> and ISO-NE’s negotiations of the Agreement. Far from the “extensive arms’-length negotiation”<sup>11</sup> that Mystic claims, the record demonstrates that the abbreviated negotiations between Exelon and ISO-NE instead consisted of unequal bargaining power,<sup>12</sup> a placeholder for a key contract provision,<sup>13</sup> no

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<sup>5</sup> Mystic Initial Brief at 95 (citing Exh. MYS-0001 at 5).

<sup>6</sup> Tr. 872:20-873:7 (Schnitzer).

<sup>7</sup> *See, e.g.*, Agreement at Schedule 3, MYS-0080 at 51-53. The FSA (the Amended and Restated Fuel Supply Agreement) is Exh. MYS-0016.

<sup>8</sup> Initial Post-Hearing Brief of National Grid USA, Docket No. ER18-1639-000 (filed Nov. 2) (“National Grid Initial Brief”), at 4-11.

<sup>9</sup> Schedule 3A, Exh. MYS-0052.

<sup>10</sup> Mystic and Exelon Generation Company, LLC (“ExGen”) are both subsidiaries of Exelon and are referred to collectively, herein, as “Exelon.”

<sup>11</sup> Mystic Initial Brief at 178.

<sup>12</sup> Exh. CT-076 at 1. Indeed, at the same time that it was negotiating the Agreement with Exelon, ISO-NE

[BEGIN CUI/PRIV]

[END CUI/PRIV] Exh. NES-049 at 16.



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formal analysis of means to reduce consumer costs,<sup>14</sup> the absence of any negotiations with respect to revenue requirements,<sup>15</sup> and the execution of the Agreement in under two months.<sup>16</sup> The Hearing Order's compressed discovery and litigation schedule demanded that the hearing take on the same rushed pace, requiring that the hearing conclude in a fraction of the time that would be afforded to litigants under even a "simple" Track 1 case.<sup>17</sup> Mystic's recitation to hundreds of discovery requests submitted and the thousands of pages of transcripts and documents that traded hands<sup>18</sup> illustrates the significant burden on intervenors to review, analyze, and react to volumes of information within a constrained time period. Such a compressed schedule favored Exelon as the entity with the most information.

The cost implications of this proceeding are equally extraordinary. Mystic asks the Commission to accept almost \$575 million in costs passed through to consumers to keep the Mystic Units running for two years,<sup>19</sup> without limits to escalating costs or mechanisms to

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<sup>13</sup> Ethier Answering Testimony, Exh. ISO-001 at 32:3-5; Exh. NES-003 at 1.

<sup>14</sup> Exh. NES-003 at 1 ("ISO-NE did not perform a formal analysis of the means to reduce costs of the Mystic Cost of Service Agreement to consumers. ISO-NE has taken no position on the components of the agreement that address Exelon's revenue requirements and expected this aspect of the agreement to be resolved in this proceeding.").

<sup>15</sup> *Id.*; see also Initial Brief of ISO New England Inc. ("ISO-NE Initial Brief") at 3 ("the ISO's execution of the Mystic Agreement expressly does not extend to Mystic's proposed cost of service for Mystic 8 & 9") (footnote omitted).

<sup>16</sup> See Exh. MYS-0080 at 5 (listing May 15, 2018 execution date) and *Constellation Mystic Power, LLC*, Transmittal Letter, Docket No. ER18-1639-000, at 2 (May 16, 2018) ("Transmittal Letter") (stating that Mystic submitted its de-list bid for the Mystic Units on March 23, 2018, after which ISO-NE determined they were needed for reliability and initiated discussions with Exelon regarding cost-of-service treatment).

<sup>17</sup> See *Constellation Mystic Power, LLC*, Docket No. 18-1639-000, Request for Reconsideration, Request for Tariff Waiver to Extend Deadlines, and Request for Expedited Consideration and Shortened Answer Period of the New England States Committee on Electricity (Aug. 9, 2018) at 5-6, available at [http://nescoe.com/wp-content/uploads/2018/08/MysticReconsiderReq\\_9Aug2018.pdf](http://nescoe.com/wp-content/uploads/2018/08/MysticReconsiderReq_9Aug2018.pdf) (pending before the Commission). See also Initial Brief of the Connecticut Public Utilities Regulatory Authority, the Connecticut Department of Energy and Environmental Protection, and the Connecticut Office of Consumer Counsel ("CT Parties Initial Brief") at 6 (stating that the Hearing Order requires "intervenors and the Presiding Judge to undertake an extraordinarily expedited hearing process, completing in roughly two and one-half months what would normally take anywhere from 8-10 months.") (footnote omitted).

<sup>18</sup> Mystic Initial Brief at 3.

<sup>19</sup> *Id.* at 11-12 (citing Exh. MYS-0050).

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discipline spending while passing on unknown fuel delivery risks to consumers. Other intervenors have pointed to the potential material and adverse effects that Mystic's proposal could have on New England's competitive electricity markets and the gas market.<sup>20</sup>

The Commission should see through Mystic's attempt to underplay the novelty of its proposal and this proceeding. The unique posture of this case, the substantial consumer costs at issue, and the market implications involved demand a heightened need for scrutiny, transparency, and cost discipline in connection with the Agreement. ISO-NE's determination that the Mystic Units are needed for fuel security is not, as the Commission has found, a blank check for Exelon to spend consumer dollars subject only to a true-up process that Exelon designed unilaterally.<sup>21</sup> Unlike an agreement that has been negotiated by parties with equal bargaining power,<sup>22</sup> here, the Commission must act to protect consumers from the unjust and unreasonable rate that Exelon seeks to impose through an untested Agreement negotiated by parties with unequal bargaining power and without consumer interests represented.

Similarly, the Commission should reject Exelon's efforts to tie the Commission's statutory responsibilities to Exelon's revenue demands. The purpose of this proceeding is not "to determine a cost of service rate that will enable the [Mystic Units] to continue operating, despite

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<sup>20</sup> See generally Initial Brief of NextEra Energy Resources, LLC and FirstLight Power Resources, Inc. ("NextEra & FirstLight Initial Brief"); Initial Brief of the Eastern New England Consumer-Owned Systems ("ENECOS Initial Brief") at 60-64.

<sup>21</sup> See Hearing Order at P 11 (setting the Agreement for hearing and finding that it "has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful."); see also *id.* at PP 19, 34, 42.

<sup>22</sup> See *Morgan Stanley v. Public Utility Dist. No. 1*, 554 US 527, 545 (2008) (discussing *Mobile-Sierra* doctrine and explaining that *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) "was grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.'" (citing *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 479 (2002))).

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the failure of the market to retain them.”<sup>23</sup> That’s a Mystic business decision, as it has stated in this proceeding and repeated *ad nauseum* in its brief.<sup>24</sup> The Commission’s obligation, of course, is to determine whether the Agreement is just and reasonable. As NESCOE has stated, Mystic’s retirement threats “cannot supplant the Commission’s obligation to ensure that the rates under the Agreement are just and reasonable.”<sup>25</sup>

Mystic has failed to meet its burden to demonstrate that the Agreement is just and reasonable. It cannot overcome a record that reveals a one-sided deal, rife with the potential for market power abuses, excessive consumer costs, and insufficient oversight. The Commission should reject the Agreement as it stands and condition acceptance on the modifications set forth in the NESCOE Initial Brief.

## II. ARGUMENT

### A. The Record Evidence Fails to Support the Justness and Reasonableness of Mystic’s Requested Rate Base for Mystic 8 & 9.

Mystic seeks special treatment from the Commission in setting the rate base for Mystic 8 & 9. While it claims that others propose a “mix and match approach,”<sup>26</sup> Mystic provides shifting rationales for its proposal. It alternates between defending accounting rules used for market-based units, arguing that impairment does not apply to cost-of-service resources, and its standard fall-back threat to retire if its revenue demands are not met.<sup>27</sup>

The Commission can cut through this winding rhetoric by adopting the simple approach set forth in the NESCOE Initial Brief: requiring Mystic to value the assets as conditions exist

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<sup>23</sup> Mystic Initial Brief at 15.

<sup>24</sup> See Tr. 665:23 – 666:11 (Berg); Exh. MYS-0025 at 3:6-12; Mystic Initial Brief at 5, 32, 33-34, 115, 180.

<sup>25</sup> NESCOE Initial Brief at 103; *see also id.* at 3.

<sup>26</sup> Mystic Initial Brief at 15, 37.

<sup>27</sup> *Id.* at 4-5, 14-15, 21-25, 31-34.

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today.<sup>28</sup> Mystic is, of course, resistant to this approach. Its arguments amount to a smoke screen. Mystic skirts the central question of the appropriate rate base for Mystic 8 & 9 by pivoting back to Exelon's use of a grouping methodology to assess impairments.<sup>29</sup> Mystic never explains why it is reasonable to group assets in this case, where Mystic is seeking cost-of-service regulation solely for Mystic 8 & 9. Instead, it cites to an excerpt from a Deloitte report that a NESCOE witness, Nancy Heller Hughes, sponsored to support her testimony on impairment in the context of the Everett Marine Terminal ("Everett" or "EMT").<sup>30</sup> But that report does not prescribe whether impairments should be evaluated on the basis of an individual asset or as a group. Rather, as Ms. Hughes noted (and Mystic replays in its Initial Brief): "The company has a decision to make, at what level are they doing the impairment test? Are they doing it on an individual unit or on a group of assets."<sup>31</sup> Exelon's company decision on impairment is doubly questionable: first, it grouped assets when the cash flows of only two resources were at issue and, second, it assumed a long-term market "fix" that was unknown and had neither been filed with nor approved by the Commission.<sup>32</sup>

Mystic's other claims regarding NESCOE's approach<sup>33</sup> are similarly a distraction. Mystic notes that NESCOE witness Jeffrey W. Bentz, rather than Ms. Hughes, recommended to the Commission that Mystic perform a stand-alone impairment analysis.<sup>34</sup> This provides no probative value to the Commission. Mystic conspicuously omits Mr. Bentz's significant industry

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<sup>28</sup> NESCOE Initial Brief at 9-15.

<sup>29</sup> Mystic Initial Brief at 38-40.

<sup>30</sup> *Id.* at 38-39.

<sup>31</sup> Tr. 1756:7-9 (Hughes); Mystic Initial Brief at 39.

<sup>32</sup> NESCOE Initial Brief at 13.

<sup>33</sup> Mystic Initial Brief at 38-40.

<sup>34</sup> *See id.* at 38.

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experience, including in accounting.<sup>35</sup> Mystic also claims that Mr. Bentz “did not disagree” with an Exelon response to a data request discussing how the impairment analysis assumed a long-term market solution for fuel security and that he did not opine on the coordination of operations among Exelon’s assets.<sup>36</sup> Mr. Bentz’s testimony necessarily encompassed both of these issues: his recommendation for a stand-alone impairment assessment is specifically in response to Mystic’s claim that its assessment, which both grouped assets and assumed a non-existent market fix, represented an appropriate valuation of the Mystic Units.<sup>37</sup> Moreover, contrary to Mystic’s speculation about Mr. Bentz’s objective,<sup>38</sup> he sought only to ensure, consistent with the Commission’s statutory responsibilities, that the net plant is being valued appropriately.<sup>39</sup> He did not prejudge or assume what adjustment would be made. His request was solely for additional information to allow the Commission to adjudicate the appropriate rate.<sup>40</sup>

The Commission should not approve the Agreement without a stand-alone impairment assessment for the Mystic Units. It should, accordingly, disallow the equity return on Mystic’s requested rate base in the absence of this analysis and an appropriate adjustment of the net plant value.

In fact, as discussed in the NESCOE Initial Brief, the Commission’s determination on impairment has implications for Mystic’s proposed accumulated depreciation value.<sup>41</sup> Mystic

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<sup>35</sup> Exh. NES-001 at 3; Exh. NES-009.

<sup>36</sup> Mystic Initial Brief at 40.

<sup>37</sup> Bentz Answering Testimony, Exh. NES-001 at 29-30.

<sup>38</sup> Mystic Initial Brief at 40 (“it is obvious that the only reason that Mr. Bentz wants an asset-level impairment analysis is in hopes that such a departure from actual GAAP rules will create the very ‘Catch 22’ situation described above.”).

<sup>39</sup> Bentz Answering Testimony, Exh. NES-001 at 32. *See also id.* at 30 (describing purpose of impairment assessment).

<sup>40</sup> *Id.* at 32.

<sup>41</sup> NESCOE Initial Brief at 16.

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cannot claim that an impairment charge is unnecessary because cost-of-service treatment should be afforded while ignoring the assets' accumulated depreciation reserves. NESCOE disagrees with Mystic's contention that Mystic 8 & 9's depreciation expense is uncontested in this proceeding.<sup>42</sup> Mystic itself makes this an issue in refusing to undertake a stand-alone impairment assessment and adjust the plant values accordingly. Mystic should not be allowed to fashion the regulatory treatment of its choosing based on what works best for its shareholders at a given moment in time and earn a regulated return under the cover of grouped assets while those grouped assets receive an unregulated return. Should the Commission agree with Mystic that an impairment charge is not necessary because the units are to be considered cost-of-service for accounting purposes, it must require Mystic to account for depreciation of Mystic 8 & 9 over their entire useful lives.

The Commission should also continue to give weight to the recommendation of NESCOE witness Constance T. Cannady regarding the capital structure Mystic applies to its return-on-equity ("ROE") analysis. As an initial matter, Mystic's defense of the *status quo* boils down to claims that Ms. Cannady's recommended use of a double leverage capital structure requires too much complexity and is therefore contrary to Commission precedent.<sup>43</sup> This entire agreement is rife with complexity. The Commission should not capitulate to Exelon's request that the Commission reject certain recommendations on the grounds of complexity when Exelon asks the Commission to approve myriad proposals involving its own, more complicated preferences.

Additionally, the cases that Mystic relies on to discredit Ms. Cannady's recommendation do not establish the bright-line rule that Mystic suggests they do. Mystic refers to the Commission's statement in an order *Williams Nat. Gas Co.*, 80 FERC ¶ 61,158 at 61,682 (1997),

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<sup>42</sup> Mystic Initial Brief at n. 2.

<sup>43</sup> *Id.* at 93.

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that it was not persuaded to apply a double leveraging approach in that case. As Mystic notes, the Commission stated that its “policy is to use the capital structure of the pipeline subsidiary when the pipeline *is responsible for its own financing and issues its own debt.*”<sup>44</sup> Ms. Cannady testified that ExGen *does not* issue stock, a fact that Exelon’s witness recognized in his ROE analysis “by using Exelon Corporation stock information when comparing Exelon with other selected utilities.”<sup>45</sup>

The Commission’s discussion of double leveraging in the second case Mystic refers to, *Conn. Yankee Atomic Power Co.*, 10 FERC ¶ 63,018 (1980), reflected a view of the practical complexity of “the tracing of capital from a subsidiary to *a number of parent corporations*[.]”<sup>46</sup> Once again, this case is dissimilar to the corporate structure at issue in this proceeding which, as Ms. Cannady points out, requires the use of only *one parent’s* capital structure, the “tracing” of which is hardly complex.<sup>47</sup>

In the third case that Mystic cites, *Mountain Fuel Res., Inc.*, 16 FERC ¶ 61,040 (1981), the Commission was persuaded that the Utah Public Service Commission, which exercised jurisdiction over much of the business of the company at issue, had acted to “eliminate[] the

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<sup>44</sup> Mystic Initial Brief at 93 (quoting *Williams Nat. Gas Co.*, 80 FERC ¶ 61,158 (1997) (emphasis supplied), *order on reh’g*, 86 FERC ¶ 61,232 at 61,858-59 (1999)).

<sup>45</sup> Cannady Answering Testimony, Exh. NES-010, at 21:12-13. Furthermore, as the Court of Appeals for the District of Columbia Circuit recounted, the Commission held in a “chronologically connected case,” *Transcon. Gas Pipe Line Corp.*, Opinion No. 414-A, 84 FERC ¶ 61,084 at 61,413 (1998), that there were exceptions to its policy. *Missouri Pub. Serv. Comm’n v. FERC*, 215 F.3d 1, 4 (D.C. Cir. 2000).

<sup>46</sup> *Conn. Yankee Atomic Power Co.*, 10 FERC ¶ 63,018 at 65,098 (1980) (emphasis supplied).

<sup>47</sup> Cannady Answering Testimony, Exh. NES-010, at 24-25; Exh. NES-013 at 3.

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incentive to engage in ‘double leveraging[.]’<sup>48</sup> There is no similar regulatory action in this matter that prevents the use of an inflated equity position in the ROE analysis.<sup>49</sup>

While the cases Mystic relies on are inapposite, Ms. Cannady illustrates in her testimony how her approach would be straightforward with respect to *this case*, breaking down the debt/equity percentages based on the actual 2017 capital structure for ExGen and Exelon.<sup>50</sup> Tellingly, Mystic offers no alternative approach to addressing Ms. Cannady’s concern about the mismatch in Mystic’s ROE analysis or her alternative approach involving the use of Exelon’s capital structure based on 2018 information.<sup>51</sup> By contrast, the Connecticut Parties and FERC Trial Staff provide substantial support to Ms. Cannady’s position.<sup>52</sup>

### **B. Mystic Cannot Rehabilitate a Record that Demonstrates its Proposed Rate Base for the EMT Is Unjust and Unreasonable.**

The Mystic Initial Brief confirms the scant evidence Mystic has offered to establish the justness and reasonableness of its proposed \$60 million plant value for the EMT. Mystic reiterates that its proposed value is based on EMT’s fair value “as determined by the [BEGIN CUI/PRIV-HC] [REDACTED] [END CUI/PRIV-HC]”<sup>53</sup> However, the record evidence overwhelmingly demonstrates that this is a fiction.

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<sup>48</sup> *Mountain Fuel Res., Inc.*, 16 FERC ¶ 61,040 at 61,071 (1981). See *Mountain Fuel Res., Inc.*, 13 FERC ¶ 63,056 at 65,328 (1980) (presiding Administrative Law Judge finding that the Utah Public Service Commission’s action prevented any windfall profits through double leveraging).

<sup>49</sup> Cannady Answering Testimony, Exh. NES-010, at 22:3-6 (“To request a return on equity that is based on Exelon Corporation’s financial risk and apply that ROE to an equity position that is over 41% greater than Exelon Corporation’s is unreasonable and should not be approved.”).

<sup>50</sup> Cannady Answering Testimony, Exh. NES-010, at 24:1-7 – 25:1-8.

<sup>51</sup> See NESCOE Initial Brief at 21-23.

<sup>52</sup> See CT Parties Initial Brief at 66-69 (demonstrating that Commission policy requires that Exelon’s equity ratio be imputed to Mystic and that ExGen’s capital structure cannot be imputed to Mystic because it fails part of the Commission’s three-part test in *Transcon. Gas Pipeline Corp.*, Opinion No. 414, 80 FERC ¶ 61,157 (1997), Opinion No. 414-A, 84 FERC ¶ 61,084, Opinion No. 414-B, 85 FERC ¶ 61,323 (1998)); Initial Brief of the Commission Trial Staff (“Staff Initial Brief”) at 48-52 (explaining why Exelon’s capital structure is a more appropriate proxy to use for Mystic than is ExGen’s).

<sup>53</sup> Mystic Initial Brief at 98.



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Mystic omits the key details. In sum:

**[BEGIN CUI/PRIV-HC]**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

Despite this evidence showing that Exelon **[BEGIN CUI/PRIV-HC]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>54</sup> See Exh. NES-023 at 7-8.

<sup>55</sup> *Id.* The ARGA is appended to Mr. Schnitzer’s Rebuttal Testimony as Exhibit MYS-0054.

<sup>56</sup> Exh. ENC-0087 at 3.

<sup>57</sup> Exh. ENC-0083 at 2 **[BEGIN CUI/PRIV-HC]** [REDACTED]  
[REDACTED] **[END CUI/PRIV-HC]**

<sup>58</sup> Exh. ENC-0085 at 3-4.

<sup>59</sup> Mystic Initial Brief at 100.

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

The weight of record evidence in this proceeding clearly contravenes Mystic’s claims related to the fair value rate base for EMT. The Commission need not puzzle through Mystic’s explanation. “In the law, as in life, the simplest explanation is sometimes the best one.” *Loan Syndications and Trading Ass’n v. Sec. and Exchange Comm’n, et al.*, 818 F.3d 716, 718 (D.C. Cir. 2016). Mystic has not met its burden of demonstrating the justness and reasonableness of a \$60 million rate base value for EMT, and the Commission should reject its proposal. In fact, Mystic has not justified a rate base for EMT greater than zero dollars.

Mystic’s alternative rationale for EMT’s rate base value is unavailing. Mystic fails to support its claim that the [BEGIN CUI/PRIV-HC] [REDACTED]  
[REDACTED] [END CUI/PRIV-HC] It does not meet the Commission’s two-prong “substantial benefits” test under *Seaway Crude Pipeline Co., LLC*, Opinion No. 546, 154 FERC ¶ 61,070 (2016) (“*Seaway*”) for the reasons set forth in the NESCOE Initial Brief.<sup>62</sup>

Regarding the first prong of the *Seaway* test, Mystic challenges Ms. Hughes’ claim that [BEGIN CUI/PRIV-HC] [REDACTED]

<sup>60</sup> *Id.* at 101 (quoting Tr. 381:13-21 (Heintz)).

<sup>61</sup> The issue is not whether [BEGIN CUI/PRIV-HC] [REDACTED]  
[REDACTED]  
[REDACTED] [END CUI/PRIV-HC]

<sup>62</sup> NESCOE Initial Brief at 30-33.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END

**CUI/PRIV-HC]** Establishing “substantial benefits” is a “heavy burden” to meet under Commission precedent, as other intervenors note,<sup>69</sup> and it requires a showing of benefits that is “tangible and non-speculative and must be quantifiable in monetary terms.”<sup>70</sup> Mystic has not met this burden.

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<sup>63</sup> Mystic Initial Brief at 105 (quoting Exh. NES-021 at 10-11).

<sup>64</sup> *Id.* at 105-107.

<sup>65</sup> Initial Brief of the Attorney General of Massachusetts (“Massachusetts AG Initial Brief”) at 29-30; *see* ENECOS Initial Brief at 56 **[BEGIN CUI/PRIV-HC]** [REDACTED]

[REDACTED]

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

<sup>66</sup> Mystic Initial Brief at 107; Exh. NES-021 at 12:7-8.

<sup>67</sup> Mystic Initial Brief at 108.

<sup>68</sup> Tr. 330:2-6 (Heintz).

<sup>69</sup> Massachusetts AG Initial Brief at 30; ENECOS Initial Brief at 57 **[BEGIN CUI/PRIV-HC]** [REDACTED]

[REDACTED] **[END CUI/PRIV-HC]**; Initial Brief of the Environmental Defense Fund at 10-11.

<sup>70</sup> *Seaway* at P 99 (quoting *N. Natural Gas Co.*, 35 FERC ¶ 61,114, at 61,236 (1986) (citing *Mid-Louisiana Gas Co.*, 7 FERC ¶ 61,316, at 61,684 (1979))).

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Finally, the Commission should disregard Mystic’s attempt to shift its burden of showing that the transaction was [BEGIN CUI/PRIV-HC] [REDACTED] [END CUI/PRIV-HC]

In any case, as discussed above, the record evidence overwhelmingly demonstrates that the

[BEGIN CUI/PRIV-HC] [REDACTED]

[REDACTED]

[REDACTED] [END CUI/PRIV-

HC]

**C. NESCOE’s Proposed Approach to Allocating EMT Costs Is Consistent with the Hearing Order and Mitigates Concerns Regarding Market Power, LNG Availability, and Oversight.**

After analyzing Mystic’s proposal, NESCOE witness James F. Wilson concluded that it provided insufficient incentives for efficient operations and, therefore, risked imposing excessive costs on consumers.<sup>72</sup> Mr. Wilson sought to correct those aspects of the arrangement that are “fundamentally flawed”<sup>73</sup> by recommending a “more straightforward, efficient and understandable contractual relationship” between Constellation LNG (the seller of LNG) and Mystic (the buyer of LNG).<sup>74</sup> A key feature of Mr. Wilson’s proposed structure is a limitation that EMT pass on no more than 39.16% of its costs to Mystic—*i.e.*, the ratio of Everett’s maximum daily send out to Mystic of 280,000 MMBtu/day to its FERC-certificated capacity of 715,000 MMBtu/day.<sup>75</sup> Mr. Wilson’s approach is summarized in the NESCOE Initial Brief.<sup>76</sup>

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<sup>71</sup> See Mystic Initial Brief at 109.

<sup>72</sup> See Wilson Answering Testimony, Exh. NES-028 at 6-7.

<sup>73</sup> *Id.* at 6:11.

<sup>74</sup> *Id.* at 26:18.

<sup>75</sup> At the hearing, ISO-NE witness Levitan confirmed this vaporization send-out from EMT to Mystic and other facilities. Tr. 1177:1-14. Wilson Answering Testimony, Exh. NES-028, at 26:21-27:7; *see id.* at 36:1-2; Exh. CT-064 (FERC-certificated capacity of EMT is 715,000 MMBTU/day).

<sup>76</sup> NESCOE Initial Brief at 38-46.

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Mystic challenges Mr. Wilson’s recommendations as part of a broad effort to discredit any proposals that stray from the Agreement’s revenue sharing incentives.<sup>77</sup> At the outset, Mystic makes two characterizations that are flatly wrong and need correction. First, Mystic asserts that the Hearing Order approved the Agreement’s revenue sharing incentive mechanism and that other incentive structures are beyond the scope of this proceeding.<sup>78</sup> The Hearing Order contains no such restriction, nor did it approve the Agreement’s proposed mechanism. In fact, the Commission was clear that Mystic may not be “entitled to recover all costs that it claims in connection with [EMT]” and that recovery for such fuel-related costs depends on whether they are just and reasonable.<sup>79</sup> Far from being beyond scope, the Commission specifically directed “participants to address at hearing the justness and reasonableness of the Fuel Supply Charge.”<sup>80</sup> Regarding the Agreement’s third-party sales incentive, the Commission did not “prohibit Mystic from retaining a percentage of the margin” and directed hearing participants “to address . . . the *appropriate* amount of the margin on third-party sales to be retained by Mystic.”<sup>81</sup> Indeed, the Commission expressed concern that Mystic’s proposal was “excessive.”<sup>82</sup> The Commission thus did not foreclose consideration of fixed-cost proposals such as the approach Mr. Wilson recommends and, to the contrary, mandated that the Fuel Supply Charge be addressed at the hearing.<sup>83</sup> At the same time, the Hearing Order suggested that the Commission may *not* approve

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<sup>77</sup> See, e.g., Mystic Initial Brief at 8-9, 114, 118-124.

<sup>78</sup> Mystic Initial Brief at 8, 120, 122.

<sup>79</sup> Hearing Order at P 37.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at P 38 (emphasis supplied).

<sup>82</sup> *Id.*

<sup>83</sup> As other intervenors underscored, the Commission’s precedent on cost causation further supports the tailored approach to cost assignment that Mr. Wilson recommended. See, e.g., Massachusetts AG Initial Brief at 32 (“Mystic’s proposal violates the cost causation principle, ‘one of the bedrocks of cost allocation and rate design principles’ which requires that customers ‘should be charged rates that fairly track the costs for which they are

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the Agreement's revenue sharing approach and, in setting for hearing the appropriate amount of the incentive, did not rule out the possibility that the appropriate level is zero, *i.e.*, that there may be no need for that incentive given alternative approaches to the Fuel Supply Charge.

Second, Mystic misstates Mr. Wilson's "prevailing concern" as the market impacts of EMT's operations.<sup>84</sup> Mr. Wilson concisely summarized his primary concern as part of his testimony, which focuses squarely on both achieving greater efficiencies and safeguarding consumers against unnecessary costs:

The FSA is fundamentally flawed. Mystic is essentially proposing, through the proposed FSA, to treat EMT as nothing more than a dedicated fuel delivery system for Mystic 8&9. Notwithstanding EMT's long history of serving other customers, the FSA would pass all of EMT's costs through to Mystic, and provide no incentive and no requirement for Constellation LNG to make short-term merchant sales to other customers (for longer term sales, there is a rather questionable "Seller's Incentive", which was added at ISO-NE's request).

Operating EMT efficiently and realizing its full value is a complex task; customers desire firm and flexible supply, while the relatively small storage capacity requires careful management of deliveries and tank levels. The FSA essentially proposes that Constellation LNG will not bother with this, and will simply pass all EMT costs through to Mystic and to customers through the [Agreement].

I recommend that this flawed approach to Mystic's fuel supply be rejected, and a simpler, more straightforward and standard approach to the fuel supply relationship be established.<sup>85</sup>

In addition to addressing the potential for inefficiencies and excessive costs, by limiting the recovery of EMT's costs to a fixed percentage, Mr. Wilson's recommended approach helps to address concerns that ISO-NE and intervenors raised in this proceeding. These concerns

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responsible.") (quoting *Midwest Indep. Sys. Operator, Inc.*, 116 FERC ¶ 63,030 at P 227 (2006); and *Pa. Elec. Co. v. FERC*, 11 F.3d 207, 211 (D.C. Cir. 1993)).

<sup>84</sup> Mystic Initial Brief at 112.

<sup>85</sup> Wilson Answering Testimony, Exh. NES-028, at 6:11-20 – 7:1-5.

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range from ensuring that LNG is available to local distribution companies and electric generators;<sup>86</sup> the potential for adverse market impacts;<sup>87</sup> and the need for audits.<sup>88</sup> Mystic does not explain how its fuel supply arrangement will meaningfully address this range of critical issues.

Mystic and its witness Michael M. Schnitzer likewise fail 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.<sup>89</sup> Mystic attempts to normalize its unprecedented approach by citing to a line of RMR cases.<sup>90</sup> None of these cases are analogous. They involve, as Mystic notes, "traditional" RMR arrangements. Those arrangements did not seek to impose on ratepayers the full costs of a fuel supplier—owned by an affiliate—that also serves other customers. Nor could they under the Commission's long-standing cost causation precedent, where "the rates charged for electricity should reflect the costs of providing it."<sup>91</sup> As the United States Court of Appeals for the District of Columbia Circuit recently observed, the Commission and the courts have applied this principle for decades, requiring that the "'burden is matched with benefit,' so that FERC 'generally may not single out a party for the full cost of a project, or

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<sup>86</sup> ISO-NE Initial Brief at 4; *see also id.* at 9-10.

<sup>87</sup> NextEra & FirstLight Initial Brief at 9-24; Initial Post-Hearing Brief of Repsol Energy North America Corp. at 11-12, 16-17.

<sup>88</sup> CT Parties Initial Brief at n. 4 (stating that their expert witness "explains that auditing of Everett may be unnecessary if an appropriate portion of its costs were allocated to third-party sales and not recovered under the proposed" Agreement). *See* NESCOE Initial Brief at 77 ("NESCOE's recommended Reliability Charge approach . . . is driven in part by NESCOE's concern about actions such as scheduling LNG cargoes and managing third-party fuel sales, which have significant consumer cost implications. . . . the Reliability Charge model mitigates the need for oversight over the EMT because it provides Exelon with the incentive to manage that facility as efficiently as possible.").

<sup>89</sup> Tr. 872:20-873:7 (Schnitzer) (stating that he is unaware of any situation involving a FERC-regulated natural gas facility where a customer that is using less than 100% of that facility's service would pay for the full 100% of that service).

<sup>90</sup> Mystic Initial Brief at 141-142.

<sup>91</sup> *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1255 (D.C. Cir. 2018).

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even most of it, when the benefits of the project are diffuse.”<sup>92</sup> If the Commission accepts Mystic’s proposal, it must explain why it departed from its past practice, and courts will closely scrutinize the Commission’s change in course.<sup>93</sup>

In contrast to Mr. Wilson’s detailed support for his proposal, Mystic is unable to provide even baseline support to justify a 50 percent sharing level. At the hearing, witnesses for the counterparties to the Agreement both acknowledged the [BEGIN CUI/PRIV-HC] [REDACTED]

[REDACTED] [END CUI/PRIV-HC] In response to a similar question about analysis supporting the percentage, Dr. Ethier responded: “I’ve been hoping for this whole proceeding, that somebody would provide some analysis that would shed some light on that, and so far, we are left wanting, unfortunately.”<sup>95</sup> Dr. Ethier’s answer is consistent with his earlier response to a NESCOE data request that the “50-50 margin split was agreed to largely as a placeholder[.]”<sup>96</sup> Most recently, ISO-NE reiterated that the 50 percent sharing incentive could be adjusted, stating that it “recognizes that the Commission could reasonably decide on a different margin split.”<sup>97</sup> The record is devoid of evidence to support a 50 percent sharing level. This is dispositive, and the Commission must reject Mystic’s proposal.

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<sup>92</sup> *Id.* (quoting *BNP Paribas Energy Trading GP v. FERC*, 743 F.3d 264, 268 (D.C. Cir. 2014)).

<sup>93</sup> *New England Power Generators Ass’n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018). For the reasons explained in the NESCOE Initial Brief, FERC Trial Staff’s recommended 91% allocation likewise runs contrary to Commission precedent on cost causation: Staff removes only those costs related to liquid deliveries from truck sales but would continue to allocate costs to the Mystic Units related to other merchant revenue streams. NESCOE Initial Brief at 41; *see* Staff Initial Brief at 76-77.

<sup>94</sup> Tr. 846:6-11 (Schnitzer).

<sup>95</sup> Tr. 1042: 2-9 (Ethier).

<sup>96</sup> Exh. NES-038 at 1.

<sup>97</sup> ISO-NE Initial Brief at 13.



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### **D. The Commission Should Accept ISO-NE’s Proposed Modification to Ensure that Consumers Receive the Benefits from Positive Performance Payments.**

The ISO-NE Initial Brief identifies a material error in the Agreement. It states that, after further review, ISO-NE “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” the parties to the Agreement.<sup>98</sup> Instead, “the version of the Mystic Agreement filed with the Commission does not properly cancel out the under- and overperformance charges and credits.”<sup>99</sup> ISO-NE proposes changes to the Agreement that “will have the intended effect of ensuring that Exelon will receive the benefit only of overperformance credits (i.e., positive Capacity Performance Payments) to the extent those credits offset underperformance charges (i.e., negative Capacity Performance Payments).”<sup>100</sup> These revisions are reflected in Attachment A of the ISO-NE Initial Brief. With these changes in place, “[a]ny remaining positive balance of overperformance credits will reduce the Annual Fixed Revenue Requirement and, therefore, the charges to those responsible for the costs of the Mystic Agreement.”<sup>101</sup>

NESCOE appreciates ISO-NE’s efforts to correct this error. The NESCOE Initial Brief identified concerns about the lack of clarity around excess positive Capacity Performance and its potential significant consumer cost implications.<sup>102</sup> NESCOE supports ISO-NE’s proposed modifications and urges the Commission to condition any acceptance of the Agreement on revisions that ensure these payments are credited back to consumers.

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<sup>98</sup> *Id.* at 16.

<sup>99</sup> *Id.* at Attachment A, at 2.

<sup>100</sup> *Id.* at 17.

<sup>101</sup> *Id.*

<sup>102</sup> NESCOE Initial Brief at 79.

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### **E. The Agreement’s Termination Provisions are Unjust and Unreasonable.**

NESCOE witness Mr. Bentz recommended two changes to the Agreement’s termination provisions to protect consumers in the event Mystic 8 & 9 do not provide the services for which consumers are paying. ISO-NE asserts that there is no need for these recommended modifications and that the existing provisions are sufficient.<sup>103</sup> At the outset, the Commission should discount any ISO-NE claim that the terms it negotiated in the Agreement are sufficient to guard against excessive consumer costs. ISO-NE has plainly stated that its negotiations with Exelon did not extend to consumer economic interests and that it left these issues to litigants in this proceeding and to the Commission.<sup>104</sup>

In opposing Mr. Bentz’s changes, ISO-NE contends that “there is nothing unique about Mystic vis-a-vis RMR units that warrants a heightened availability requirement.”<sup>105</sup> That is not what the record shows. This is the first RMR contract in the nation driven by fuel security concerns, and ISO-NE identified the Mystic Units as necessary for reliability specifically because of risks it identified during the winter months.<sup>106</sup> Mr. Bentz’s recommended changes are tied to these stated risks. They are based on the need for ISO-NE to have greater flexibility to terminate the Agreement if the units are unavailable during this winter stretch or over a sustained period of time.<sup>107</sup> Despite ISO-NE’s claim that the Agreement provides it with the ability to

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<sup>103</sup> ISO-NE Initial Brief at 20-22.

<sup>104</sup> Exh. NES-003 at 1 (“ISO-NE did not perform a formal analysis of the means to reduce costs of the Mystic Cost of Service Agreement to consumers. ISO-NE has taken no position on the components of the agreement that address Exelon’s revenue requirements and expected this aspect of the agreement to be resolved in this proceeding.”); *see also* ISO-NE Initial Brief at 3 “the ISO’s execution of the Mystic Agreement expressly does not extend to Mystic’s proposed cost of service for Mystic 8 & 9.” (footnote omitted).

<sup>105</sup> ISO-NE Initial Brief at 22.

<sup>106</sup> *Id.* at 2-3; Exh. NES-003 at 2 (ISO-NE explanation that its “objectives for the agreement were to ensure that the Mystic units would have the incentive to maintain sufficient fuel on site to be available during times of critical need in the winter months.”).

<sup>107</sup> *See* NESCOE Initial Brief at 81-86.

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terminate if the Mystic Units are unavailable over a short time period,<sup>108</sup> the fact remains that under the Agreement as filed by Mystic, the Mystic Units could be non-operational for almost an entire winter month and ISO-NE would be without recourse under the Agreement.<sup>109</sup>

ISO-NE points to “the heightened financial penalties for Mystic’s failure to perform in the winter months” as an additional reason why Mr. Bentz’s modifications are unwarranted.<sup>110</sup> This does not, of course, explain why ISO-NE should not have an option to terminate the Agreement if the performance incentives are insufficient in practice. To the extent the performance incentives work as they are intended, ISO-NE will not need to exercise its termination rights. As NESCOE has underscored, none of these proposed changes alter ISO-NE’s ability to exercise its judgment in triggering termination, which will depend on a specific set of facts and conditions.<sup>111</sup> On the other hand, the absence of sufficient termination rights places at risk ISO-NE’s ability to manage unexpected outages and to protect consumers who are paying (substantial amounts) for a service that is not being provided.

Finally, ISO-NE asserts that “Mr. Bentz’s proposed changes would provide Exelon added incentive to over-procure LNG to ensure it meets Mr. Bentz’s increased availability requirement, at ratepayers’ expense.”<sup>112</sup> ISO-NE provides no analysis to support this claim. In any event, the Commission can address the potential for Exelon to over-procure LNG by conditioning

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<sup>108</sup> ISO-NE Initial Brief at 21.

<sup>109</sup> *See id.* (linking the termination right to an outage of greater than 25 days.).

<sup>110</sup> *Id.* at 22.

<sup>111</sup> NESCOE Initial Brief at 83.

<sup>112</sup> ISO-NE Initial Brief at 22.

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acceptance of the Agreement on Mr. Wilson's approach to EMT costs<sup>113</sup> and through the enhanced oversight features NESCOE has previously discussed.<sup>114</sup>

### **F. The Design of Mystic's Proposed True-Up and Challenge Process Is Flawed.**

Mystic resists changes to its proposed Schedule 3A that would provide greater transparency, accountability, and cost discipline.<sup>115</sup> It asks that the Commission keep intact a process that it designed unilaterally.<sup>116</sup> The Commission should reject this request. It is critically important to get these procedures right. Even putting aside the substantial implications in this case, the Commission will be setting new precedent. Future generators seeking similar RMR contracts will look first to the Commission's actions in this proceeding to model true-up and challenge procedures. The Commission must enhance the transparency of the process and place appropriate parameters around cost recovery. NESCOE respectfully asks the Commission to condition any acceptance of the Agreement on Mystic adopting the changes set forth in Attachment C of the NESCOE Initial Brief ("NESCOE Revisions").

#### **1. Mystic's Proposal Provides Insufficient Transparency.**

The NESCOE Revisions were developed to improve transparency and clarity.<sup>117</sup> Mystic states that its proposal is modeled on the procedures the Commission approved in the context of transmission formula rates, *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,127 (2012) ("MISO Formula Rate Order"), *order on investigation*, 143 FERC ¶ 61,149 (2013), *order on reh'g*, 146 FERC ¶ 61,209 (2014), *order on compliance*, 146 FERC ¶ 61,212

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<sup>113</sup> See *supra* at 14-19 and NESCOE Initial Brief at 38-46.

<sup>114</sup> NESCOE Initial Brief at 75-77.

<sup>115</sup> See, e.g., Mystic Initial Brief at 146-151, 156, 160-161.

<sup>116</sup> *Id.* at 146, 154.

<sup>117</sup> NESCOE Initial Brief at 56-57, 63-66. As the NESCOE Initial Brief explains, the NESCOE Revisions in Attachment C are the same, or are consistent with, the recommendations of NESCOE witness Cannady that are reflected in Exh. NES-020.

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(2014), *order on reh'g*, 150 FERC ¶ 61,024 (2015).<sup>118</sup> The MISO Formula Rate Order included the Commission's guiding principles regarding formula rate protocols:

The reason for including formula rate protocols in formula rates for transmission service is to provide the parties paying such rates specific procedures for notice, review, and challenges to the transmission owner's annual updates. Such formula rate protocols, in order to fulfill this purpose, should afford adequate transparency to affected customers, state regulators or other interested parties, as well as provide mechanisms for resolving potential disputes; they can be an important tool in ensuring just and reasonable rates.<sup>[119]</sup>

More recently, the Commission underscored that “the integrity and transparency of formula rates are critically important to ensuring just and reasonable rates.”<sup>120</sup>

Schedule 3A, as currently written, is at odds with this Commission precedent. Its lack of clarity and transparency in several respects undermines the integrity of the procedures and confidence that consumers will have in them. Mystic does not address many of the changes NESCOE has recommended to enhance transparency or explain why it has rejected these modifications. In other cases, although Mystic does respond to the recommendations, its request to be excused from mechanisms promising greater transparency falls short given the high bar the Commission has set for formula rate protocols. For example, Mystic's sole response to NESCOE's request for administrative filings closer in time to the occurrence of capital expenditures<sup>121</sup> is that it would be “an unnecessary administrative burden and expense.”<sup>122</sup> Essentially, Mystic states that consumers will be able to review these costs under the time

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<sup>118</sup> Mystic Initial Brief at 154-155.

<sup>119</sup> MISO Formula Rate Order at P 10.

<sup>120</sup> See *ISO New England Inc. Participating Transmission Owners Administrative Committee*, 153 FERC ¶ 61,343 at P 5 (2015).

<sup>121</sup> See NESCOE Initial Brief at 56-57.

<sup>122</sup> Mystic Initial Brief at 161.

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parameters Mystic has set.<sup>123</sup> Mystic fails to address the fact that there will be a four-year lag between a cost incurred in 2018 and the review of that cost in Mystic’s informational filing in 2022.<sup>124</sup> NESCOE is unaware of any comparable four-year review lag in formula rate protocols. As explained in the NESCOE Initial Brief, consumer-interested parties and others must be given the opportunity to monitor and observe changes in rate base as they occur, rather than potentially years later as Mystic has proposed.<sup>125</sup>

Mystic also rejects changes to true-up all components of rate base.<sup>126</sup> While Mystic cites to its interest in cost recovery certainty,<sup>127</sup> rates must reflect actual prudently incurred costs.<sup>128</sup> Mystic cannot artificially narrow the inputs that are subject to the true-up mechanism. Moreover, as explained in the NESCOE Initial Brief, a true-up of all components of rate base is consistent with the Hearing Order.<sup>129</sup>

### **2. Schedule 3A Fails to Include Mechanisms to Disciple Spending.**

The NESCOE Revisions include mechanisms to control cost escalations, which are currently unbounded under Mystic’s proposal. These mechanisms, recommended by NESCOE-witness Cannady, would disallow or cap certain categories of costs—cash working capital

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<sup>123</sup> *Id.* (“The intervenors will be given the opportunity to review all capital expenditures incurred between 2018 and the beginning of the term, ask discovery, and have all of the protections of the protocols at the appropriate time.” Exh. No. MYS-0037 at 32-33.”).

<sup>124</sup> *See* Schedule 3A, Exh. MYS-0051, at 4 (“At this time, net plant will be updated to include actual capital expenditures and depreciation incurred between January 1, 2018 and December 31, 2021.”).

<sup>125</sup> NESCOE Initial Brief at 57.

<sup>126</sup> Mystic Initial Brief at 154

<sup>127</sup> *Id.*

<sup>128</sup> As Staff explains: “Absent a true-up of the gross plant and other inputs to the proposed formula template, the rate may not be fully subject to transparent challenge and review. Furthermore, trueing up some components but not all will yield an unreasonable result. . . . absent a true-up of all cost components that may be changed without a section 205 filing, Mystic ‘may recover more than or may not recover all of its actual prudently incurred costs of providing [RMR] service, as the Commission found in the Hearing Order.’” Staff Initial Brief at 17 (quoting Staff witness Miller).

<sup>129</sup> NESCOE Initial Brief at 62.

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(“CWC”), incentive pay, overtime labor expenses, and overall operations and maintenance costs.<sup>130</sup> Mystic employs several techniques in an attempt to discredit Ms. Cannady’s recommendations, all of which miss their mark.

In one such ploy, Mystic suggests that Ms. Cannady’s references to state public utility commission (“PUC”) proceedings or statutes should provide no probative value to the Commission.<sup>131</sup> Mystic is wrong. Ms. Cannady never claimed that a PUC proceeding or state law had binding effect on the Commission. Her references were illustrative of regulators’ and other state officials’ determinations of reasonableness. Moreover, the absence of Commission precedent with respect to this case should not be surprising: as discussed above, this proceeding presents novel issues of first impression for the Commission.

Mystic also criticizes Ms. Cannady’s citations to Commission precedent.<sup>132</sup> Regarding CWC, Mystic states that the Commission has not required lead lag studies for electric utilities and asserts that Ms. Cannady “erroneously” cited to a case involving a natural gas company.<sup>133</sup> But Ms. Cannady acknowledged the absence of a lead lag requirement.<sup>134</sup> Her recommendation was based on “*the special circumstances of this case.*”<sup>135</sup> Ms. Cannady explained these circumstances, including that “[c]ompared to a typical cost of service for electric operations, Mystic’s request to expense all capital expenditures for both Mystic 8&9 and EMT during the [cost-of-service period] greatly enhances Mystic’s cash flow . . . . This accelerated payment of Mystic’s capital outlay absolutely should be considered when determining the need for a CWC

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<sup>130</sup> See *id.* at 60-62.

<sup>131</sup> Mystic Initial Brief at 147-149.

<sup>132</sup> *Id.* at 43-44, 147.

<sup>133</sup> *Id.* at 43.

<sup>134</sup> Tr. 1727:14-21 (Cannady).

<sup>135</sup> Cannady Answering Testimony, Exh. NES-010, at 8:1-2 (emphasis supplied).

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allowance.”<sup>136</sup> The Commission is not constrained in disallowing CWC given the special circumstances of this case and its statutory obligation to ensure just and reasonable rates.

Similarly, Mystic attempts to use Ms. Cannady’s citation to *NRG Energy, Inc. v. Entergy Servs., Inc.*, 126 FERC ¶ 61,053 (2009) (“*NRG*”), to contest her recommendation.<sup>137</sup> Mystic omits key facts. In *NRG*, the Commission permitted Entergy to recover certain incentive pay, but, as discussed in the NESCOE Initial Brief, those payments were shown to have a connection to “quality” utility services provided “at reasonable costs.”<sup>138</sup> A utility does not meet that standard when bonus payments are made solely on the basis of financial performance for the company.

Mystic additionally claims that Ms. Cannady’s recommended limitations are “arbitrary.”<sup>139</sup> Ms. Cannady sponsored seven exhibits, consisting of almost 100 pages of workpapers, data responses, and financial documents to support her proposals. Indeed, Ms. Cannady’s recommendations on CWC, overtime expenses, and bonus pay were based on the financial data that Mystic provided. The Commission should afford no weight to Mystic’s efforts to discredit Ms. Cannady’s testimony. It should set clear guidelines for Mystic regarding cost discipline during the cost-of-service period.

### **G. NESCOE’s Clawback Approach Is a Just and Reasonable Solution to the Unique Circumstances Presented in this Case.**

Mystic confirms that it continues to be willing to adopt a clawback mechanism in connection with the Agreement.<sup>140</sup> However, its acceptance of a clawback provision is

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<sup>136</sup> *Id.* at 8:7-11; *see id.* at 8-9.

<sup>137</sup> Mystic Initial Brief at 147.

<sup>138</sup> NESCOE Initial Brief at 61 (quoting *NRG* at P 33).

<sup>139</sup> Mystic Initial Brief at 147.

<sup>140</sup> *Id.* at 161.



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conditioned on a carve-out if the Agreement is extended or if the units reenter the market because ISO-NE implements new market rules.<sup>141</sup> The NESCOE Initial Brief discusses why the Commission should reject these conditions.<sup>142</sup>

Mystic further states that, in the absence of these “two possible eventualities,” it would be appropriate to apply the clawback proposal that NESCOE-witness Bentz proposed.<sup>143</sup> Several intervenors in this proceeding have also expressed support for NESCOE’s clawback proposal,<sup>144</sup> and ISO-NE’s perspective aligns with NESCOE’s balanced approach.<sup>145</sup> (Connecticut does not support NESCOE’s clawback proposal.)

The NESCOE Initial Brief describes how Mr. Bentz’s recommended clawback is tailored to the circumstances of this case, consistent with Commission precedent, and more effectively promotes consumer interests than other potential approaches.<sup>146</sup> NESCOE respectfully requests that the Commission condition any acceptance of the Agreement on the adoption of NESCOE’s clawback mechanism.

### **H. Additional Oversight Is Needed to Supplement ISO-NE’s Audit Rights.**

ISO-NE underscores its audit rights under the Agreement.<sup>147</sup> ISO-NE expects that it will exercise these rights “on a routine basis, throughout the term of the agreement.”<sup>148</sup> Mystic

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<sup>141</sup> *Id.* at 163.

<sup>142</sup> NESCOE Initial Brief at 5-6, 72-75.

<sup>143</sup> Mystic Initial Brief at 163-164.

<sup>144</sup> Initial Post-Hearing Brief of Eversource Energy, Docket No. ER18-1639-000 (filed Nov. 2), at 8-9; National Grid Initial Brief at 12; Initial Brief of Industrial Energy Consumer Group, Docket No. ER18-1639-000 (filed Nov. 2), at 13.

<sup>145</sup> ISO-NE Initial Brief at 37 (“[A]ny claw back provision would need to balance the return to ratepayers of certain costs recovered under the Mystic Agreement against whether the expected costs to be returned approach or exceed the expected value provided by Mystic (which, from Mystic’s perspective, would be in the form of market revenues) over a reasonable forecast horizon. The Commission should strike that balance carefully, to ensure that it does not lean too heavily in one direction or the other.”).

<sup>146</sup> *See* NESCOE Initial Brief at 69-72.

<sup>147</sup> ISO-NE Initial Brief at 37-40.

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similarly points to the tools at the disposal of ISO-NE and the Internal Market Monitor, as well as Schedule 3A, as providing sufficient oversight in connection with the Agreement.<sup>149</sup>

While NESCOE appreciates ISO-NE's intent to monitor closely the Mystic Units and EMT, as discussed in the NESCOE Initial Brief, there is added value to the Commission and to consumers in providing opportunities for states and others to assist in reviewing the implementation of this complex, first-of-its-kind Agreement.<sup>150</sup> For the reasons set forth in the NESCOE Initial Brief, NESCOE respectfully requests that the Commission, at minimum, provide meaningful opportunities for states and other consumer-interested parties to review, assess, and provide input on the operations and costs in connection with the Mystic Units and EMT.<sup>151</sup>

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<sup>148</sup> *Id.* at 40 (footnote omitted).

<sup>149</sup> *See* Mystic Initial Brief at 169-170, 178.

<sup>150</sup> NESCOE Initial Brief at 76.

<sup>151</sup> *Id.* at 75-77.

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### **III. CONCLUSION**

NESCOE respectfully requests that the Commission consider this Reply Brief, and, as NESCOE requested in its Initial Brief, find that the Agreement as proposed is unjust, unreasonable and unduly discriminatory, and (i) direct changes to the rates to be collected under the Agreement to ensure that it is just and reasonable; (ii) adopt NESCOE's proposed approach and modifications to the Fuel Supply Agreement; (iii) adopt the changes NESCOE recommends to the true-up mechanism in Schedule 3A; (iv) direct Mystic to adopt a balanced clawback mechanism as NESCOE proposes; (v) require changes to the Agreement to enhance customer protections and disallow certain costs that Mystic has not demonstrated to be just and reasonable; and (vi) take other action as the Commission deems appropriate to ensure that the rates, terms and conditions of the Agreement are just and reasonable.

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Respectfully Submitted,

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Date: November 16, 2018

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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 Washington, DC this 16th day of November, 2018.

*/s/ Phyllis G. Kimmel* \_\_\_\_\_

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