Public Version

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Constellation Mystic Power, LLC) Docket No. ER18-1639-003

PROTEST OF THE
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 18 C.F.R. § 385.211, the New England States Committee on Electricity ("NESCOE") files this Protest of the Compliance Filing submitted by Constellation Mystic Power, LLC ("Mystic") on March 1, 2019 in the above-captioned proceeding ("Mystic Compliance Filing").[1] The December 2018 Order conditionally accepted the cost-of-service agreement among Mystic, Exelon Generation Company, LLC, and ISO New England Inc. ("ISO-NE") (the "Agreement") subject to a compliance filing and paper hearing on return on equity ("ROE").[2] Although much of Mystic's compliance filing may appear at first glance to be consistent with the Commission's directives, certain aspects are not. Below NESCOE discusses the ways in which Mystic's compliance filing falls short of meeting the directives in the December 2018 Order and respectfully requests Commission action to ensure compliance with its prior directives.

[1] On January 22, 2019, NESCOE filed a "Request for Clarification or, in the Alternative, Rehearing" of the Commission's "Order Accepting Agreement, Subject to Condition, and Directing Briefs," issued December 20, 2018, in this proceeding. *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) ("December 2018 Order"). NESCOE sought clarification regarding the Commission's directive to Mystic to include a clawback mechanism in the Agreement ("NESCOE Clarification Request"), as discussed below in Section I.A. On February 14, 2019, NESCOE filed an answer in response to Mystic's answer ("February 14 Answer"). NESCOE's Clarification Request remains pending at the Commission. NESCOE incorporates by reference its Clarification Request and its February 14 Answer into this Protest.

[2] December 2018 Order at P 2.

I. PROTEST

A. Mystic's Proposed Clawback Provision Does Not Fully Comply with the Commission's Directives.

At the outset, NESCOE believes that, as it explained in the NESCOE Clarification Request, the Commission's directives on the clawback provision were intended to apply to both the Mystic 8 and 9 generating units ("Mystic 8 and 9" or "Mystic Units") and to the Everett Marine Terminal ("Everett"). As noted above, NESCOE's Clarification Request remains pending before the Commission.[3]

Mystic proposes to include a clawback provision in new Section 2.4 of the Agreement.[4] In addition to Mystic's error in omitting Everett from the clawback provision, there are several ways in which Mystic's proposed mechanism is inconsistent with the Commission's directives on this issue. The Commission found that the Agreement is not just and reasonable because it lacks a clawback provision and:

> direct[ed] 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 Resource" during the term of the cost-of-service agreement.[5]

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[3] *See* n. 1, *supra*.

[4] *See* Mystic Compliance Filing, Transmittal Letter, at 6; Mystic Compliance Filing, Attachment B (redlined Agreement), at 13. NESCOE will refer herein to these parts of the Mystic Compliance Filing as the Transmittal Letter and Attachment B.

[5] December 2018 Order at P 208 (citing Midcontinent Indep. Sys. Operator, Inc., FERC Electric Tariff Module C (53.0.0) ("MISO Tariff"), § 38.2.7.e(ii)).

Additionally, the Commission directed 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."[6]

Mystic states that it has modeled the language of its new Section 2.4 after 38.2.7(e)(ii) of the MISO Tariff, but that it has modified the language "to reflect the standards for capital expense recovery under the ISO-NE Tariff."[7] Additionally, Mystic states that it has modified the MISO Tariff language to reflect "the terminology used in ISO-NE Tariff and in the Mystic Agreement and to remove inapplicable language."[8] Finally, Mystic states that it has added language "to make explicit that the clawback mechanism does not apply if ISO-NE retains Mystic under a new cost of service agreement based on a reliability need, a distinction that the Commission found reasonable."[9]

NESCOE understands the need to modify terminology to make the provision sync up with the ISO-NE Tariff and to remove terms that are specific to the MISO Tariff. However, Mystic has proposed changes that go beyond that, with little or no explanation for its proposed deviations. Its modifications create a materially different standard for providing refunds than is reflected in the MISO Tariff, are confusing, and are in conflict with the standard for recovering capital expenses in the Agreement. Mystic's proposed clawback provision is not compliant with the Commission's directives.

First, Mystic struck language in the MISO Tariff provision that required the resource owner to refund all costs, less depreciation, for repairs and capital expenditures "that were

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6 December 2018 Order at P 208.

7 Transmittal Letter at 6 (citing ISO-NE Tariff, Market Rule 1, Section III.13.2.5.2.5.2(b) (quotation omitted)).

8 Transmittal Letter at 6.

9 *Id*. at 6-7 (citing December 2018 Order at P 210). NESCOE notes that Mystic mistakenly refers to Section 2.3, rather than 2.4, in footnote 9 of the Transmittal Letter.

needed to continue operation of the Generation Resource…and to meet applicable regulations and other requirements (including environmental)… ."[10] In its place, Mystic proposed language obligating it to refund all costs, less depreciation, for repairs and capital expenditures "that were expensed because they were reasonably determined to be the least-cost-commercially reasonable option consistent with Good Utility Practice." As noted above, Mystic suggests that it needed to modify language to make it consistent with ISO-NE Tariff Market Rule 1, Section III.13.2.5.2.5.2(b), but the change that Mystic proposes is confusing and seems to require refund of something less than what the MISO Tariff provision requires—*i.e.*, "costs, less depreciation, for repairs and capital expenditures that were needed to continue operation of" the facility(ies), period.

At the outset, it is unclear whether Mystic's new clause would apply to the costs of repairs. Moreover, Mystic unnecessarily introduces a new standard for assessing refunds that strays from the Commission's directives. The standard in the MISO clawback provision, underscored by the Commission in the December 2018 Order, is straightforward: if Mystic recovered costs for capital expenditures and the costs of repairs related to the running of the Mystic Units or Everett, unless the exception referenced above is met, all of these costs should be refunded to consumers. Mystic's approach complicates, and seeks to narrow, the mechanism. It introduces a materially different standard for refunds with a higher bar and borrows from language in the ISO-NE Tariff that is inapplicable here and that has never been raised or discussed in connection with the clawback mechanism in this proceeding.

The ISO-NE Tariff provision Mystic relies upon (Market Rule 1, Section III.13.2.5.2.5.2(b)) involves a case-by-case Commission review and determination of the justness

[10] MISO Tariff, § 38.2.7.e(ii)).

and reasonableness of capital investment recovery for certain units retained for transmission security. But here, the Commission has already accepted the Agreement providing compensation for the Mystic Units, which ISO-NE has retained for fuel security. The Commission further determined 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."[11] The December 2018 Order accepted Mystic's proposed true-up mechanism, subject to compliance directives.[12] The true-up process, set forth in Schedule 3A of the Agreement, establishes the standard that capital expenditures for which Mystic seeks cost recovery will be evaluated.[13] It differs from the case-by-case standard reflected in the ISO-NE Tariff provision that Mystic relies upon, requiring a more specific demonstration of the project need and, as the Commission directed, a demonstration that the project was not unduly delayed into the Agreement's term.

At best, by setting forth conflicting standards, Mystic's approach creates confusion regarding the standard for recovery of capital expenditures and repairs during the Agreement's term. At worst, it creates a gap between the costs Mystic ultimately will recover from consumers for capital investments and repairs during the cost-of-service term and the refunds it will provide if the resources reenter the market. Such a gap, which would be in Mystic's favor given the narrower standard for refunds it seeks to impose compared with the MISO Tariff provision, is clearly at odds with the Commission's clear directives regarding the need for a clawback mechanism to ensure just and reasonable rates.[14] The Commission should direct Mystic to

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[11] *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at P 20 (2018).

[12] December 2018 Order at P 174

[13] Attachment B at 66-67 (Section II.2.A).

[14] December 2018 Order at PP 208-212.

remove this unnecessary language and adopt the straightforward approach reflected in the MISO Tariff.

Second, Mystic eliminates another key provision in the MISO Tariff provision without explanation. In addition to refunds for "repairs and capital expenditures that were needed" to operate a resource during the cost-of-service term, the MISO Tariff provision also requires refunds for repairs and capital expenditures that were needed "to meet applicable regulations and other requirements (including environmental)" during the cost-of-service period.[15] Mystic does not explain why it removed this language or why it would be inapplicable to the Agreement. As the Commission found, clawback mechanisms are needed to prevent a resource from toggling between market-based and cost-of-service rates and to ensure that a resource owner does not inequitably recover investments and repairs that consumers funded during the cost-of-service period that would "benefit the resource for years after the contract ends."[16] By eliminating this provision refunding costs to meet regulatory and other legal requirements, Mystic again takes "too narrow"[17] of an approach to the clawback mechanism and produces a provision that is inconsistent with Commission precedent. The Commission should direct Mystic to include this language or explain why it is not applicable.

Third, the two conditions Mystic inserts at the end of Section 2.4 are, at a minimum, confusing, and it is not entirely clear that they collectively comply with the Commission's straightforward directive. The Commission directed 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

[15] Transmittal Letter at 6 (quoting MISO Tariff, § 38.2.7.e(ii)).

[16] December 2018 Order at P 210. *See id.* at PP 208 and 212.

[17] *Id*. at P 210.

Agreement or after an extension."[18] The Commission went on to explain that the clawback provision need not apply "if Mystic continues to operate under a new or revised cost-of-service agreement" because "in that instance…ISO-NE would find a continuing need for the Agreement for reliability purposes."[19] However, the Commission rejected 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."[20] Mystic's proposed clawback provision would apply under ***two*** circumstances: if the Owner/Lead Participant: "(1) continues operation of Mystic 8 and/or 9 after termination of this Agreement on other than a cost-of-service basis pursuant to a reliability determination by ISO, or (2) returns either unit to service following termination of this Agreement or any other cost-of-service agreement and later retirement of the unit."[21] The first clause, although awkwardly worded, seems to comply with the Commission's directive.[22] However, it is unclear what is intended by the second clause and how it differs from the first clause. Given this ambiguity, NESCOE urges the Commission to direct Mystic to revise this language in the clawback provision to clearly and succinctly meet the Commission's directive.

Fourth, regarding a more minor issue, Section 2.4 refers to "Mystic 8 & 9's Owner and Lead Market Participant." The definition of "Owner" in the Agreement (Section 1.1.26) refers back to the meaning set forth in the preamble of the Agreement, which is "Constellation Mystic Power, LLC, a Delaware limited liability company." "Mystic 8 & 9's Owner" is not itself a defined term and adds confusion to this provision.

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18 *Id.* at P 208 (emphasis added).

19 *Id.* at P 209.

20 *Id*. at P 210.

21 Attachment B at 13.

22 As noted above, Everett must also be added to comply fully with the Commission's directive.

Finally, Mystic's proposed clawback provision lacks any means to ensure that customers (or the Commission for that matter) have the ability to review and verify that the amounts proposed to be refunded are accurate. NESCOE had proposed a provision that would require Mystic to file with the Commission the refund amount calculation and a list of the repairs and capital expenditures included in the calculation. Such a filing would include a list, if any, of any capital expenditures and repairs made during the term of the Agreement that it did ***not*** include in the refund amount calculation.[23] The Commission should require such a provision here, and NESCOE provides below one possible model for this provision.

To incorporate these changes, NESCOE urges the Commission to direct Mystic to revise Section 2.4 as follows:

2.4 Operation of Mystic 8 & 9 and the LNG Terminal After Termination

> The ~~Mystic 8 & 9's~~ Owner and Lead Market Participant must refund to ISO with interest at the Commission-approved rate, all costs, less depreciation, for repairs and capital expenditures of Mystic 8 and/or 9 and/or the LNG Terminal (as appropriate) that were needed to continue operation of the Resource and/or the LNG Terminal and to meet applicable regulations and other requirements (including environmental) ~~expensed because they were reasonably determined to be the least-cost commercially reasonable option consistent with Good Utility Practice~~ during the Agreement term, if Mystic 8 and/or 9 and/or the LNG Terminal continues operation after termination of this Agreement on other than a cost-of-service basis. ~~, or (2) returns either unit to service following termination of this Agreement or any other cost-of-service agreement and later retirement of the unit~~.
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> No less than three (3) months prior to the end of the Agreement term, the Owner or Lead Market Participant shall make an informational filing with the Commission that projects the refund amount and lists the capital expenditures and repairs included in the calculation. Owner or Lead Market Participant must include in

[23] *See* NESCOE Initial Brief at 70; NESCOE Initial Brief, Attachment A at 37-38. NESCOE had proposed that such a filing be made 90 days prior to the end of the Agreement's term.

the filing a list of capital expenditures and repairs made during the term of the Agreement that it did not include in the refund amount calculation. Thirty days after the end of the Agreement's term, the Owner or Lead Market Participant shall make a filing with the Commission of the actual amounts of the refunds, with interested parties having the opportunity to challenge such amounts.

B. Certain Aspects of Mystic's Annual Fixed Revenue Requirement Are Calculated Incorrectly and Are Difficult To Verify.

1. The Accumulated Depreciation Does Not Appear To Be Calculated Correctly.

As Mystic acknowledged in its compliance filing, the Commission directed it to "submit a compliance filing recalculating its gross plant-in-service, including: (1) adjustments to Mystic's application of the 'original cost' test; and (2) a recalculation of accumulated depreciation using 'a 2.74 percent depreciation rate (i.e., a 36.5 year useful life).'"[24] Mystic explains that in its Schedule D, it included highlighted blank spaces for capital expenditures added to rate base for 2018 through 2024, and its populated Methodology provided in Attachment C-1 has amounts through 2022.[25] Schedule D also includes capital expenditures dating back to 2002. Mystic provides no information or support for these additions to rate base nor explains if they are net of retirements. Mystic added approximately $250 million[26] of capital expenditures from 2002 through 2017 and intends to add **[BEGIN CUI/PRIV-HC]** [redacted][27] [redacted] **[END CUI/PRIV-HC]** As far as NESCOE can tell, it does not appear that Mystic intends to remove any undepreciated amounts associated with capital

[24] Transmittal Letter at 16 (citing December 2018 Order at P 70).

[25] *Id.* (citing Mystic Compliance Filing, Attachment A at 79). Attachment C-1 was provided pursuant to the protective order in this proceeding and information in it was designated by Mystic as CUI/PRIV-HC.

[26] Sum of amounts on Mystic 8&9 Schedule D in column labeled Rate Base Capex for years 2002-2017. Attachment B at 87.

[27] Sum of amounts on Mystic 8&9 Schedule D in column labeled Rate Base Capex for years 2018-2022. Attachment C-1 at 5.

retirements from rate base. Apparently, either all of these additions are for new facilities in addition to the original construction or the facilities that have been replaced by these capital improvements are continuing to remain in rate base even though they have been replaced. The latter would appear to inappropriately inflate rate base. The Commission should ensure that these additions are just and reasonable and that the proper treatment for rate base has been applied in complying with the Commission's directives.

2. Mystic Failed To Exclude Property Taxes Associated With Mystic 7, Contrary to the Commission's Directive.

In the December 2018 Order, the Commission found 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."[28] Lest there be any doubt, the Commission reiterated that "Mystic may ***not*** recover property tax expenses associated with Mystic 7 land under the term of the Agreement."[29]

Although acknowledging the Commission's statement that "Mystic may not recover property tax expenses associated with Mystic 7 land[,]"[30] Mystic takes the view that it is acceptable to include property tax expenses associated with Mystic 7 in its AFRR for now, on the theory that it will be taken care of in the true-up.[31] Accordingly, in what Mystic refers to as the "Populated Methodology," the projected property taxes in the line item labeled "Taxes Other

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[28] December 2018 Order at P 92 (emphasis added).

[29] *Id*. (emphasis added).

[30] Transmittal Letter at 17 (citing December 2018 Order at P 92).

[31] Transmittal Letter at 17 ("By the time Mystic makes its true-up filing, the tax assessment will change because Mystic will have either sold the land associated with Mystic 7 or, the current tax finance agreement will have expired such that the taxes for the individual Mystic 7, 8, and 9 parcels will be re-segregated by parcel.").

Than Inc RES" reflect ***the same property tax projection*** of $15,500,445 as was originally filed.[32] This is blatantly inconsistent with the Commission's directive to Mystic in the December 2018 Order.

To place this in context, in other instances where the Commission explicitly found that the recovery of certain expenses would be deferred until the true-up, the Commission so stated. The Commission, for example, stated with respect to capital expenditures associated with relocating the boiler from Mystic 7 to Mystic 8 and 9 that "[b]ecause 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."[33] The Commission likewise found that "[r]egarding 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."[34]

The Commission made no such finding with respect to the Mystic 7 property taxes. The December 2018 Order was clear that such costs may not be recovered whether now or in the true-up. At a bare minimum, the Commission should direct Mystic to modify the definition of the AFRR in the Agreement to comply with the Commission's directive on this issue. This could be accomplished by modifying the definition of the AFRR as follows (with new proposed language underlined):

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[32] *Id*. at 17 (comparing Exh. No. MYS-008 at 1 (line 18) and 10 (line 1) with Attachment C-1 at 2).

[33] December 2018 Order at P 98.

[34] *Id*. at P 99.

> The AFRR is the cost-of-service for the Resource, including annual fixed operation and maintenance expense and annual expenses, depreciation, amortization, taxes and return, as accepted by the Commission, and as subject to the provisions of Schedule 3A; provided, however, that no property tax expense associated with Mystic 7 will be included in the AFRR.[35]

Corresponding language would need to be included in Schedule 3A, perhaps at Section I.A.[36]

C. The True-Up Mechanism Needs To Be Modified To Ensure That It Fully Reflects All Items That Are Subject to True-Up and the Commission's Directives.

The Commission clarified in the December 2018 Order "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)."[37] Mystic's compliance filing evinces an intent to comply with this directive,[38] and Mystic indicated that its changes to Schedule 3A were intended to comply with the Commission's "general directive to make clear that all items of the AFRR except those that can only be modified by an FPA Section 205 filing would be trued-up, including a directive to true-up all 'revenues.'"[39] Mystic proceeded to describe the changes to

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35 This would be inserted in Schedule 3, Attachment A at 49 (Attachment B at 53).

36 Attachment A at 52 (Attachment B at 57) (new proposed language underlined) ("The Annual Fixed Revenue Requirement, the Maximum Monthly Fixed Cost Payment, and the Fixed O & M/Return on Investment component of the Monthly Fuel Cost Charge set forth in Schedule 3 of the Agreement shall be updated prior to the Term and subject to true-up as detailed herein and in accordance with the Methodology for all items with the exception of ROE and depreciation that are fixed and must be modified by a Federal Power Act section 205 filing; provided, however, that no property tax expense associated with Mystic 7 will be included in the AFRR and subject to true-up.").

37 December 2018 Order at P 174. The Commission set the ROE for briefing (*id*. at P 2) and noted that Mystic must also include components of the capital structure, such as the cost of debt and equity, as subject to the true-up mechanism. *Id*. at n. 369.

38 *See* Transmittal Letter at 9 (quoting from P 174 of the December 2018 Order).

39 *Id*. at 12.

Schedule 3A it implemented to comply with this directive.[40] Among other things, Mystic indicated that it "[d]eleted references throughout Schedule 3A that referred to the true-up as being limited to 'operations and maintenance expense and one eighth O&M cash working capital allowance, administrative and general expense, and taxes other than income taxes' and replaced that language with a reference back to revised Section I.A,"[41] with revised Section I.A delineating "the inputs subject to true up, to include 'all items with the exception of ROE and depreciation rates that are fixed and must be modified by filing a Federal Power Act section 205 filing.'"[42] Similarly, the Prepared Testimony Supporting Compliance Filing of Alan C. Heintz explained that Mr. Heintz modified the true-up methodology to revise the schedules and workpapers "to allow for the true up of all inputs with the exception of ROE and depreciation rates."[43] NESCOE supports these revisions.

However, a review of Schedule 3A shows that there remain at least four instances where the Schedule 3A redlines refer to "items subject to True-Up as specified in Section II.[44] However, unlike Section I, Section II (or Section II.A, as the redline erroneously refers to twice) does not specify which items are subject to true-up. Consistent with the Commission's directives, and Mr. Heintz's February 27, 2019 supporting testimony, all items are subject to true-up except for those that are fixed or require a Section 205 filing to change. Accordingly,

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40 *Id*. at 13-14 (summarizing "Modifications to Schedule 3A to effectuate true up of all AFRR components and the true-up of all 'revenues'").

41 *Id*. at 13 (citing to changes made in Attachment B at 57-58).

42 *Id*. (citing to Attachment B at 57).

43 Attachment C at 6.

44 These references to Section II appear in Attachment B at 59 and 61. They also appear in Attachment B at 62 and 64, but there the references are erroneously to "Section II.A."

NESCOE requests that the Commission direct Mystic to strike "as specified in Section II" and "as specified in Section II.A" in all four of these instances.[45]

2. Schedule 3A Should Be Modified To Ensure Full Compliance With the Commission's Directives Regarding Pre-Term Capital Expenditure Delays.

The Commission directed Mystic to make certain changes to Section 3A to require "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."[46] Specifically, the Commission directed Mystic to implement two revisions in order to:

> (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.[47]

The Commission explained that requiring Mystic to provide the information about the timing of the capital expenditures would "enable interested parties to ensure that Mystic recovers the costs of a capital expenditure from the users who benefit from it."[48]

To comply with this directive, Mystic added a new sub-section II.A.2.A.4 to the Agreement that states that for any capital expenditures to be incurred during the term, Mystic will:

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[45] The reference on Attachment B at 59 should also remove the period after "Section II."

[46] December 2018 Order at P 174.

[47] *Id*. at P 180 (citing Trial Staff's Initial Br. at 102-03).

[48] *Id.* at P 182 (quoting Trial Staff's Initial Br. at 104).

> Demonstrate that neither of the following occurred: (a) the project was scheduled for before the Term but delayed into the Term, nor (b) the project was scheduled for during the Term but should have been completed prior to the Term. If either (a) ***of*** (b) have occurred or will occur, Mystic ***can*** provide information and an explanation of why the capital project was performed during the Term to demonstrate that it has not or is not unduly delaying a project into the Term.[49]

While the language of new Section II.2.A.4 comes close to complying with the Commission's directive, use of the word "can" (as shown above) suggests that there is no obligation on Mystic's part to provide the information and relevant explanation. In the event that a capital expenditure that was supposed to occur before the term but is delayed to or completed during the Term, the Informational Posting *requires* a demonstration that such delay is not undue. To implement that requirement, the provision should *require*—not permit—Mystic to provide the requisite information and explanation. To effectuate this, "can" should be changed to "shall." Additionally, there is a typo earlier in that sentence. The revised sentence would read as follows:

> If either (a) ~~of~~ or (b) have occurred or will occur, Mystic ~~can~~ shall provide information and an explanation of why the capital project was performed during the Term to demonstrate that it has not or is not unduly delaying a project into the Term.

3. The Informational Filing Requirement of Schedule 3A Needs a Conforming Change To Ensure Compliance with the Commission's Directive.

Although Section II.2.A.4, once revised as shown above, would accurately reflect the Commission's directive that Mystic provide information regarding potential delays of capital projects, this requirement should also be folded into the Informational Filing. Section II.6.A requires the Owner to submit an Informational Filing that includes information reasonably

[49] Transmittal Letter at 12-13; Attachment B at 67 (emphasis added).

necessary to determine, among other things, "whether a capital expenditure collected as an expense during the Term is necessary in order to meet the obligations of the Agreement."[50] Whether a capital project has appropriately been undertaken during the Term, rather than having been done prior to the Term, is information for which interested parties (and, it seems, the Commission) have just as much of a need. In order to facilitate the ability of interested parties to evaluate such information, the obligation to provide the information in Section II.2.A.4 should also be made part of the Informational Filing. This change could be made as follows in Section II.6.A:

> (5) whether a capital expenditure collected as an expense during the Term is necessary in order to meet the obligations of the Agreement; (6) if a capital expenditure is collected for a project scheduled for before the Term but delayed into the Term, or the project was scheduled for during the Term but should have been completed before the Term, information and an explanation of why the capital project was performed during the Term; and ~~(6)~~ (7) whether a capital expenditure collected as an expense during the Term is reasonably determined to be the least-cost commercially reasonable option consistent with Good Utility Practice to meet the obligations of the Agreement.

D. Additional Corrections to the Agreement Should Be Made To Conform with the Commission's Directives.

1. The Audit Rights Do Not Fully Capture All That ISO-NE Will Need To Ensure That the Fuel Supply Costs Are Just and Reasonable.

Although the Commission did not agree with some of the arguments made by parties regarding the scope of ISO-NE's ability to audit the Mystic Units and Everett, the Commission did conclude "that to the extent that there is information that Everett possesses that ISO-NE may not access under section 6.2 of the Agreement, 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

[50] Attachment B at 78.

more accurately perform its audit."[51] Additionally, in connection with its approval of Trial Staff's proposal regarding a sliding scale incentive for third-party sales, the Commission directed Mystic to modify the Agreement to include a provision for maintaining a record of third-party sales for the purposes of verifying how revenues are credited.[52] Mystic proposed revisions to Section 6.2 of the Agreement to reflect these directives.[53]

For the most part, the revisions to this section of the Agreement appear to be consistent with the Commission's directives. However, Mystic's insertion of "Constellation LNG, LLC" and "Distrigas of Massachusetts LLC" at only the beginning of the provision fails to comply fully with the December 2018 Order and could be interpreted as limiting the contractual audit rights of ISO-NE to sales. These entities must also be captured later in the provision to ensure that ISO-NE has audit rights regarding gas *purchases* in connection with Everett. For example, there are significant costs (and the potential for shifting of costs/benefits) associated with Constellation LNG's cargo supply and purchase agreement, and ISO-NE should have the ability under the Agreement, consistent with the Commission's directives, to audit all aspects of these arrangements. This could be easily remedied by inserting the phrase "affiliates of" and pointing to Constellation LNC, LLC and Distrigas of Massachusetts LLC, in the appropriate context, as follows:

6.2. Books and Records; Audit Rights.

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[51] December 2018 Order at P 193. *See also id*. at P 196 ("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.").

[52] *Id*. at P 134.

[53] *See* Transmittal Letter at 8-9; Attachment B at 24.

> ISO shall have the right, at any time upon reasonable notice, to examine at reasonable times the books and records of Owner, Lead Market Participant, Constellation LNG, LLC and Distrigas of Massachusetts LLC to the extent necessary to audit and verify the accuracy of all reports, statements, invoices, charges, or computations pursuant to this Agreement. The Parties acknowledge and agree that ISO may perform audits of the Monthly Reports and the Periodic Cost Reports as well as a final audit of all expenses incurred under this Agreement upon completion of the Term. Owner or Lead Market Participant's affiliates shall exercise reasonable efforts to secure the ability to provide ISO, subject to a non-disclosure agreement, copies of any contracts between affiliates of Owner, ~~or~~ Lead Market Participant, ~~'s~~ Constellation LNG, LLC, or Distrigas of Massachusetts LLC ~~Affiliates~~ and third-parties for the sale of fuel from the LNG Facility during the Term and any contracts between affiliates of Owner, ~~or~~ Lead Market Participant, ~~'s~~ Constellation LNG, LLC, or Distrigas of Massachusetts LLC ~~Affiliates~~ and third parties for the supply of fuel to the LNG Facility during the Term.[54]

2. The Revised Agreement Contains Typos and Minor Inconsistencies Which Need Correcting.

NESCOE recognizes the significant effort involved in developing this Compliance Filing and understands that typos and minor errors are inevitable. NESCOE offers the following proposed corrections to help correct these mistakes and provide greater clarity to the Agreement.

a. Recitals

Section H of the Recitals refers to the wrong date of the FPA section 205 filing. It should state that the filing was made on May 16, 2018, not May 16, 2016.[55]

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[54] Attachment B at 24.

[55] *Id*. at 6.

b. Section 3.6

Section 3.6 contains a statement that refers to resources other than the Mystic Units but is incorrectly capitalized as "Resources." The provision is thus inaccurate and should be revised as follows:

3.6 Capacity Performance Payments.

> The Resources shall be subject to negative Capacity Performance Payments and eligible for positive Capacity Performance Payments consistent with other ~~Resources~~ resources with Capacity Supply Obligations; provided, however, that positive Capacity Performance Payments shall be used solely as a credit against negative Capacity Performance Payments and shall not otherwise accrue to the benefit of the Resources, but net negative Capacity Performance Payments shall affect the amount of the Revenue Credit.[56]

"Resource" is a defined term in the Agreement, defined in Section 1.1.30 as having the meaning set forth in the Section A of Recitals (*i.e.*, Mystic 8 or Mystic 9). The reference here is addressing resources *other than* Mystic 8 or 9 participating in the capacity market, and thus should not be the defined term "Resources," but rather, simply "resources."

c. Section 3.7

Section 3.7 contains a typo which should be corrected as follows:

> . . . . and provided further, that if the interval occurs less than 6 hours in advance of the next scheduled arrival of an LNG cargo, this minimum tank volume shall be 330,000 MCF, and. . . . [57]

d. Schedule 3A, Section II.4.F

Schedule 3A contains the Resource Compensation True-up procedures and protocols. These are applicable to and place obligations on the Owner, defined in the Agreement as

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[56] *Id.* at 17.

[57] *Id.* at 19.

Constellation Mystic Power, LLC.[58] In Section II.4 of the protocols, addressing formal challenges, there is a reference to an obligation of "[t]he Transmission Owner" to respond to the Formal challenge by the deadline established by FERC.[59] The word "Transmission" should be deleted; it may be an inadvertent carry-over from using other protocols as a model. The language should read as follows:

> The ~~Transmission~~ Owner shall respond to the Formal Challenge by the deadline established by FERC.

e. Schedule 3A, Section II.6.A

As explained directly above, the procedures in Schedule 3A are applicable to "the Owner." There is a reference in Section II.6.A to "each Owner" which may cause confusion and should be stricken. The obligation is on "the Owner," and the language should read as follows:

> Within five (5) days of such Informational Filing, ISO shall provide notice of the Informational Filing by posting the docket number assigned to ~~each~~ the Owner's Informational Filing. . .[60]

II. CONCLUSION

For the reasons discussed herein, NESCOE respectfully requests that the Commission direct Mystic to make the changes discussed in this Protest so that the Agreement is fully compliant with the Commission's directives in the December 2018 Order.

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[58] Section 1.1.26 of the Agreement (Attachment B at 10) states that "Owner" shall have the meaning set forth in the preamble of this Agreement [*i.e.*, Constellation Mystic Power, LLC] (*id*. at 5) and, where applicable and appropriate, its assignee and/or designee.

[59] Attachment B at 76.

[60] *Id*. at 78.

Respectfully Submitted,

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Attorneys for the New England States Committee on Electricity

Date: March 22, 2019

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 22nd day of March, 2019.

/s/ Phyllis G. Kimmel

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