

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

ISO New England Inc.

)

Docket No. ER18-1639-000

**REQUEST FOR CLARIFICATION OR, IN THE ALTERNATIVE, REHEARING OF
THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 825*l* (2012), and Rules 212 and 713 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.713, the New England States Committee on Electricity (“NESCOE”)¹ respectfully requests clarification or, in the alternative, rehearing of the Commission’s December 20, 2018 order in this proceeding.² The December 2018 Order found, among other things, that the cost-of-service agreement among Constellation Mystic Power, LLC (“Mystic”), Exelon Generation Company, LLC (“ExGen”),³ and ISO New England Inc. (“ISO-NE”) (the “Agreement”) was unjust and unreasonable because it failed to include a clawback provision.⁴ NESCOE respectfully requests clarification that the December 2018 Order requires a clawback provision applicable to not only the Mystic 8 and 9 generating units (“Mystic 8 and 9” or “Mystic Units”) but to the Everett Marine Terminal (“Everett”) as well. NESCOE believes this clarification is consistent with the December 2018 Order as well as the expectations of participants to the proceeding.

¹ NESCOE filed a timely motion to intervene in the above-referenced docket and is a party to this proceeding. *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at P 9 (2018).

² *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) (“December 2018 Order”).

³ Mystic and ExGen are affiliates and are subsidiaries of Exelon Corporation (“Exelon”). *Id.* at n. 25.

⁴ *Id.* at P 208.

I. BACKGROUND

The December 2018 Order conditionally accepted the Agreement subject to a compliance filing and a paper hearing on return on equity.⁵ The Commission directed that Mystic, as part of its compliance filing, include a clawback provision in the Agreement that is similar to the mechanism reflected in the Midcontinent Independent System Operator’s (“MISO”) tariff.⁶ The Commission explained that the MISO tariff “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.”⁷

The Commission noted that Mystic had agreed to accept a clawback mechanism as part of the Agreement if two conditions were met.⁸ The Commission accepted the first condition, which would delay application of the clawback if the Agreement is extended or if Mystic enters into a new or revised cost-of-service agreement with ISO-NE for reliability purposes.⁹

The Commission rejected Mystic’s second condition, which requested that the clawback would not apply if Mystic “seeks to re-enter a market that has been restructured in a way that values Mystic’s fuel security benefits.”¹⁰ The Commission found that this exception would run

⁵ *Id.* at P 2.

⁶ *Id.* at P 208.

⁷ *Id.*, quoting Midcontinent Indep. Sys. Operator, Inc., FERC Electric Tariff Module C (53.0.0), § 38.2.7.e(ii).

⁸ December 2018 Order at P 209.

⁹ *Id.* See *id.* at P 208 (“We direct Mystic to clarify that the clawback mechanism will not apply if ISO-NE chooses to extend the Agreement but that the clawback mechanism would apply if Mystic chooses to return to the market after the term of the Agreement or after an extension.”).

¹⁰ *Id.* at P 210.

contrary to the clawback’s purpose, which is to “preven[t] both undesirable toggling and inequitable recovery from ratepayers for investments and repairs; while incurred during the term of a cost-of-service contract, these investments will benefit the resource for years after the contract ends.”¹¹ The Commission explained that it “has accepted clawback provisions to address the concern that a retiring generator may enter into a reliability must-run cost-of-service agreement, recover the costs of significant upgrades under that agreement, and subsequently return to service without reimbursing ratepayers for those upgrade costs.”¹² It found that revising the Agreement to include a clawback provision like the one reflected in the MISO tariff would address this concern.¹³

II. REQUEST FOR CLARIFICATION

NESCOE respectfully requests clarification that the clawback provision would apply to consumer-funded investments and repairs in connection with both the Mystic Units *and* Everett. Cost recovery under the Agreement relates both to the Mystic Units and to their sole source of fuel, Everett. The December 2018 Order allowed Mystic to recover 91 percent of Everett’s costs under the Agreement.¹⁴ Subject to further revisions it directed Mystic to make in a compliance filing, the Commission also accepted Mystic’s proposed true-up and cost review process for recovering, among other things, capital expenditures and operation and maintenance costs for both the Mystic Units and Everett.¹⁵

¹¹ *Id.*, citing *Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 556, 161 FERC ¶ 61,059 at PP 55, 59 (2017) (“Opinion No. 556”).

¹² December 2018 Order at P 212.

¹³ *Id.*

¹⁴ *Id.* at P 133.

¹⁵ *Id.* at P 174. *See id.* at P 165. The true-up process is set forth in Schedule 3A of the Agreement. *See* Exhibit MYS-0052.

The December 2018 Order may have unintentionally created uncertainty regarding the application of the clawback provision. In some places, the order references the potential for the Mystic Units to reenter the market and trigger the clawback mechanism without also referencing the potential for Everett—which began commercial operations over 30 years before the Mystic Units¹⁶—to return to merchant operations and likewise be subject to the clawback provision.¹⁷

Despite the omission of an explicit reference to Everett in the December 2018 Order’s discussion of the clawback mechanism, NESCOE understands the Commissions directives on the clawback provision to apply both to the Mystic Units and to Everett. As the Commission explains, the purpose of a clawback mechanism—and in mandating one in this proceeding—is to prevent 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.”¹⁸ The Commission’s rationale applies equally to the Mystic Units and to Everett. Under the Agreement, Mystic may seek cost recovery for capital expenditures and repairs not only for Mystic 8 and 9 but also for Everett. It would be an unjust and unreasonable outcome, and inconsistent with Commission precedent,¹⁹ for Exelon to reap the benefits of operating Everett as a merchant facility after the term of the Agreement or benefit from the sale of the facility without reimbursing consumers for the upgrades they funded.

¹⁶ See *Distrigas of Massachusetts, LLC*, 124 FERC ¶ 61,039 at P 3 (2008); Initial Post-Hearing Brief of Constellation Mystic Power, LLC, Docket No. ER18-1639-000 (Nov. 2, 2018) (“Mystic Initial Brief”), at 13.

¹⁷ See, e.g., December 2018 Order at P 208 (“We direct Mystic to clarify that the clawback mechanism will not apply if ISO-NE chooses to extend the Agreement but that the clawback mechanism would apply if Mystic chooses to return to the market after the term of the Agreement or after an extension.”) and P 212 (“If Mystic 8 and 9 return to service after the term of the Agreement, we find that adopting the clawback provision described in the MISO tariff will resolve that concern here.”).

¹⁸ *Id.* at P 210. See *id.* at PP 208 and 212.

¹⁹ See *id.* at PP 210 and 212, discussing Opinion No. 556.

There would be two circumstances under which the clawback would apply to Everett. First, the clawback would apply if both the Mystic Units and Everett operate under market-based rates following the Agreement term (or after an extension). Second, the clawback would apply to Everett if the Mystic Units retire at the end of the Agreement period (or after an extension) and Everett continues to operate as a merchant facility. In this latter circumstance, Exelon would not reimburse consumers for expenditures related to the Mystic Units, but it would be responsible for repaying capital expenditures and the costs of repairs in connection with Everett.

NESCOE believes that applying the clawback provision to both the Mystic Units and Everett is consistent with the expectations of participants in the proceeding. Despite significant briefing on the clawback issue,²⁰ not a single participant expressed opposition to the clawback's application to Everett in addition to the Mystic Units. In fact, during the proceeding, Mystic expressed openness to employing a clawback mechanism for capital expenditures associated with Everett.²¹ Additionally, as the December 2018 Order noted, Mystic agreed to accept a clawback mechanism provided that its two exceptions were incorporated.²² In that circumstance, Mystic stated that it would be appropriate to apply the clawback proposal that NESCOE sponsored.²³ That proposal applied the clawback to both the Mystic Units *and* Everett.²⁴

To eliminate any uncertainty regarding the December 2018 Order, NESCOE respectfully asks the Commission to confirm that the clawback mechanism applies to the Mystic Units *and* Everett. The Commission should ensure that the clawback provision it has directed Mystic to

²⁰ *See id.* at PP 197-207.

²¹ *See* Initial Brief of the New England States Committee on Electricity, Docket No. ER18-1639-000 (Nov. 2, 2018) ("NESCOE Initial Brief"), at 68, citing Exhibit NES-004 at 3.

²² December 2018 Order at P 209.

²³ Mystic Initial Brief at 163-164.

²⁴ *See* NESCOE Initial Brief at 69-72.

include in the Agreement appropriately reflects the full range of investments and repairs that consumers are required to pay Mystic as part of its cost-of-service.

III. ALTERNATIVE REQUEST FOR REHEARING

If the Commission does not grant clarification, NESCOE respectfully requests rehearing. Without this clarification, the December 2018 Order is in error. It does not explain why the clawback provision would apply to Mystic 8 and 9 but not to Everett. Under the Commission's precedent, the Agreement must include a provision to reimburse ratepayers for investments and repairs in connection with Everett if it returns to merchant operations. Absent the clarification that NESCOE seeks, the Commission will have failed to explain why it has deviated from its precedent and will not have addressed record evidence supporting application of the clawback both to the Mystic Units and Everett.²⁵ To the extent clarification is not provided, the Commission's actions are arbitrary and capricious and do not constitute reasoned decision-making.²⁶ On rehearing, the Commission should direct Mystic to revise the Agreement to include a clawback provision that expressly applies to Everett, in addition to the Mystic Units.

IV. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

NESCOE provides the following statement of issues in accordance with Rule 713(c)(2), 18 C.F.R. § 385.713(c)(2). This statement of issues also serves as the concise specification of errors required under Rule 713(c)(1), 18 C.F.R. § 385.713(c)(1).

The December 2018 Order is arbitrary, capricious, and inconsistent with reasoned decision-making because it does not explain why the clawback provision would apply to Mystic 8 and 9 but not to Everett. 5 U.S.C. § 706(2)(A) (agency actions must be vacated if they are "arbitrary, capricious, an abuse of discretion, or

²⁵ See *New Eng. Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 211-213 (D.C. Cir. 2018) (finding that the Commission did not engage in reasoned decision-making because it "failed to respond to the substantial arguments put forward . . . and failed to square its decision with its past precedent.").

²⁶ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010); *American Mining Congress v. EPA*, 907 F.2d 1179, 1187 (D.C. Cir. 1990).

otherwise not in accordance with law.”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010); *American Mining Congress v. EPA*, 907 F.2d 1179, 1187 (D.C. Cir. 1990). The Commission “failed to respond to the substantial arguments put forward . . . and failed to square its decision with its past precedent.” *New Eng. Power Generators Ass’n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018).

V. CONCLUSION

For the reasons discussed herein, NESCOE respectfully requests that the Commission (i) grant NESCOE’s request for clarification, or (ii) in the alternative, grant rehearing and direct Mystic to revise the Agreement to include a clawback provision that applies to the Mystic Units and Everett.

Respectfully Submitted,

/s/ Jason Marshall _____

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Dated: January 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 Cambridge, Massachusetts this 22nd day of January, 2019.

/s/ Jason Marshall _____

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