

No. 20-1343 (LEAD)  
Consolidated with 20-1361, 20-1362, 20-1365, 20-1368, 21-1067, 20-1070

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CONSTELLATION MYSTIC POWER, LLC,  
*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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BRAINTREE ELECTRIC LIGHT DEPARTMENT, ET AL.,  
*Intervenors.*

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ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

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**REPLY BRIEF OF PETITIONERS**  
**CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY,**  
**CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL**  
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**THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY, INC.**

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## **RULE 26.1 CORPORATE DISCLOSURE STATEMENTS**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1 of this Court, Petitioners the Attorney General of the Commonwealth of Massachusetts, Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, Connecticut Office of Consumer Counsel, and the New England States Committee on Electricity, Inc. hereby submit the following disclosure statements. Each of the undersigned counsel submits the disclosure statement with regard to the petitioner they represent.

*The Attorney General of the Commonwealth of Massachusetts* (Massachusetts AG) is a governmental entity charged with ensuring a reliable and safe power system at the lowest possible cost for all ratepayers. The Massachusetts AG does not issue any stock and thus is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

*Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, and Connecticut Office of Consumer Counsel* are governmental entities that do not issue any stock and thus are not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

*The New England States Committee on Electricity, Inc.* (the States Committee) is a non-profit entity governed by a board of managers appointed by the

Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Its general purpose is to represent the collective perspective of the six New England states in regional electricity matters. The States Committee has no parent company, is not a publicly held corporation, and there is no publicly held company that has any ownership interest in the States Committee.

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## GLOSSARY

Agreement	The cost-of-service agreement among Constellation Mystic Power, LLC, Exelon Generation Company, LLC, and ISO New England Inc.
Commission or FERC	Federal Energy Regulatory Commission
Connecticut Authority	Petitioner Connecticut Public Utilities Regulatory Authority
Connecticut Department	Petitioner Connecticut Department of Energy and Environmental Protection
Connecticut Consumer Counsel	Petitioner Connecticut Office of Consumer Counsel
Connecticut Parties	Petitioners Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, and Connecticut Office of Consumer Counsel, collectively
December 2018 Order	<i>Constellation Mystic Power, LLC</i> , Order Accepting Agreement, Subject to Condition and Directing Briefs, 165 FERC ¶ 61,267 (Dec. 20, 2018), R.313, JA____.
December 2020 Order	<i>Constellation Mystic Power, LLC</i> , Order Addressing Arguments Raised on Rehearing, and Setting Aside Prior Order, in Part, 173 FERC ¶ 61,261 (Dec. 21, 2020), R.420, JA____.
Everett	Everett Marine Terminal, the liquefied natural gas facility in Everett, Massachusetts owned by Exelon and used to serve the Mystic Units
Exelon	Exelon Generation Company, LLC, the corporate parent of Mystic
FERC Br.	Brief of Respondent Federal Energy Regulatory Commission

FPA	Federal Power Act
July 2018 Order	<i>Constellation Mystic Power, LLC</i> , Order Accepting and Suspending Filing and Establishing Hearing Procedures, 164 FERC ¶ 61,022 (July 13, 2018), R.75, JA__.
July 2020 Rehearing Order I	<i>Constellation Mystic Power, LLC</i> , Order Granting Clarification in Part, Denying Clarification in Part, and Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,043 (July 17, 2020), R.374, JA__.
July 2020 Rehearing Order II	<i>Constellation Mystic Power, LLC</i> , Order on Clarification, Directing Compliance, and Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,044 (July 17, 2020), R.375, JA__.
Massachusetts AG	Petitioner Massachusetts Attorney General
Mystic	Constellation Mystic Power, LLC, owner of the Mystic Units
Mystic Units	Mystic Units 8 and 9 gas-fired power plants located adjacent to Everett and owned by Mystic
States Committee	Petitioner the New England States Committee on Electricity, Inc.
State Petitioners	Collectively, Massachusetts AG, Connecticut Parties and the States Committee
State Pet'rs Br.	Brief of Petitioners Conn. Pub. Utils. Regulatory Auth., Conn. Dep't of Energy & Env. Prot., Conn. Office of Consumer Counsel, Att'y Gen. of the Commonwealth of Mass., and the New England States Committee on Elec., Inc.
System Operator	ISO New England Inc., the grid operator for New England

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Authorities upon which we chiefly rely are marked with asterisks.

Pursuant to the Court's June 23, 2021 Order, Petitioners Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy & Environmental Protection, Connecticut Office of Consumer Counsel, Attorney General of the Commonwealth of Massachusetts, and the New England States Committee on Electricity, Inc. (State Petitioners) submit their reply brief, which responds to the Brief of Respondent Federal Energy Regulatory Commission (FERC or Commission) (FERC Br.).

### **SUMMARY OF ARGUMENT**

In the orders under review, FERC accepted a cost-of-service agreement (the Agreement) to secure the operation of the Mystic Units for two years past their announced retirement date. FERC did not err in accepting the Agreement but fell short of its statutory duty to ensure that Constellation Mystic Power, LLC's (Mystic) rates are just and reasonable. Specifically, FERC erred by: (1) allocating to Mystic's ratepayers 91% of the fixed costs of its affiliated fuel supplier, the Everett Marine Terminal (Everett); (2) refusing to offset those costs by crediting Everett third-party sales revenue; (3) not requiring Mystic to refund amounts collected for Everett capital expenditures and repairs if Everett continues operating after Mystic retires; and (4) failing to address issues regarding procedures to true-up Mystic's rates based on costs actually incurred.

As explained in State Petitioners' initial brief, those rulings were contrary to precedent and not the product of reasoned decision-making. FERC's brief fails to reconcile the agency's decisions with its obligations under the Federal Power Act (FPA) and Administrative Procedure Act (APA). Accordingly, the Court should vacate the decisions in relevant part and remand the case for further proceedings to remedy those defects.

## ARGUMENT

### I. ALLOCATING 91% OF EVERETT COSTS TO MYSTIC VIOLATED COST CAUSATION PRINCIPLES.

The orders on review correctly acknowledge that the close affiliate relationship between Mystic and its fuel supplier, the Everett Marine Terminal, necessitated "heightened scrutiny" of the pass-through of Everett's costs to Mystic's wholesale electric ratepayers. R.375 [*Constellation Mystic Power, LLC*, 172 FERC ¶ 61,044, P 29 (2020) (July 2020 Rehearing Order II)], JA \_\_\_\_\_. But the Commission failed to provide the necessary scrutiny.

The relevant facts are undisputed. Everett stores liquefied natural gas in massive tanks, from which it sells gas to Mystic and unaffiliated third parties. It sells some to third parties as liquid. FERC Br. at 52. Everett also transforms gas to vapor that it sells to Mystic, a local gas distribution company, and two interstate natural gas pipelines. FERC Br. at 13; R.313 [*Constellation Mystic Power, LLC*, Order Accepting Agreement, Subject to Condition and Directing Briefs, 165 FERC

¶ 61,267, P 100 (Dec. 20, 2018) (December 2018 Order)], JA\_\_\_\_. Everett has four vaporization systems that deliver gas at different pressures, but Mystic requires high-pressure gas and can use only two of those systems and the pipes connecting them to the Mystic Units. R.276 [Connecticut Parties Initial Br. at 17-18 (citing Ex. CT-064)], JA\_\_\_\_. Mystic cannot use Everett’s lower-pressure systems or the pipes connecting Everett to the distribution company and interstate pipelines. *Id.* At most, Mystic can consume just 39% of the gas that Everett can transform and deliver as vapor. R.252 [Ex. CT-010 at 9:23-25], JA\_\_\_\_; R.253 [Ex. NES-028 at 7:10-12, 26:21–27:7], JA\_\_\_\_; R.276 [Connecticut Parties Initial Br. at 29 (citing Tr. 856:4-12)], JA\_\_\_\_.

FERC should have allocated at most 39% of Everett’s fixed costs to Mystic’s ratepayers. Instead, it allocated a much greater, unjust and unreasonable percentage. FERC treated all Everett fixed costs as common costs—that is, it made no effort to tie the costs of specific vaporization, piping, or other systems to the customers served by them. FERC then allocated those fixed costs using the ratio of Everett’s liquid sales (9%) to its vapor sales (91%). FERC prevented Mystic from passing through the 9% assigned to liquid sales because “Mystic . . . can accept only vapor” and thus

“does not benefit” from the costs assigned to liquid sales.<sup>1</sup> R.313 [December 2018 Order P 133], JA\_\_\_\_. The Commission then assigned to Mystic the remaining 91%—*all* of the Everett costs allocated to its vapor sales. *Id.*<sup>2</sup> On rehearing, State Petitioners explained why that decision was unjust, unreasonable, and contrary to precedent. *See, e.g.*, R.319 [Connecticut Parties’ January 2019 Rehearing Request] at 3-8], JA\_\_\_\_. The Commission did not meaningfully respond. R.375 [July 2020 Rehearing Order II PP 64-65], JA\_\_\_\_. And the Commission’s brief similarly fails to reconcile its orders with its FPA and APA obligations.

FERC begins its defense by observing that Everett is Mystic’s “sole source” of fuel. FERC Br. at 13, 27; *see also* R.375 [July 2020 Rehearing Order II P 5], JA\_\_\_\_. But Mystic’s dependence on Everett does not justify forcing New England ratepayers to shoulder nearly all Everett fixed costs. R.313 [December 2018 Order

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<sup>1</sup> Substantial evidence showed that 9% was too low a forecast of Everett’s liquid sales as a proportion of its total sales during the Mystic agreement’s term. *See* R.319 [Connecticut Parties January 2019 Rehearing Request at 6-7 & n.7], JA\_\_\_\_ (discussing evidence that, in some years, liquid sales made up as much as 37% of total Everett deliveries and that going forward Mystic likely would consume less vapor than it did historically). FERC’s rehearing orders ignored that evidence, as does its brief.

<sup>2</sup> As explained below, FERC initially coupled that allocation with a requirement to reduce Mystic’s pass-through of Everett costs by crediting a portion of its revenues on third-party vapor sales. *Id.* P 134, JA\_\_\_\_. On rehearing, FERC eliminated the crediting requirement, but did not modify the 91% cost allocation. R.375 [July 2020 Rehearing Order II P 66], JA\_\_\_\_.



P 133], JA\_\_\_\_ (“[P]rinciples of fairness and cost causation require that New England ratepayers and those third-party customers . . . share” Everett’s fixed costs.); *id.* P 133 n.300, JA\_\_\_\_ (citing cases).<sup>3</sup> Other customers buy gas from Everett, and cost-causation principles and precedent require the allocation of costs to those purchasers. While the Commission acknowledged the relevant rules, it did not apply them correctly.

FERC next contends that its exclusion of 9% of Everett’s fixed costs was supported by substantial evidence that Everett’s liquid sales do not benefit Mystic. FERC Br. at 61. That sidesteps the relevant question: whether FERC was justified in refusing to exclude any part of the remaining 91%. *See* R.319 [Connecticut Parties January 2019 Rehearing Request at 4-5], JA\_\_\_\_. As State Petitioners have explained, Mystic can use no more than 39% of Everett’s vaporization capacity and should bear no more than that percentage of Everett’s fixed costs. *See* State Pet’rs Br. at 24 & n.55 (citing R.276 [Connecticut Parties Initial Brief at 29 (citing Tr. 856:4-12)]),

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<sup>3</sup> FERC does not regulate rates for Everett’s natural gas sales. Here, FERC allocated Everett’s costs by approving arrangements that pass through to Mystic’s ratepayers nearly all of Everett’s fixed costs. As explained in the text, FERC should have allocated more costs to third parties by reducing the amount that Mystic could pass through. Without the forced subsidy by electric ratepayers, Everett would have an incentive to sell gas to third parties in the market and collect from them an appropriate share of its fixed costs.

JA\_\_\_; R.252 [Ex. CT-010 at 9:23-25], JA\_\_\_); R.253 [Ex. NES-028 at 7:10-12, 26:21–27:7], JA\_\_\_.

FERC responds by quoting a brief submitted to FERC by its trial staff, which contended that State Petitioners' allocation was "flawed" because it used vaporization capacity shares to allocate all Everett fixed costs, including those of its liquid trucking facilities. FERC Br. at 62. But the Commission did not adopt trial staff's contention, so the orders cannot be defended on that basis. *Secs. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943). And it is easy to see why FERC declined to adopt trial staff's argument: it shows why 39% was *too high* an estimate of Mystic's proper share of Everett costs. *See* R.319 [Connecticut Parties' January 2019 Rehearing Request] at 8-9 & n.11], JA\_\_\_. As State Petitioners pointed out on rehearing, "a more precise calculation" would assign Mystic 39% of the 91% of costs allocated to vapor sales, not 39% of all Everett fixed costs. *Id.* FERC, however, held Mystic's ratepayers responsible for a much higher share: 91% of all Everett fixed costs.

Responding to State Petitioners' observation that Everett can "vaporiz[e] and deliver[]" to third parties . . . far more vapor than Mystic possibly could consume,"<sup>4</sup> FERC says it is irrelevant to compare Everett's ability to deliver vapor to Mystic

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<sup>4</sup> R.319 [Connecticut Parties' January 2019 Rehearing Request at 7], JA\_\_\_; State Pet'rs Br. at 25.

with its ability to deliver vapor to third parties because fixed costs “do not vary with” demand or the “amount of energy produced.” FERC Br. at 63 (quoting R.375 [July 2020 Rehearing Order II P 65], JA \_\_\_\_). But fixed costs must be allocated some way, and FERC has long accepted relative use as an appropriate allocator because it is a reasonable proxy for cost causation and the benefits a party derives from a facility. *E.g.*, *Town of Norwood, Mass. v. FERC*, 962 F.2d 20, 24 n.1 (D.C. Cir. 1992); *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1198 (D.C. Cir. 1989). In contrast, FERC points to no case upholding anything approaching what the Commission did here: allocate entirely to one customer—Mystic—the fixed costs of facilities that serve many. As this Court has held repeatedly, the Commission ““may not single out a party for the full cost of a project, or even most of it, when the benefits of the project are diffuse.”” *Pub. Serv. Gas & Elec. Co. v. FERC*, 989 F.3d 10, 14 (D.C. Cir. 2021) (quoting *BNP Paribas Energy Trading GP v. FERC*, 743 F.3d 264, 268 (D.C. Cir. 2014)); *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1255 (D.C. Cir. 2018), *reh’g denied*, 905 F.3d 671 (D.C. Cir. 2018).

FERC claims that the result is justified because Everett’s third-party vapor sales “benefit Mystic by helping to manage Everett’s tank.” FERC Br. at 63 (quoting R.375 [July 2020 Rehearing Order II P 64], JA \_\_\_\_). Even if true, that assertion would not justify the one-sided allocation FERC approved. *All* Everett sales—including liquid sales and vapor sales to third parties or Mystic—can help

manage Everett's tank and provide reciprocal benefits to other customers. R.276 [Connecticut Parties Initial Br. at 18 n.27], JA\_\_\_\_); *cf. Western Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999) ("When a system is integrated, any system enhancements are presumed to benefit the entire system."). Indeed, the System Operator specifically agreed that Mystic could "self-schedule" the Mystic Units—that is, run them regardless of market price—when needed to burn gas in Everett's tanks to make room for a scheduled tanker delivery, R.267 [Initial Br. of ISO New England Inc. at 4], JA\_\_\_\_, including an "extra" delivery "to meet merchant needs," R.253 [Ex. NEE-050 at 17], JA\_\_\_\_\_.

This reciprocity of benefits—that all customers benefit from Everett's inventory management while deliveries to either Mystic or third parties can be used for that purpose—further illustrates why FERC should have allocated Everett's costs broadly instead of foisting 91% on Mystic's ratepayers. *Pub. Service. Gas & Elec. Co.*, 989 F.3d at 14; *Western Mass. Elec. Co.*, 165 F.3d at 927 (approving the Commission's "consistent policy to assign the costs of system-wide benefits to all customers"); *N. States Power Co.*, 64 FERC ¶ 61,324, at 63,379 (1993) (The "fundamental theory of Commission ratemaking" is that costs should be allocated to "those customers who utilize the facilities and thus cause the cost to be incurred.").

## II. ALLOCATING NEARLY ALL OF EVERETT'S COSTS TO NEW ENGLAND RATEPAYERS IS A JURISDICTIONAL OVERREACH.

State Petitioners agree that reviewing fuel supply charges to ensure they are just and reasonable is within FERC's jurisdiction. As discussed above, however, burdening ratepayers with 91% of the costs of a facility from which they can receive no more than 39% of its output is contrary to bedrock principles of cost causation and is not the result of reasoned decision-making. FERC's repeated and explicit expressions of concern for Everett's financial viability (R.75 [*Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022, P 36 (2018) (July 2018 Order)], JA\_\_\_\_; R.313 [December 2018 Order P 107 & n.297], JA\_\_\_\_; R.374 [*Constellation Mystic Power, LLC*, 172 FERC ¶ 61,043, P 34 (2020) (July 2020 Rehearing Order I)], JA\_\_\_\_) make clear that FERC's actions are not motivated by cost-causation concerns, but by the desire "to keep a separate and unquestionably non-jurisdictional entity, the Everett [liquefied natural gas] facility, financially afloat." R.374 [*Id.*, Glick Dissent P 7], JA\_\_\_\_.<sup>5</sup> It is beyond FERC's jurisdiction to regulate Everett directly and as this Court has recognized, FERC cannot "do indirectly what it [cannot] do directly." *Altamont Gas Transmission v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996).

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<sup>5</sup> The System Operator lends credence to this motivation by echoing the Commission on this point, calling Everett and its ability to make third party sales "critical" to fuel security in the region. ISO New England Inc. Brief in Support of Commission at 2-3, 5-6.

None of the cases FERC cites in its brief (FERC Br. at 54-55) address FERC setting a cost-of-service rate for a fuel supplier as it has done for Everett, nor do they involve requiring ratepayers to cover costs associated with a fuel supplier's third-party sales. In fact, they are inapposite. For example, in *Public Service Co. of New Mexico*, 17 FERC ¶ 61,123 (1981), *aff'd*, 832 F.2d 1201 (1987), which FERC cites as supporting the routine nature of its actions here (R.374 [July 2020 Rehearing Order I P 28], JA\_\_\_; FERC Br. at 54, 55), FERC *refused* to use a cost-of-service analysis to evaluate the justness and reasonability of a utility's coal purchases from an affiliated coal company. 17 FERC at 61,246. FERC asserted that such conduct would "extend . . . our rate-making analysis to an industry in which we have very little expertise." *Id.* The absence of applicable precedent in support of FERC's actions here is confirmation that it has strayed outside the bounds of its authority in the pursuit of a particular, prohibited result.

### **III. FERC'S REFUSAL TO REQUIRE CREDITING OF THIRD-PARTY SALES REVENUE WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO PRECEDENT.**

Having held that it has jurisdiction to include Everett costs in Mystic's rates, FERC wrongly concluded that it *lacks* jurisdiction to reduce the included amounts by crediting to ratepayers some of Everett's profit on its vapor sales to third parties. That decision was arbitrary, capricious, and contrary to precedent.

The Commission has long held that, when costs are allocated entirely to one class of customers,<sup>6</sup> they must be offset by crediting profits realized on sales to other customers. R.313 [December 2018 Order P 134 & n.303], JA\_\_\_\_. Such credits are required as a matter of fairness to the ratepayers who bear the costs and to prevent the utility from recovering more than its cost of service. “If costs are included but related revenue credits are excluded, then the resulting rate results in double-recovery.” *Id.*; *see also Sw. Power Pool, Inc.*, 167 FERC ¶ 61,235, P 12 (2019) (Where costs are allocated to firm load, “revenue from non-firm services” should be “reflected as a revenue credit in order to prevent over-recovery.”); R.420 [December 2020 Order P 34, n.80], JA\_\_\_\_ (citing cases); *Tenn. Gas Pipeline Co.*, 65 FERC ¶ 61,224, at 62,071 (1993) (“[S]ince firm shippers pay the fixed costs not allocated to interruptible services, they should receive the benefit of the credit to the extent interruptible revenues exceed the allocated costs.”).

When FERC authorized Mystic to charge ratepayers 91% of its affiliate Everett’s fixed costs, it initially required Mystic to reduce those charges by crediting

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<sup>6</sup> As explained above, FERC and judicial precedent require costs to be “allocated to those who cause [them] to be incurred and reap the resulting benefits.” *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007). Under that precedent, costs can be assigned to a specific customer class where a utility plans its system to serve that class—as those customers cause the costs to be incurred and reap most of the benefits. *See Ft. Pierce Utils. Auth. v. FERC*, 730 F.2d 778, 785-86 (D.C. Cir. 1984). By contrast, where, as here, benefits are diffuse, then costs should be allocated broadly. *Pub. Serv. Elec. & Gas Co.*, 989 F.3d at 13.

back to ratepayers a portion of Everett's profits on third-party vapor sales. R.313 [December 2018 Order P 134], JA \_\_\_\_\_. In a later order, FERC retracted the revenue credits (R.375 [July 2020 Rehearing Order II P 66], JA \_\_\_\_)—and, contrary to precedent, thereby allowed Mystic to charge its ratepayers all Everett costs allocated to vapor sales, with no offset for Everett's profits on those sales. *Golden Spread Elec. Coop., Inc. v. Sw. Pub. Serv. Co.*, Op. No. 501, 123 FERC ¶ 61,047, P 82 (2008) (“In a cost-based regime,” costs are allocated to off-system sales or the revenues are “reflected ... through ... a revenue credit.”), *partial reh'g*, 144 FERC ¶ 61,132 (2013).

On brief, FERC cites no case supporting its decision to neither allocate costs to third-party vapor sales nor require revenue credits against the charges imposed on Mystic ratepayers. Nor does FERC try to reconcile its actions with the precedent discussed above. Instead, it dismisses those cases on grounds that “none . . . involved credits for revenues of nonjurisdictional entities.” FERC Br. at 66. But FERC emphasizes that its rulings, which authorize recovery of nearly all of Everett's costs from New England ratepayers, regulate Mystic, not Everett. FERC Br. at 52-53. If so, then the same is true of any ruling limiting the amount that Mystic can collect by requiring it to credit Everett revenues against those costs. FERC unquestionably has the authority, in regulating jurisdictional rates, to account for non-jurisdictional



activities and revenues. *Panhandle E. Pipe Line Co. v. Fed. Power Comm'n*, 324 U.S. 635, 646 (1945).

FERC suggested below (R.375 [July 2020 Rehearing Order II P 66], JA\_\_\_\_) and echoes in its brief (FERC Br. at 66) that FERC lacked authority to require revenue credits because they were part of an “incentive mechanism” to encourage Everett to make third-party sales. But that argument is doubly wrong. First, “FERC regulation does not run afoul of” statutory limits “just because it affects—even substantially—the quantity or terms of” non-jurisdictional sales. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016). Second, FERC’s argument mischaracterizes which of its actions were intended to provide a sales incentive.

As explained above, revenue credits do not incentivize sales; they prevent the utility from over-recovering its costs and ensure that customers receive the benefits of the facilities for which they have paid. Here, parties were concerned that allocating nearly all Everett fixed costs to Mystic and requiring *all* of Everett’s third-party sales revenue to be credited to Mystic would eliminate Everett’s motive to sell to third parties. State Petitioners explained that the best way to maintain the incentive was to limit appropriately how much of Everett’s costs Mystic’s ratepayers would cover. Had FERC allocated only 39% of Everett’s costs to Mystic, no revenue crediting would have been required and Everett would have had appropriate incentives to make market sales to third parties to recover the remainder of its costs.

But FERC did not follow that course. It *created* the incentive problem by eliminating Everett's need to make third-party vapor sales to help cover its costs and triggering an obligation to credit revenues on those sales. It then attempted to fix the incentive problem by *cutting back* the crediting obligation required by precedent to prevent over-recovery.

If FERC doubted its authority to incentivize Everett to make third-party vapor sales by letting Mystic retain *some* sales revenue, it settled on an illogical remedy: abandoning precedent and allowing Mystic to retain *all* the revenue. R.319 [Connecticut Parties' January 2019 Rehearing Request at 17], JA\_\_\_\_. The logical approach would have been the opposite. Having allocated 100% of the vapor sales costs to Mystic, FERC should have abandoned the incentive effort and required Mystic to credit all Everett third-party sales revenue to Mystic's customers, as precedent required. And if, somehow, there were jurisdictional doubt about the Commission's authority to require revenue credits, that should have been another reason to adopt a different cost allocation: one that allocates costs based on an appropriate share of Mystic costs to the third-party sales. Had FERC allocated costs appropriately to Everett's third-party vapor sales, Commission policy and precedent would not have required revenue credits.

#### **IV. FERC’S INCONSISTENT JUSTIFICATIONS FOR FAILING TO REQUIRE MYSTIC TO REFUND EVERETT COSTS UNDER THE CLAWBACK PROVISION ARE INDEFENSIBLE.**

FERC fails to reconcile how it can have the authority to require consumers to pay Mystic for Everett costs, while simultaneously lacking the authority to require Mystic to refund those same costs if Everett remains in service after the Agreement expires. R.375 [July 2020 Rehearing Order II P 43], JA\_\_\_\_. FERC defends its ruling through mischaracterization, arguing that “the States Committee asked the Commission to . . . require[] *Everett* to refund expenditures made to keep its own plant in service if it remained in service after the Mystic Agreement ended.” FERC Br. at 74 (emphasis supplied). Not so. The States Committee asked for clarification “that the clawback provision would apply to consumer-funded investments and repairs in connection with both the Mystic Units and Everett” because both facilities’ costs are recovered from Mystic’s ratepayers under the Agreement. R.316 [States Committee January 2019 Rehearing Request at 3], JA\_\_.<sup>7</sup> State Petitioners’

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<sup>7</sup> Likewise the Connecticut Parties challenged on rehearing the Commission’s acceptance of:

a compliance filing clawback provision that fails to *require Mystic to refund costs* (less depreciation) of repairs and capital expenditures on the Everett Marine Terminal in the event that Mystic and Everett (or Everett alone) continue to operate after the expiration of the Mystic RMR agreement[.]

R. 378 [Connecticut Parties’ August 2020 Rehearing Request at 2 (emphasis added)], JA\_\_.

objections relate to cost recovery by *Mystic* and the clawback of revenues *Mystic* receives pursuant to the FERC-jurisdictional Agreement.

FERC says that the payments made to *Mystic* for Everett costs cannot be subject to a refund obligation because they were “payments that Everett received under the non-jurisdictional Everett Agreement.” FERC Br. at 74. This, too, is a mischaracterization. What Everett receives is irrelevant. What is at issue are the costs that *Mystic* charges its ratepayers pursuant to the FERC-jurisdictional Agreement, which include not only costs related to the *Mystic* Units but also costs related to Everett.

In defending its orders, FERC says that “the Commission consistently held that costs related to Everett’s operation ‘are a component of *Mystic*’s proposed cost-of-service rate.’” FERC Br. at 56 (quoting R.75 [July 2018 Order P 35], JA\_\_). If the Commission can authorize *Mystic* to recover Everett costs under the Agreement (*see* FERC Br. at 61-64), then FERC can also require refunds of those payments if Everett remains in operation after the Agreement ends. FERC has never reconciled this fundamental inconsistency in its orders.

The Commission next argues that Everett costs cannot be part of the clawback provision because “if [the *Mystic* Units] retired and Everett did not, there would be no jurisdictional rate through which the Commission could order refunds.” *Id.* at 75.

However, this fails to confront that the clawback is codified in the Agreement in a provision that survives the Agreement's termination. State Pet'rs Br. at 39-40.

FERC's contentions sidestep the most crucial point. FERC precedent holds that contracts like the Agreement must include clawback provisions "to prevent the inequitable recovery from ... customers for repairs that provide significant benefits beyond [the agreement's] term ... should the [resource] later return to regular service." R.313 [December 2018 Order P 210, JA\_\_\_ (citing *Midcontinent Indep. Sys. Operator, Inc.*, Op. No. 556, 161 FERC ¶ 61,059, P 55 (2017)). And that consideration applies whether the costs borne by Mystic's ratepayers fund repairs to the Mystic Units or to Everett. The point is so clear that even Mystic accepted it, and offered to include Everett costs in the clawback. *See* State Pet'rs Br. at 39 & n.70 (citing R.189 [Exhibit NES-004], JA\_\_\_ ("Exelon confirms that it is willing to agree to a clawback process to refund certain capital expenditures if Everett continues in service after the Mystic Agreement terminates.")). The Commission's failure to address these arguments was arbitrary and capricious, and its failure to include passed-through Everett costs in the Mystic Agreement's clawback provision was unjust, unreasonable, and contrary to the FPA.

**V. FERC FAILS TO JUSTIFY ITS INADEQUATE EXPLANATIONS REGARDING THE TRUE-UP MECHANISM.**

**A. FERC’s brief wrongly suggests that the Commission answered a rehearing argument it ignored.**

Because the proceeding involved Mystic’s anticipated recovery of costs incurred during a future contract term, FERC required Mystic to make filings to “true-up” (or reconcile) its rates, which are based on forecasted costs, to reflect actually incurred costs. FERC also established procedures to address the concern that Mystic might delay capital projects into the term of the Agreement, which would allow Mystic to recover from ratepayers the costs of projects that it should have started or completed on its own dime before the Agreement began. The December 2018 Order required Mystic to demonstrate that capital projects were neither “scheduled before the term ... but delayed until the term” nor “scheduled to be completed during the term” when they “should have been completed prior to the term.” R.313 [December 2018 Order P 180], JA\_\_\_\_.

On rehearing, at Mystic’s request, FERC specified that the requirement to demonstrate the timing of projects is informational only and “would not necessarily preclude Mystic from recovering capital expenditures incurred prior to the term of the Mystic Agreement.” R.375 [July 2020 Rehearing Order II P 87], JA\_\_\_\_. FERC replaced Mystic’s obligation to “demonstrate” that projects were not delayed with a

requirement merely to “identify” whether delay occurred “and if so, explain why.”

*Id.*

The States Committee sought rehearing of that change and asked the Commission to hold that Mystic cannot recover costs for capital projects that “should have been completed prior to the [Agreement’s] term.” R.381 [States Committee August 2020 Rehearing Request at 28-30], JA\_\_\_\_. FERC recited the States Committee’s argument, R.420 [December 2020 Order P 32], JA\_\_\_\_, but never responded to it. State Pet’rs Br. at 43-44.

FERC counsel defends the Commission’s orders with mischaracterization. FERC says “the States Committee did not . . . dispute the Commission’s ruling on the informational purpose of the true-up provision.” FERC Br. at 79. But the States Committee sought rehearing precisely because it objected to “[t]he way that the Commission has directed Mystic to revise the protocols” to make this provision *only* informational. R.381 [States Committee August 2020 Rehearing Request at 29], JA\_\_\_\_. In so doing, FERC appeared to permit Mystic to charge ratepayers for “expenditures that should have been completed earlier,” thus “leav[ing] Mystic with an incentive to delay capital projects into the Mystic Agreement’s period, which would unfairly shift costs to ratepayers.” *Id.* at 29-30, JA\_\_\_\_-JA\_\_\_\_.

FERC also says that the December 2020 Order addressed the States Committee’s claim together with another party’s challenge on a related, but distinct

issue. FERC Br. at 80. This is incorrect. FERC’s order addressed solely a different claim brought by a group of generators and did not address the States Committee’s rehearing request on this issue. R.420 [December 2020 Rehearing Order P 33], JA\_\_\_ (agreeing with generators “that the Commission’s intention is for the clawback mechanism to apply to costs ‘that are incurred’ rather than those that ‘that [sic] were expensed’”). The distinction between “incurred” versus “expensed” costs in the Agreement’s clawback provision has nothing to do with the States Committee’s articulated concerns—that (1) FERC should prohibit Mystic from recovering in the first instance costs that it incurred during the Agreement’s term but should have incurred earlier; and (2) Mystic should bear the burden of demonstrating that it did not delay the projects for the “purpose of recovering excessive costs from ratepayers under the Agreement.” R.313 [December 2018 Order P 174] JA\_\_\_. FERC failed to provide any explanation for weakening the consumer protection standard it formerly required on this issue. *See* R.313 [December 2018 Order P 180], JA\_\_\_.

**B. FERC’s explanation on brief cannot solve the failure of the Commission’s orders to clarify the treatment of revenue discrepancies.**

Under the Agreement, Mystic’s charges to ratepayers are reduced by applying credits for the revenue that Mystic receives for its market sales of energy and related products (but not revenue that Everett receives for selling vapor to customers other than Mystic). The States Committee sought clarification that any revenue



discrepancies experienced during the Agreement's term—that is, differences between Mystic's projected and actual market revenues—would be subject to challenge in the true-up process. R.381 [States Committee August 2020 Rehearing Request at 30-31], JA\_\_\_. Although FERC's brief in this Court assures that revenue discrepancies will be subject to challenge (FERC Br. at 81-83), the Commission's orders fail to say so.

FERC points to paragraph 27 of the December 2020 Rehearing Order as providing the States Committee's requested clarification by holding that “Mystic must demonstrate that it recovers only those costs attributable to serving Mystic.” FERC Br. at 82 (quoting R.420 [December 2020 Rehearing Order P 27], JA\_\_\_). But paragraph 27 addresses only the Everett tank congestion charge. It does not address credits for *Mystic's* sales of electric energy and related products. R.420 [December 2020 Rehearing Order P 27], JA\_\_\_.<sup>8</sup>

Although it is tempting to accept FERC's counsel's assurance that the requested clarification was provided, the language in FERC's order does not support counsel's assertion. As this Court has explained, when “called on to review [an agency's] decision, we cannot simply adopt counsel's suggested interpretation as an

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<sup>8</sup> Paragraph 25 of the December 2020 Order misconstrued the States Committee's argument as involving “Everett's revenue discrepancies.” R.420 [December 2020 Rehearing Order P 25], JA\_\_\_.

expedient to eliminate the ambiguity left unresolved by the [agency].” *Plumbers & Steamfitters Local 342, etc. v. Nat. Lab. Rels. Bd.*, 598 F.2d 216, 220-21 (1979); see also *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 329 (2006) (“counsel’s explanation to this court cannot substitute for reasoned decisionmaking at the agency level”) (quotation omitted). The Court should remand this aspect of FERC’s order and direct FERC to make the requested clarification.

**C. FERC fails to clarify its confusing rulings regarding the prudence of the tank congestion charges.**

FERC’s brief fails to clarify inconsistent statements in the orders as to whether customers may challenge in the true-up the prudence of the tank congestion charge.<sup>9</sup>

FERC’s December 2020 Rehearing Order found that “these costs may be reviewed in the true-up process.” R.420 [December 2020 Rehearing Order P 27], JA \_\_\_. But this same order subsequently said that no such challenge can be filed by customers; rather, only the System Operator has authority to audit these costs. *Id.* P 28, JA \_\_\_ (granting Mystic’s requested clarification that the prudence of tank congestion costs for third-party sales is “limited to the expectation that [the System

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<sup>9</sup> The tank congestion charge is a complicated mechanism that Mystic and the System Operator intended to develop to control and allocate costs incurred to manage the levels of liquid natural gas in Everett’s storage tanks, including potential costs of diverting a tanker shipment, self-scheduling the Mystic Units at a loss, or selling excess gas to third parties at a loss. See R.420 [December 2020 Order P 17], JA \_\_\_; R.313 [December 2018 Order PP 161-162], JA \_\_\_; State Pet’rs Br. at 46 n.74.

Operator] will audit and ensure that the tank congestion charge is properly calculated.”).

It cannot be simultaneously true that (1) consumers have the right to review the prudence of the tank congestion charge in the true-up and (2) the review of the prudence of the tank congestion charge costs is limited to the System Operator’s audit. FERC counsel’s effort to reconcile these contradictory statements is unavailing, as FERC’s brief states only that the rulings were consistent with one another without explaining how that is the case. FERC Br. at 85. This internal inconsistency is not reasoned decision-making. Moreover, FERC’s rulings seem to require Mystic’s ratepayers to cover at least some of Everett’s losses, in the event it sells gas unprofitably to make room in its tank, without receiving any credit for profitable sales, and with no opportunity to challenge the prudence of the activities producing the costs they are required to bear. FERC’s rulings fail to justify depriving interested parties of the ability to review these costs.

## VI. CONCLUSION

State Petitioners' petitions for review should be granted, and the challenged decisions should be vacated and remanded.

Respectfully submitted,

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February 3, 2022

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation of the Court's June 23, 2021 Order because the brief's textual portions, including headers, quotations, and footnotes, but excluding the (i) cover pages, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) signature block contain 5,422 words, as counted by the word count feature of Microsoft Word 2010, with which this brief was prepared.

*/s/ Scott H. Strauss*

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Scott H. Strauss

February 3, 2022

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 3rd day of February, 2022, caused the foregoing document to be served electronically through the Court's CM/ECF system.

*/s/ Scott H. Strauss*

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