

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

Constellation Mystic Power, LLC)

Docket No. ER18-1639-019

**ANSWER OF THE
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”), 18 C.F.R. § 385.213, the New England States Committee on Electricity (“NESCOE”) submits this Answer to the Emergency Motion of Constellation Mystic Power, LLC (“Mystic”) and Constellation Energy Generation, LLC (“Constellation”) (collectively, the “Companies”) for Partial Directed Disposition on Remand, filed in the above-captioned docket on November 22, 2022 (“Motion”).

I. DESCRIPTION OF FILER

NESCOE is the Regional State Committee for New England. It is governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont and is funded through a regional tariff that ISO New England Inc. (“ISO-NE”) administers.¹ NESCOE’s mission is to represent the interests of the citizens of the New England region by advancing policies that will provide electricity at the lowest possible price over the long term, consistent with maintaining reliable service and environmental quality.² This answer reflects the collective view of the six New England

¹ *ISO New England Inc.*, 121 FERC ¶ 61,105 (2007).

² *See* Sept. 8, 2006 NESCOE Term Sheet (“Term Sheet”) that was filed for information as Exhibit A to the Memorandum of Understanding among ISO-NE, the New England Power Pool (“NEPOOL”), and NESCOE

states.

II. BACKGROUND

On May 16, 2018, pursuant to section 205 of the Federal Power Act (“FPA”), Mystic filed the cost-of-service agreement among Mystic, ISO-NE, and Constellation³ (the “Agreement”). On July 13, 2018, the Commission accepted the Agreement for filing, suspended it for a nominal period, to become effective June 1, 2022 as requested, subject to refund, and established hearing procedures.⁴ Following an expedited hearing that lasted ten days, the Commission accepted the Agreement, subject to condition, effective June 1, 2022.⁵

The December 2018 Order allowed Mystic to recover 91 percent of the fixed costs of the Everett Marine Terminal (“Everett”),⁶ a liquefied natural gas (“LNG”) facility that Constellation’s predecessor acquired in late 2018.⁷ Additionally, the Commission allowed Mystic to fully expense and recover over the two-year term of the Agreement prudently incurred capital expenditures related both to the Mystic generating units and to Everett (subject to the 91 percent), rather than capitalize these expenses under the Commission’s traditional ratemaking policies.

(the “NESCOE MOU”). Informational Filing of the New England States Committee on Electricity, Docket No. ER07-1324-000 (filed Nov. 21, 2007). Pursuant to the NESCOE MOU, the Term Sheet is the binding obligation of ISO-NE, NEPOOL, and NESCOE.

³ Constellation was formerly known as Exelon Generation Company, LLC.

⁴ *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (2018).

⁵ *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) (“December 2018 Order”).

⁶ December 2018 Order at P 133.

⁷ *See id.* at P 7.

The December 2018 Order further found that the lack of a clawback provision rendered the Agreement unjust and unreasonable.⁸ The Commission directed Mystic to revise the Agreement to include a clawback provision like that in the Midcontinent Independent System Operator, Inc. (“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.”⁹

NESCOE sought clarification, or, alternatively, rehearing, that the clawback directive was not only applicable to the Mystic generating units but also must be applicable to Everett. The Commission denied rehearing and permitted Mystic to retain cost-of-service payments for Everett repairs and capital expenditures “even if Everett remains in service after the term of the Mystic Agreement.”¹⁰ Although the Commission’s orders required ratepayers to pay for Everett’s repairs and capital expenditures through provisions in the FERC-jurisdictional Agreement, the Commission determined it lacked jurisdiction to require refunds of these same expenditures should Everett return to merchant operations after the Agreement’s expiration.¹¹

⁸ *Id.* at P 208.

⁹ *Id.* (citing Midcontinent Indep. Sys. Operator, Inc., FERC Electric Tariff Module C (53.0.0), § 38.2.7.e(ii)).

¹⁰ *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,044, P 43 (2020).

¹¹ *Id.*

NESCOE and others sought review of the Commission’s orders.¹² On August 23, 2022, the Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) issued an opinion¹³ which, among other things, granted State Petitioners’ petitions for review of the Commission’s orders on two issues relevant here. The D.C. Circuit agreed with State Petitioners that the Commission’s decision to allocate to Mystic (and, by extension, ratepayers) 91 percent of Everett’s operating costs—all operating costs associated with Everett’s vapor gas sales—runs counter to longstanding cost-causation principles and is therefore arbitrary and capricious.¹⁴ The D.C. Circuit also found that the Commission failed to justify the continuing validity of the 91 percent cost allocation after eliminating the revenue crediting mechanism for Everett’s third-party sales.¹⁵

Additionally, the D.C. Circuit agreed with State Petitioners that the Commission arbitrarily and capriciously excluded Everett’s costs from the clawback mechanism and vacated the Commission’s orders on this issue. The D.C. Circuit found the Commission’s reasoning, which was supported solely by reference to a purported lack of jurisdiction over Everett, “without further explanation, to be internally inconsistent” with the Commission’s acknowledgement of jurisdiction such that Everett’s costs may be included in Mystic’s rate “in accordance with cost causation principles.”¹⁶

¹² NESCOE briefed these issues jointly with the Connecticut Public Utilities Regulatory Authority, the Connecticut Department of Energy and Environmental Protection, the Connecticut Office of Consumer Counsel, and the Attorney General of the Commonwealth of Massachusetts (collectively, the “State Petitioners”).

¹³ *Constellation Mystic Power, LLC v. FERC*, 45 F.4th 1028 (D.C. Cir. 2022).

¹⁴ *Id.* at 1050-51.

¹⁵ *Id.* at 1051-52.

¹⁶ *Id.* at 1057.

The Court issued the mandate to the Commission on October 17, 2022. On November 22, 2022, the Companies filed the Motion requesting expedited action by January 9, 2022 on the two issues summarized immediately above—the “cost allocation issue” and the “clawback issue.”¹⁷

III. ANSWER

NESCOE generally supports the Companies’ procedural request—namely, NESCOE supports the need for near-term Commission action on the two issues identified in the Motion. The Commission’s clarity on these issues as soon as is feasible would provide a significant benefit to the market and consumers.¹⁸ NESCOE agrees that “[t]he record is already fully developed on these issues”¹⁹ and sees no need for the Commission to initiate any further evidentiary hearings or require briefing in order to rule on these or other issues pending on remand.

The Companies further express openness to the Commission’s restoration of a margin crediting mechanism on Forward Transactions.²⁰ NESCOE supports the return of a credit under which Mystic customers would receive a fair share of the margin earned from Forward Transactions, as that term is defined in the Fuel Supply Agreement.²¹

¹⁷ See Motion at 4-5.

¹⁸ While supporting the need for expedited action, NESCOE does not take a position on whether Commission action is needed by what appears to be an arbitrary deadline of January 9, 2023 in the Motion.

¹⁹ Motion at 6.

²⁰ *Id.* at 6, 8.

²¹ *Id.* at n.10.

NESCOE does not, however, adopt or endorse any of the substantive arguments in the Motion. For example, the Companies' arguments about the urgent need for the Commission to rule that the clawback does not apply to Everett's costs are overstated and unsupported.²²

The Companies argue that absent prompt resolution on the clawback issue, "Everett will not know what, if any, amount of its future revenues might be clawed back."²³ This, they claim, creates "difficult-to-quantify commercial uncertainty that exacerbates the challenges to Everett's viability."²⁴ They argue that "[a]pplying a clawback to Everett's costs would further challenge Everett's continued viability" because "the amount of money that Everett would need to be able to recoup to stay alive would unnecessarily increase by a substantial amount (although it is unclear whether Everett will know exactly what that amount would be, given the uncertainty that would exist with respect to the precise calculation of the clawback)."²⁵

At the outset, the Motion fails to acknowledge that the certainty the Companies seek can (and should) be achieved by a ruling from the Commission directing that the clawback apply to Everett, as NESCOE advocated during the hearing. No other entity is in a better position than the Companies to quantify or control the risks associated with the clawback. As part of the hearing, NESCOE proposed a balanced clawback approach designed to "ensure[] that consumers are repaid within a reasonable time frame while, at the same time, reducing barriers to market

²² NESCOE focuses its Answer here on the clawback issue and its silence on the cost allocation issue should not be construed as agreement with the Motion's arguments or the relief requested by the Companies related to that issue.

²³ Motion at 5.

²⁴ *Id.*

²⁵ *Id.* at 15.

participation if a resource proves to be efficient and competitive in the marketplace.”²⁶ These considerations aligned with the Commission’s view that a clawback could “discourage an otherwise efficient generator from continuing to operate to the detriment of customers.”²⁷ The various elements of NESCOE’s proposed clawback approach were developed to avoid imposing an overly burdensome administrative process onto ISO-NE, Mystic, and others involved in the settlement of refunds. These elements included a four-year payback period and did not propose refunds of all positive cash flows earned during the cost-of-service period, thus lowering the hurdle to reentering the market.²⁸

The Companies’ articulated concerns about the applicability of a clawback to Everett are overblown in several respects. First, the Companies have been on notice for over four years of the potential for there to be a clawback of certain of Everett’s expenses and have nonetheless proceeded with making investments. Indeed, in the December 2018 Order, the Commission recited the features of the proposed clawback provision that NESCOE proposed during the hearing—expressly mentioning Everett’s inclusion in the clawback:

NESCOE’s proposed clawback provision includes the following features: (1) it would apply to Mystic 8 and 9 and Everett; (2) the amount would be based on any capital expenditures made during the cost-of-service period and costs for repairs that provide significant benefits beyond the end of that period; (3) it would provide a formula for Mystic to calculate a refund amount; (4) it would require Mystic to file the refund amount calculation no less than three months prior to the end of the Agreement term; (5) Mystic would amortize the refund amount over a four-year straight-line period; and (6) it would provide separate provisions to

²⁶ Initial Brief of the New England States Committee on Electricity, Docket No. ER18-1639-000 (filed Nov. 2, 2018) (“NESCOE Initial Brief”), at 69 (quoting testimony of Jeff Bentz, Exhibit NES-001 at 27:5-8).

²⁷ *N.Y. Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,189, P 85 (2017) (quoting *N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,076, P 127 (2016)), *order on clarification & reh’g*, 163 FERC ¶ 61,047 (2018).

²⁸ See NESCOE Initial Brief at 71-72.

terminate the clawback provisions for Mystic 8 and 9 and for Everett.^[29]

As NESCOE previously told the Commission, applying the clawback provision to both the Mystic units and Everett is consistent with the expectations of participants in the proceeding.³⁰ Despite significant briefing on the clawback, not a single participant expressed opposition to the clawback’s application to Everett.³¹ In fact, during the proceeding, Mystic expressed openness to employing a clawback mechanism for capital expenditures associated with Everett.³²

Second, the dollar amount in question is neither as mysterious nor substantial as the Companies make it out to be. In its 2022 Informational Filing, Mystic showed a projected “RMR CapEx”³³ for Everett in the amount of \$6,385,000 for 2022, \$6,350,000 for 2023, and \$1,000,000 for 2024.³⁴ NESCOE recognizes that these amounts are projections and may change for various reasons (including that some are being challenged by NESCOE and others),³⁵ and that other items may emerge during the term of the Agreement. Nevertheless, those costs projections appear to be the likely maximum exposure from applying the clawback to Everett

²⁹ December 2018 Order at n.430 (citing NESCOE Initial Brief at 69-70, 72).

³⁰ Request for Clarification or, in the Alternative, Rehearing of the New England States Committee on Electricity, Docket No. ER18-1639-002 (filed Jan. 22, 2019), at 5.

³¹ *Id.* (citing December 2018 Order at PP 197-207).

³² *Id.* (citing Exhibit NES-004 at 3).

³³ Mystic refers to capital expenditures it is expensing over the two-year period as RMR CapEx (reliability-must-run capital expenditures).

³⁴ Constellation Mystic Power, LLC, 2022 Informational Filing, Docket No. ER18-1639-000 (filed Sept. 15, 2022) (“September 2022 Informational Filing”), Attachment B (Public Version) (Populated Methodology), Everett Schedule A, line 24.

³⁵ *See* Formal Challenge of the New England States Committee on Electricity, Docket No. ER18-1639-000 (filed Oct. 17, 2022), at 7-14; Formal Challenges of the Eastern New England Consumer-Owned Systems to 2022 Informational Filing, Docket No. ER18-1639-000 (filed Oct. 18, 2022), at 25-27.

capital expenditures, *less the depreciation expense*.³⁶ Such figures represent a relatively small portion of the approximately \$50 million gross annual revenue requirement that Mystic seeks to recover for Everett.³⁷ Using Mystic’s projected figures submitted with its September 2022 Informational Filing, the RMR CapEx represents approximately 13 percent of the gross revenue requirement for 2022; 12.7 percent of the gross revenue requirement for 2023; and less than 2 percent of the gross revenue requirement for 2024.³⁸

Absent the cost-of-service agreement treatment afforded to Mystic, Mystic would not have been permitted to fully expense and recover over a two-year period costs it spent on capital projects for Everett. This special rate treatment was afforded to Mystic for both the Mystic generating units and Everett because of the imminent retirement of those facilities. As the Commission explained, it requires 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. 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.^[39]

Notwithstanding the Companies’ threats that Everett will shut down if the Commission does not issue an order to their liking (“a clawback would encourage Everett to shut down after

³⁶ December 2018 Order at n.441 (“under the directed clawback mechanism, we do not require Mystic to pay back any depreciation expense recovered on the relevant investments, thus allowing Mystic to recover the portion of the capital expenditures associated with the Agreement as though the capital expenditures were originally capitalized.”).

³⁷ September 2022 Informational Filing, Attachment B, Everett Schedule A, line 23.

³⁸ *See id.* (dividing line 24, RMR CapEx, by the Gross Revenue Requirement line 23, for Everett).

³⁹ December 2018 Order at P 212 (citation omitted).

the Mystic Agreement is over”⁴⁰), the Commission must ensure that the rates charged to New England consumers are just and reasonable. Absent the consumer protection of a clawback, Mystic’s recovery over a 24-month period of the full amount that it spends on Everett capital projects, many of which will provide lasting value for Everett’s owners for decades, would not be a just and reasonable result.

IV. CONCLUSION

For the reasons discussed above, NESCOE respectfully requests that the Commission act as expeditiously as practicable to rule on the two issues identified in the Motion and take this answer into consideration in taking action in this proceeding.

Respectfully Submitted,

/s/ Jason Marshall

Jason Marshall
Deputy Executive Director & General Counsel
New England States Committee on Electricity
P.O. Box 322
Osterville, MA 02655
Tel: (617) 913-0342
Email: jasonmarshall@nescoe.com

/s/ Phyllis G. Kimmel

Phyllis G. Kimmel
Phyllis G. Kimmel Law Office PLLC
1717 K Street, NW, Suite 900
Washington, DC 20006
Tel: (202) 787-5704
Email: pkimmel@pgklawoffice.com

Attorneys for the New England States Committee on Electricity

Date: December 7, 2022

⁴⁰ Motion at 16-17.

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 7th day of December, 2022.

/s/ Phyllis G. Kimmel _____

Phyllis G. Kimmel
Phyllis G. Kimmel Law Office PLLC
1717 K Street, NW, Suite 900
Washington, DC 20006
Tel: (202) 787-5704
Email: pkimmel@pgklawoffice.com