

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

Constellation Mystic Power, LLC)

Docket No. ER18-1639-021

**COMMENTS IN SUPPORT OF SETTLEMENT AGREEMENT OF THE
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

Pursuant to Rule 602(f) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. § 385.602(f), the New England States Committee on Electricity (“NESCOE”) submits comments in support of the Settlement Agreement by and among Constellation Mystic Power, LLC (“Mystic”), Constellation Energy Generation, LLC (“Constellation Generation”), the Attorney General of the Commonwealth of Massachusetts (“Mass AG”), the Connecticut Department of Energy and Environmental Protection (“CT DEEP”), the Connecticut Public Utilities Regulatory Authority (“CT PURA”), the Connecticut Office of Consumer Counsel (“CT OCC”), ISO New England, Inc. (“ISO-NE”) and NESCOE, filed by Mystic in this proceeding on March 15, 2023 (“Settlement Agreement”).¹ Attached to these comments as Attachment A is the Affidavit of Jeffrey W. Bentz.

I. DESCRIPTION OF COMMENTER

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

¹ Constellation Mystic Power, LLC, Settlement Agreement to Resolve Formal Challenges to 2021 Informational Filing (sub-docket -015), and Request for Action by September 1, 2023, Docket No. ER18-1639-021 (filed Mar. 15, 2023).

England Inc. (“ISO-NE”) administers.² 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.³

II. BACKGROUND

On May 16, 2018, pursuant to section 205 of the Federal Power Act (“FPA”), 16 U.S.C. §824d, Mystic filed a cost-of-service agreement among Mystic, its affiliate Exelon Generation Company, LLC (now Constellation Generation), and ISO-NE (the “Agreement”). The Agreement provides cost-of-service compensation to Mystic for continued operation of the Mystic 8 and 9 natural gas-fired generating units (the “Mystic Units”). 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 NESCOE actively participated in the evidentiary hearing and sponsored the testimony of four witness, including that of Mr. Bentz, now the Director of Market Affairs at NESCOE.⁵ Among other things, Mr. Bentz testified to the need for a clawback provision to protect consumers if either of the Mystic generating units or the Everett Marine Terminal (“Everett” or EMT”), an

² *ISO New England Inc.*, 121 FERC ¶ 61,105 (2007).

³ *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 (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.

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

⁵ Answering Testimony and Exhibits of Jeffrey W. Bentz on Behalf of New England States Committee on Electricity, Docket No. ER18-1639-000 (filed Aug. 23, 2018; revised filed Sept. 25, 2018) (“Bentz Testimony”).

indirect wholly-owned subsidiary of Constellation Generation, remain in operation after the Agreement ends on May 31, 2024.⁶

Following an expedited hearing, on December 20, 2018, the Commission issued an order accepting the Agreement, subject to condition, effective June 1, 2022.⁷ The December 2018 Order found, among other things, that the Agreement was unjust and unreasonable because it failed to include a clawback provision. The Commission directed Mystic to incorporate a clawback that would refund the cost of repairs less depreciation if the Mystic Units do not retire at the end of the Agreement's term but instead return to the market.⁸ NESCOE sought clarification and rehearing of failure of the December 2018 Order to require a clawback provision applicable to not only the Mystic Units but to Everett as well.⁹ The Commission denied NESCOE's request, and NESCOE and others sought review of FERC's orders on this and other issues. In August 2022, the D.C. Circuit granted the petitions for review of NESCOE and other state petitioners.¹⁰ Among other things, the Court found that the Commission's reasoning for excluding Everett's costs from the clawback did not hold up to scrutiny and granted the state petitioners' petition and vacated the clawback portion of FERC's orders.¹¹

NESCOE has participated actively in the annual review process of Mystic's costs, as set forth in the protocols, Schedule 3A of the Agreement. On October 15, 2021, NESCOE filed

⁶ Bentz Testimony at 21-27.

⁷ *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267, at P 1 (2018) ("December 2018 Order").

⁸ *Id.* at P 208.

⁹ 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).

¹⁰ The state petitioners were CT DEEP, CT PURA, CT OCC, the Mass AG and NESCOE.

¹¹ *Constellation Mystic Power, LLC v. FERC*, 45 F.4th 1028, 1056-57 (D.C. Cir. 2022).

formal challenges to Mystic’s 2021 Informational Filing (“2021 Formal Challenges”).¹² As part of its 2021 Formal Challenges, NESCOE argued that Mystic had not provided adequate support for approximately forty Mystic and Everett capital expenditure projects (totaling \$3 million for Mystic and nearly \$5.7 million for Everett).¹³ NESCOE also explained that Mystic had not demonstrated a reliability need for certain Everett projects, for example, inclusion of a forward bollard project. The Commission issued an order in April 2022, granting certain of NESCOE’s 2021 Formal Challenges. The Commission found that “Mystic has not adequately supported its 2022 CapEx Projects as being necessary to meet the obligations of the Mystic Agreement or being the least-cost commercially reasonable option consistent with Good Utility Practice.”¹⁴ The Commission set NESCOE’s 2021 Formal Challenges and the formal challenges of other parties for hearing and established settlement procedures. NESCOE has been actively participating in the settlement procedures.

NESCOE likewise participated actively in the review of Mystic’s 2023 projected capital expenditures in the 2022 annual review process, which culminated in Mystic’s 2022 Informational Filing.¹⁵ On October 17, 2022, NESCOE filed formal challenges arguing that certain of Mystic’s 2023 capital expenditures were not adequately supported, having been deemed “emergent:” \$2.5 million of Mystic 2023 capital expenditures, and \$6.35 million of

¹² Formal Challenge of the New England States Committee on Electricity, Docket No. ER18-1639-000 (filed Oct. 15, 2021).

¹³ *Id.* at 16-18.

¹⁴ *Constellation Mystic Power, LLC*, 179 FERC ¶ 61,011, P 26 (2022).

¹⁵ *Constellation Mystic Power, LLC*, 2022 Informational Filing, Docket No. ER18-1639-000 (filed Sept. 15, 2022).

EMT 2023 capital expenditures (“2022 Formal Challenges”).¹⁶ NESCOE also challenged the inclusion of property tax unrelated to the Mystic 8 & 9 Units in the 2022 Informational Filing, but noted it was willing to hold this challenge in abeyance until the 2023 true-up filing. The Commission has not yet acted on NESCOE’s 2022 Formal Challenges. On February 17, 2023, Mystic filed a motion seeking abeyance of 2022 formal challenges (which NESCOE supported, with respect to the NESCOE 2022 Formal Challenges).¹⁷

III. SUPPORT FOR SETTLEMENT AGREEMENT

The Settlement Agreement resolves NESCOE’s 2021 Formal Challenges and part of NESCOE’s 2022 Formal Challenges. Pursuant to the Settlement Agreement, Mystic will forego full recovery of all EMT capital expenditures, not just for the 2022 rate year (\$8.15 million), but for the entire term of the Agreement. Instead, Mystic will recover these amounts as part of the EMT rate base,¹⁸ thus recovering only the rate of return and depreciation expense on the EMT capital expenditures during the term of the Agreement.

As Mr. Bentz explains, by providing for this treatment of the EMT capital expenditures, the Settlement Agreement removes the need for a clawback for Everett.¹⁹ Under the clawback provision that Mr. Bentz proposed during the 2018 hearing, consumers would have received the EMT capital expenditures less depreciation plus interest at the FERC-approved rate over a four-

¹⁶ Formal Challenge of the New England States Committee on Electricity, Docket No. ER18-1639-000 (filed Oct. 17, 2022).

¹⁷ Motion for Abeyance of Formal Challenges to Constellation Mystic Power, LLC’s September 15, 2022 Informational Filing, Docket No. ER18-1639-000 (filed. Feb. 17, 2023).

¹⁸ Settlement Agreement Section 2.2.

¹⁹ Attachment A, Bentz Affidavit at P 11.

year period if Everett did not retire at the end of the term.²⁰ Having clawback protection for Everett has been a critical issue for NESCOE for over four years. Without it, New England electricity consumers will effectively pay to upgrade Everett during the Agreement's term, and if Everett does not retire, Constellation would retain full recovery of the EMT capital expenditures at the end of the Agreement, thus providing it with a windfall and possible unfair competitive advantage in future operations.²¹ The Settlement Agreement will resolve this issue in a manner that is favorable for New England consumers and in a way that reduces regulatory uncertainty for all parties.

As part of the Settlement Agreement, Mystic has also agreed not to seek recovery of costs related to the forward bollard project that NESCOE challenged.²² Additionally, under the Settlement Agreement, Mystic will treat \$7 million of 2022 capital expenditures related to the Mystic Units as rate base, rather than fully expensing that amount (thus recovering only a rate of return plus depreciation expense on this amount).²³ Consistent with the Settlement Agreement, Mystic has filed a request for waiver of certain deadlines in the protocols²⁴ and a motion asking the Commission for permission to implement the settlement rates—both for Mystic and Everett—on an interim basis.²⁵ These implementation details are important because they will enable New England consumers to reap the benefit of the reduced rates in a timely manner,

²⁰ *Id.*

²¹ *Id.* at PP 8, 10.

²² Settlement Agreement Section 2.5.

²³ *Id.* Section 1.2.

²⁴ Constellation Mystic Power, LLC, Request for Limited Waiver, Shortened Comment Period, and Expedited Consideration by March 20, 2023, Docket No. ER23-1159-000 (Filed Feb. 17, 2023).

²⁵ Motion of Constellation Mystic Power, LLC for Authorization to Implement Settlement Rate on an Interim Basis and Request for Expedited Action, Docket No. ER18-1639-022 (filed Mar. 15, 2023).

rather than waiting for the outcome of a future true-up proceeding and possible litigation, which most likely would be long after load-serving entities will have likely established their competitive rates.

If the Commission approves the Settlement Agreement, NESCOE will partially withdraw its pending 2022 Formal Challenges, *i.e.*, those challenging Mystic's capital expenditures.²⁶

IV. CONCLUSION

For the reasons discussed above and in Mr. Bentz's Affidavit, NESCOE respectfully requests that the Commission approve the Settlement Agreement by the date requested, *i.e.*, no later than September 1, 2023.

²⁶ The Settlement Agreement does not affect NESCOE's 2022 Formal Challenges related to property tax, which would remain pending before the Commission. Settlement Agreement Section 3.5.

Respectfully Submitted,

/s/ Shannon Beale

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Attorneys for the New England States Committee
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Date: March 16, 2023

ATTACHMENT A

AFFIDAVIT OF JEFFREY W. BENTZ

**AFFIDAVIT OF JEFFREY W. BENTZ
ON BEHALF OF
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

March 16, 2023

Introduction

1. My name is Jeffrey W. Bentz. My business address is P. O. Box 322 Osterville, MA 02655. I am the Director of Market Affairs for the New England States Committee on Electricity (“NESCOE”).

2. NESCOE is the Regional State Committee for New England. NESCOE 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. 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 reasonable cost over the long-term, consistent with maintaining reliable service and environmental quality.

3. Among my responsibilities, I provide NESCOE’s board of managers with analysis of and recommendations about various proposals advanced by ISO-NE, market participants, other stakeholders, and state entities, primarily in the context of the New England Power Pool (“NEPOOL”) Markets Committee. I am an active participant in the NEPOOL stakeholder process. In some cases, I develop proposals for NESCOE to advance through the regional stakeholder process and potentially to the Federal Energy Regulatory Commission (“FERC” or the “Commission”). I work closely with NESCOE managers and other state agencies, ISO-NE personnel and NEPOOL stakeholders to achieve consensus where possible on a wide range of complex issues related to the Forward Capacity Market and the energy markets administered by ISO-NE.

4. Before joining NESCOE in January 2010, I was employed by various entities providing administrative services to MASSPOWER, a Massachusetts joint venture that owned a 240 megawatt combined-cycle generation facility located in Springfield, Massachusetts. Over the course of nearly 20 years, I served as Controller and General Manager of MASSPOWER. I managed the day-to-day activities on behalf of the joint venture, including operations, finance, technology, risk management, maintenance, and regulatory compliance. This included overseeing the management of five long-term power purchase agreements and several long-term gas commodity and transportation agreements. I was responsible for setting the annual strategic and business planning process, including Strengths, Weaknesses, Opportunities, and Threats analysis, operating plans, budgets, and quarterly updates. Prior to my tenure with MASSPOWER, I was a Senior Accountant with Arthur Andersen and Company, performing audit activities primarily in the utility and brokerage industries. I have a Bachelor of Science in Accounting from Central Connecticut State University. I received my certificate as a Certified Public Accountant from the State of Connecticut Board of Accountancy on July 6, 1993.

5. I have previously provided written testimony to the Commission in connection with a NESCOE complaint proposing ISO-NE's adoption of a renewable technology resource exemption in Docket No. EL13-34-000 (Dec. 28, 2012). I provided written testimony to the Commission supporting a NEPOOL proposal regarding the 2015/2016 to 2017/2018 winter reliability programs, Docket No. ER15-2208-000. Most recently, and as is relevant to my affidavit here, I provided testimony in response to the application filed by Constellation Mystic Power, LLC ("Mystic"), in Docket No. ER18-1639-000 (my revised testimony was filed Sept. 25, 2018). My testimony addressed the proposed Cost-of-Service Agreement among Mystic, its affiliate Exelon Generation Company, LLC (now Constellation Energy Generation, LLC, or "Constellation Generation") and ISO-NE (the "Agreement").

6. I have also participated actively in NESCOE's review of Mystic's 2021 and 2022 informational filings, including preparing information requests, developing informal and formal challenges, and participating in technical and settlement conferences.

Purpose of Affidavit: Support for Resolution of Clawback

7. The purpose of this affidavit is to provide support for the Settlement Agreement among Mystic, Constellation Generation, the Attorney General of the Commonwealth of Massachusetts, the Connecticut Department of Energy and Environmental Protection, the Connecticut Public Utilities Regulatory Authority, the Connecticut Office of Consumer Counsel, ISO-NE and NESCOE, filed by Mystic on March 15, 2023 ("Settlement"). I believe the Settlement is a fair compromise. One of the primary reasons that NESCOE supports the Settlement is that it resolves an issue of great importance to the New England States and consumers—the "clawback" issue for the Everett Marine Terminal ("EMT" or "Everett").

8. Having clawback protection for both the Mystic units and Everett is particularly important because of the way the Agreement is structured. FERC has allowed capital expenditures made at both the Mystic units and Everett to be fully expensed (as long as they meet certain standards in the protocols) over the Agreement's two-year term. In 2018, I testified about the critical omission from the Agreement of a clawback provision to protect consumers if either the Mystic units or Everett, which is an indirect wholly-owned subsidiary of Constellation Generation, remain in operation after the Agreement ends on May 31, 2024. Without a clawback, electricity customers will have effectively paid to upgrade Mystic and EMT during the term of the Agreement, only to have the facilities emerge out from under the security of cost-of-service operation with a competitive advantage in any following period of merchant operations.

9. As part of my testimony, I developed a proposed clawback mechanism designed to ensure that if Mystic or EMT did not retire at the end of the cost-of-service period and continued to remain in operation, Mystic would refund to consumers (1) the actual cost of capital expenditures paid, less depreciation as approved in the Agreement, plus interest at the FERC-approved rate, and (2) the actual cost of repairs that provide significant benefits beyond the two-year cost-of-service period, prorated for the benefit received during the cost-of-service period, plus interest at the FERC-approved rate, amortized over a four-year straight-line period.

10. Although the Commission did not accept all of the elements of my proposed clawback, FERC did impose a clawback on Mystic. However, the Commission did *not* require a clawback to be applicable to Everett. Because there is no obligation for Everett to cease operations after the Agreement ends, without a clawback provision, Constellation would be able to retain full recovery of millions of dollars of EMT capital expenditures at the end of the Agreement, thus providing it with a windfall and a possible unfair competitive advantage in future operations. As a result, NESCOE, along with other state parties, appealed this decision to the U.S. Court of Appeals for the D.C. Circuit. I understand that the Court agreed with NESCOE and the other state petitioners that the Commission did not adequately explain itself and remanded the issue back to FERC.

11. While the Settlement does not have a clawback provision, it removes the need to have one for EMT because there are no fully-expensed EMT capital expenditures. That is, Mystic has agreed to forego full recovery of EMT capital expenditures and instead treat those expenditures as rate base capital expenditures. Under the Settlement, Mystic will recover zero “reliability-must-run” dollars in EMT capital expenditures for the 2022 rate year, and instead will add a black-box amount of \$8,150,000 to rate base for 2022. Mystic will therefore recover only a rate of return and depreciation expense on this \$8.15 million, not the full expenditure, during the term of the Agreement. The Settlement also requires Mystic to treat 2023 and 2024 EMT capital expenditures in the same manner. Because the Settlement provides for this treatment regardless of whether the Everett facility continues to operate, the Settlement provides a better result for consumers than the original NESCOE proposal, under which a clawback would only occur if Everett operations continued.

12. The Settlement also describes how its terms will be implemented as part of Mystic’s 2023 True-Up. To make this possible, the Settlement obligates Mystic to seek a waiver of related Protocol deadlines, and to request authority to implement the Settlement rates on an interim basis (both of which Mystic has already done). This will provide for a prompt decrease in Mystic Agreement costs for consumers at a time when energy prices have been significantly higher than in recent years.

13. Settling unknowns and removing future litigation risks in a timely manner is ultimately beneficial to consumers. In addition to the direct rate decrease that will result for consumers, the uncertainty resolved by the Settlement will allow energy providers to have greater confidence in the cost of the supply that they in turn offer into competitive auctions and bilateral agreements, thus reducing the risk premiums that they may charge.

14. I believe overall the Settlement provides positive benefits to consumers by having real dollars flow back to ratepayers’ pockets in the near-term through the interim rate request, provides a positive outcome to the long outstanding “clawback” concern of how potential refunds of EMT capital expenditures might flow after the cost-of-service period ends, and avoids the uncertainty of more regulatory processes, appeals, and open questions to future capital expenditures.

15. For these reasons, I support the Settlement. This concludes my affidavit.

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I, Jeffrey W. Bentz, state under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

A handwritten signature in black ink, appearing to read "Jeffrey W. Bentz", is written over a horizontal line. The signature is fluid and cursive.

Jeffrey W. Bentz
Director of Market Affairs
New England States Committee on Electricity

Executed this 14th day of March, 2023

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 16th day of March, 2023.

/s/ Phyllis G. Kimmel _____

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