

170 FERC ¶ 61,006  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

Constellation Mystic Power, LLC

Docket No. ER19-1164-000

ORDER ON AMENDMENT

(Issued January 9, 2020)

1. On March 1, 2019, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> Constellation Mystic Power, LLC (Mystic) filed a proposed amendment to its Amended and Restated Cost-of-Service Agreement with ISO New England Inc. (ISO-NE), designated as Rate Schedule FERC No. 1 (Mystic Agreement), to permit early termination of that agreement (Amendment). As discussed below, we reject the Amendment.

**I. Background**

**A. Cost-of-Service Agreement**

2. Mystic Generating Station units 8 and 9 (Mystic 8 and 9), located in Boston, Massachusetts, currently participate in ISO-NE's Forward Capacity Market (FCM). On March 23, 2018, Mystic submitted Retirement De-List Bids for Mystic 8 and 9. Mystic indicated that, unless it could obtain cost-of-service compensation for Mystic 8 and 9, it would retire those units prior to Forward Capacity Auction (FCA) 13, which covers the Capacity Commitment Period from June 1, 2022 through May 31, 2023.<sup>2</sup>

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<sup>1</sup> 16 U.S.C. § 824d (2018).

<sup>2</sup> See ISO New England Inc., Petition for Review, Docket No. ER18-1509-000, at 1 (filed May 1, 2018).

3. In response to the Retirement De-List Bids, ISO-NE studied the impact of the proposed retirement of Mystic 8 and 9 and determined that their loss would present an unacceptable fuel security risk.<sup>3</sup> Specifically, ISO-NE's analyses found that the retirement of Mystic 8 and 9 would cause ISO-NE to deplete 10-minute operating reserves on numerous occasions and to instigate load shedding (a potential violation of North American Electric Reliability Corporation (NERC) reliability standards) during the winters of 2022-2023 and 2023-2024.<sup>4</sup> ISO-NE concluded that it needed to retain Mystic 8 and 9 through the FCA 13 and 14 Capacity Commitment Periods. As a result, Mystic filed the Mystic Agreement, pursuant to which Mystic 8 and 9 will remain in operation to provide capacity until May 31, 2024, in return for cost-of-service compensation from ISO-NE. On December 20, 2018, the Commission accepted the Mystic Agreement, suspended it for a nominal period, to become effective June 1, 2022, subject to refund and subject to the outcome of the ongoing Commission proceedings regarding interim provisions of the ISO-NE Transmission, Markets and Services Tariff (Tariff) addressing retention of resources for fuel security, and established hearing procedures.<sup>5</sup>

#### **B. Amendment**

4. In the Amendment, Mystic proposes two changes to the Mystic Agreement. First, Mystic proposes language allowing ISO-NE to terminate the Mystic Agreement on May 31, 2023 (i.e., after the first year of the two-year term of the Mystic Agreement) if ISO-NE determines that Mystic 8 and 9 are no longer needed for fuel security purposes.<sup>6</sup> Second, Mystic proposes language to allow Mystic to terminate the Mystic Agreement on May 31, 2023, upon written notice to ISO-NE no later than January 10, 2020. Mystic states that the Mystic termination right is necessary because key components of the cost-of-service compensation that Mystic will receive under the Mystic Agreement remain uncertain.<sup>7</sup> Mystic argues that the Amendment is just and reasonable, was negotiated at

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<sup>3</sup> See ISO New England Inc., Transmittal, Docket No. ER18-1509-000, at 8-9.

<sup>4</sup> See *ISO New England Inc.*, 164 FERC ¶ 61,003, at P 10 (2018).

<sup>5</sup> *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022, at P 2 (2018); *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) (accepting Mystic Agreement, subject to condition, effective June 1, 2022, and directing compliance filing and paper hearing on return on equity).

<sup>6</sup> New England Inc., Transmittal, Docket No. ER19-1164-000, at 2-3 (Transmittal).

<sup>7</sup> Transmittal at 4.

arm's-length by non-affiliated parties, and effectuates the intent of the Mystic Agreement. Mystic and ISO-NE have executed the Amendment.<sup>8</sup>

## **II. Notice of Filing and Responsive Pleadings**

5. Notice of the filing was published in the Federal Register, 84 Fed. Reg. 8328 (2019), with interventions and protests due on or before March 22, 2019. Avangrid Networks, Inc.; Connecticut Attorney General William Tong; Connecticut Office of Consumer Counsel; Eastern New England Consumer-Owned Systems (ENECOS); Environmental Defense Fund; Eversource Energy Service Company, Massachusetts Attorney General Maura Healey; Massachusetts Department of Public Utilities; Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative (Public Systems); National Grid; New England Local Distribution Companies;<sup>9</sup> New England States Committee on Electricity; Repsol Energy North America Corporation; and Verso Corporation (Verso) filed timely motions to intervene. Connecticut Parties<sup>10</sup> filed timely motions to intervene and a notice of intervention. Connecticut Parties, ENECOS, Public Systems, and Verso filed protests. On April 8, 2019, Mystic filed an answer.<sup>11</sup>

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<sup>8</sup> Transmittal at 2.

<sup>9</sup> New England Local Distribution Companies consist of Bay State Gas Company d/b/a Columbia Gas of Massachusetts; The Berkshire Gas Company; City of Holyoke; City of Norwich Department of Public Utilities; Connecticut Natural Gas Corporation & The Southern Connecticut Gas Company; Liberty Utilities Corp. d/b/a(New England Natural Gas Company; Massachusetts Gas and Electric Department; Middleborough Gas & Electric Department; NSTAR Gas Company d/b/a Eversource; Northern Utilities, Inc. & Fitchburg Gas and Electric Light Company; Westfield Gas & Electric Light Department; and Yankee Gas Services Company d/b/a Eversource.

<sup>10</sup> Connecticut Parties consist of Connecticut Attorney General William Tong; Connecticut Department of Energy and Environmental Protection; Connecticut Office of Consumer Counsel; and Connecticut Public Utilities Regulatory Authority.

<sup>11</sup> On March 5, 2019, Mystic filed a motion for expedited entry of a protective order. Because no party has requested access to this material, we deny the motion as moot.

### III. Comments and Answers

#### A. Protests and Comments

6. No party opposes the provision giving ISO-NE the right to terminate the Mystic Agreement if it determines that it no longer needs Mystic 8 and 9 for fuel security purposes. However, multiple parties oppose the provision allowing Mystic to unilaterally terminate the Mystic Agreement. Generally, protestors object to the fact that the Amendment would give Mystic the unilateral right to terminate the Mystic Agreement even if ISO-NE determines that it continues to need Mystic 8 and 9 for fuel security purposes in FCA 14.<sup>12</sup> Protestors argue that such early termination would pose a reliability risk, disrupt the orderly functioning of the FCM, and cause price spikes.<sup>13</sup>

7. Protestors assert that Mystic could use its new termination rights to renegotiate or re-litigate the terms of the Commission-accepted Mystic Agreement.<sup>14</sup> For example, ENECOS contends that the Amendment is unjust and unreasonable because it creates another opportunity for Mystic to exert market power by threatening to withdraw Mystic 8 and 9 from service notwithstanding Mystic's receipt of compensation that the Commission previously found just and reasonable. ENECOS argues that nothing in Mystic's proposed amendment would require Mystic 8 and 9 to retire following unilateral termination. Therefore, ENECOS claims that Mystic 8 and 9 could either revert to market-based compensation or use the threat of retirement in order to obtain greater compensation. ENECOS adds that the Commission has long recognized that giving a generating resource in a reliability must-run agreement a provision for unilateral termination permits toggling between the higher of cost-of-service or market revenues, with the result that "competitive markets will never develop and/or generators will be guaranteed to earn higher profits that they would under the traditional regulated model at the expense of ratepayers."<sup>15</sup>

8. Public Systems argue that, despite Mystic's assertions, Mystic has not explained why it believes that no party will be prejudiced by an exercise of the early termination right. Public Systems assert that, if no party would be prejudiced by letting Mystic

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<sup>12</sup> Connecticut Parties Comments at 4; Public Systems Comments at 4-5.

<sup>13</sup> ENECOS Comments at 1, 5-6 (citing *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243, at P 66 (2007); *Milford Pwr. Co., LLC*, 119 FERC ¶ 61,167, at P 52 (2007)).

<sup>14</sup> Connecticut Parties Comments at 4.

<sup>15</sup> ENECOS Comments at 1, 5-6 (quoting *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243 at P 66; *Milford Pwr. Co. LLC*, 119 FERC ¶ 61,167 at P 52).

terminate because three years' notice is ample time to make alternative fuel security arrangements, then the Mystic Agreement was not needed in the first place; instead, ISO-NE could have let Mystic 8 and 9 retire and sought alternative means of ensuring fuel security.<sup>16</sup>

9. Verso asks the Commission to “reject the operation of [Mystic 8 and 9] for fuel security from June 1, 2023 to May 31, 2024” (the second year of the two-year term of the Mystic Agreement) and instead require ISO-NE to adopt some form of the interim compensation mechanism that ISO-NE is developing. Verso contends that doing so would be a better approach to maintaining fuel security than retaining Mystic 8 and 9 for a second year.<sup>17</sup>

## **B. Answers**

10. In its answer, Mystic argues that the Commission cannot approve the termination right for ISO-NE and reject the termination right for Mystic because such action would effectively impose an “entirely different rate design” than proposed in the Amendment, contrary to *NRG Power Mktg., LLC v. FERC*.<sup>18</sup> Mystic asserts that the Amendment is just and reasonable because it provides both ISO-NE and Mystic a greater degree of certainty over the future operation of Mystic 8 and 9. Mystic claims that, due to related matters pending before the Commission and pending requests for rehearing, it is uncertain whether it will recover its investment in assets during the term of the Mystic Agreement, both financially and from non-rate terms related to the operations of its on-site LNG fuel supply facility, the Everett Marine Terminal.<sup>19</sup>

11. Mystic asserts that protestors ignore that, under the symmetrical proposal, ISO-NE is given the same authority to opt out to protect its interests. Mystic states that its ability to terminate is not market power. Mystic contends that toggling concerns will be resolved through ISO-NE's future fuel security market mechanisms and a clawback mechanism in the Mystic Agreement. In response to protestors' concern that Mystic 8 and 9 will retire even if needed for reliability, or alternatively that Mystic will seek higher rates to stay operational, Mystic states that it anticipates that rates charged

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<sup>16</sup> Public Systems Comments at 5-7.

<sup>17</sup> Verso Comments at 1-9.

<sup>18</sup> 862 F.3d 108, 115-16 (D.C. Cir. 2017).

<sup>19</sup> Mystic Answer at 1-3. Mystic points to uncertainty caused by the Mystic Agreement true-up, Mystic 8 and 9's rate base, the return on equity, which is pending, and multiple rehearing requests. Mystic Answer at 3-5.

for fuel security would be just and reasonable because they will be based upon ISO-NE's forthcoming permanent market solution. Mystic argues that, if Mystic 8 and 9 stay operational for reasons unrelated to fuel security, customers are protected by a clawback mechanism and that arguments that Mystic will use the termination provision to exert economic leverage ignore these consumer protections.<sup>20</sup>

#### **IV. Discussion**

##### **A. Procedural Matters**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept the answer filed by Mystic because it has provided information that assisted us in our decision-making process.

##### **B. Substantive Matters**

14. We reject Mystic's proposed Amendment. The Commission originally accepted the Mystic Agreement and granted Mystic cost-of-service treatment to keep Mystic 8 and 9 in operation to ensure that the region's fuel security problems would not cause unacceptable reliability impacts.<sup>21</sup> Specifically, the Commission sought to avoid potential load shedding and violation of NERC reliability standards that ISO-NE modeling showed would occur if Mystic 8 and 9 were to retire. Based on this modeling, the Commission opened an FPA section 206 investigation that prompted ISO-NE to begin to address the reliability threat posed by the region's fuel security challenges. As a first step, ISO-NE submitted proposed tariff revisions that would allow it to retain Mystic 8 and 9. Because ISO-NE's modeling showed a need to retain Mystic 8 and 9 for a two-year period, ISO-NE's proposed tariff provisions specified a two-year term. The Mystic Agreement, which was filed concurrently with ISO-NE's initial request for waiver of

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<sup>20</sup> Mystic Answer at 5-7; Mystic Answer at 6 nn.19-20 (citing Connecticut Parties Protest at 5-6; ENECOS Protest at 6; Public Systems Protest at 6-7).

<sup>21</sup> See *ISO New England Inc.*, 164 FERC ¶ 61,003 at P 11 (noting that ISO-NE provided expert testimony that explained the reliability risks faced by the region: if Mystic 8 and 9 and their fuel supplier, Distrigas, retired, the region's risk of operating reserves depletion and load shedding would increase, as would the length and severity of such events).

multiple Tariff provisions in order to permit ISO-NE to retain Mystic 8 and 9 for fuel security purposes, also specified a two-year term. As required by its Tariff, ISO-NE recently conducted its Fuel Security Reliability Review, which reiterated the need to retain Mystic 8 and 9 for the second year of the term of the Mystic Agreement.<sup>22</sup> Therefore, we agree with protestors that allowing Mystic 8 and 9 to potentially retire during the second year of the Mystic Agreement's term would pose an unacceptable risk to reliability, and reject the proposed Amendment as unjust and unreasonable.<sup>23</sup>

15. We disagree with Mystic's contention that the Amendment is necessary for Mystic to manage ongoing uncertainty about certain aspects of the Mystic Agreement. When ISO-NE determined that Mystic 8 and 9 were needed for fuel security reasons, it initially requested a waiver of the Tariff to allow ISO-NE to retain Mystic 8 and 9. ISO-NE's waiver request included a request for waiver of the deadline for Mystic to elect to unconditionally retire, which was July 6, 2018 for FCA 13.<sup>24</sup> Instead of granting waiver, the Commission ordered ISO-NE to propose new tariff provisions that would allow ISO-NE to retain Mystic 8 and 9. In doing so, the Commission acknowledged the uncertainty facing Mystic and stated that "those revisions should address the possibility that the owner of a resource that needs to be retained for fuel security reasons may need to decide, prior to receiving approval of its cost-of-service agreement, whether to unconditionally retire the resource."<sup>25</sup> Because Mystic filed the Mystic Agreement concurrently with ISO-NE's request for waiver, the Commission also acted *sua sponte* to provide Mystic with a limited extension of the deadline to elect to retire from July 6, 2018 to January 4, 2019.<sup>26</sup> Mystic did not elect to retire Mystic 8 and 9 by January 4, 2019, and instead opted for cost-of-service treatment under the terms of the Mystic Agreement. Although several components of the Mystic Agreement have yet to be

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<sup>22</sup> Specifically, ISO-NE performed a reevaluation of Mystic 8 and 9 for fuel security purposes, which demonstrated a need to retain Mystic 8 and 9 for fuel security through the FCA 14 Capacity Commitment Period. Transmittal, ISO New England Inc., Docket No. ER20-308-000, at 17 (Nov. 5, 2019).

<sup>23</sup> See *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 23 (2018) (finding that the objective of the FCM, a market mechanism adopted by the New England region, is to ensure resource adequacy at just and reasonable rates).

<sup>24</sup> Specifically, ISO-NE requested waiver of Tariff §§ III.13.1.2.4.1, III.13.1.2.3.1.5.1(d).

<sup>25</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003 at P 56.

<sup>26</sup> *Id.* P 59.

finalized, we find that this uncertainty has not changed substantially from the time that Mystic executed the Mystic Agreement for a two-year term.

The Commission orders:

Mystic's proposed revisions are hereby rejected, as discussed in the body of this order.

By the Commission. Commissioner Glick is concurring in part and dissenting in part with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.



UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Constellation Mystic Power, LLC

Docket No. ER19-1164-000

(Issued January 9, 2020)

GLICK, Commissioner, *concurring in part and dissenting in part*:

1. I agree that Constellation Mystic Power, LLC (Mystic) has not shown that its proposal to add a unilateral termination provision to its cost-of-service agreement is just and reasonable, although I disagree with the Commission’s rationale for reaching that conclusion. By this point, the facts of the Mystic saga are well-established.<sup>1</sup> Suffice it to say that Exelon realized that the Mystic facility played a potentially important role in ensuring reliability in New England and sought to take advantage of that position in what our former colleague Commissioner Powelson aptly described as “an unprecedented exercise of market power.”<sup>2</sup> In a series of orders, the Commission assented and ultimately accepted much—although, to its credit, not all—of Mystic’s proposed two-year cost-of-service agreement.<sup>3</sup>

2. I dissented from those orders because the Commission committed a serious error in prematurely seizing control of the fuel security debate within New England.<sup>4</sup> Rather than ensuring reliability, the Commission gave Mystic license to hold the region over a barrel and force customers to fork over hundreds of millions of dollars based on a highly

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<sup>1</sup> See *Constellation Mystic Power, LLC*, 170 FERC ¶ 61,006, at PP 2-3 (2020) (Order).

<sup>2</sup> *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (2018) (Powelson, Comm’r, dissenting at 5).

<sup>3</sup> See, e.g., *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018).

<sup>4</sup> E.g., *id.* (Glick, Comm’r, dissenting at 1); *ISO New England Inc.*, 164 FERC ¶ 61,003 (2018) (Glick, Comm’r, dissenting in part at 3); *accord ISO New England Inc.*, 164 FERC ¶ 61,003 (Powelson, Comm’r, dissenting in part at 1) (“I cannot, however, support prematurely clearing a path towards out-of-market, cost-of-service payments to generators without having fully exhausting all other alternatives.”).

contested study.<sup>5</sup> That was not—and is not—a responsible way to manage the region’s long-term fuel security.

3. Accepting Mystic’s proposed amendment in this proceeding would be more of the same. As protesters explained, granting Mystic’s request to add a unilateral termination provision to its cost-of-service agreement would give Mystic another opportunity to extract every last penny from the region’s customers without any countervailing benefit.<sup>6</sup> Specifically, it would allow Mystic to back out of its cost-of-service agreement—or threaten to do so—in order to secure additional concessions from ISO New England or otherwise earn an even greater return through the market. Given that customers are already on the hook for Mystic’s full cost-of-service, I do not see how adding a “heads I win, tails you lose” provision to the agreement would be a just and reasonable result.

4. The Commission reaches the same conclusion, but for an entirely different reason. It repeats its belief that Mystic is needed for fuel security and, therefore, cannot be permitted to back out of its cost-of-service agreement.<sup>7</sup> Because I do not share that belief,<sup>8</sup> I dissent from the portions of today’s order that rely on that rationale to support the outcome. Instead, I would reject Mystic’s proposed amendment on the basis of its potential to further harm the region’s customers.

For these reasons, I respectfully concur in part and dissent in part.

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Richard Glick  
Commissioner

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<sup>5</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003 (Glick, Comm’r, dissenting in part at 2).

<sup>6</sup> Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, Connecticut Office of Consumer Counsel, and Connecticut Attorney General Protest at 5-7; Eastern New England Consumer-Owned Systems Protest at 5-8; Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc. Protest at 5, 7-9.

<sup>7</sup> Order, 170 FERC ¶ 61,006 at P 14.

<sup>8</sup> *See Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (Glick, Comm’r, dissenting at 5-6 & n.23).