172 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Constellation Mystic Power, LLC Docket No. ER18-1639-001

# ORDER GRANTING CLARIFICATION IN PART, DENYING CLARIFICATION IN PART, AND ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued July 17, 2020)

1. In an order issued July 13, 2018, the Commission accepted an executed cost-of-service agreement submitted by Constellation Mystic Power, LLC (Mystic) (Mystic Agreement), suspended it for a nominal period, and established hearing procedures.[1] Mystic, Exelon Generation Company, LLC (Exelon), and ISO New England Inc. (ISO-NE) are parties to the Mystic Agreement, which provides cost-of-service compensation to Mystic for continued operation of the Mystic 8 and 9 natural gas-fired generating units (Mystic 8 and 9). Eastern New England Consumer-Owned Systems (ENECOS),[2] Massachusetts Attorney General Maura Healey (Massachusetts AG), and New Hampshire Public Utilities Commission (New Hampshire PUC) seek rehearing and clarification of the Commission's July 2018 Order.

[1] *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (2018) (July 2018 Order). We note that, in Docket No. ER18-1639-001, the New England States Committee on Electricity filed a request for reconsideration of procedural deadlines set in the July 2018 Order. The Commission issued an order in that proceeding on December 20, 2018; therefore, that request is now moot. See *infra* P 12.

[2] ENECOS consists of: Braintree Electric Light Department; Concord Municipal Light Plant; Georgetown Municipal Light Department; Hingham Municipal Lighting Plant; Littleton Electric Light & Water Department; Middleborough Gas & Electric Department; Middleton Electric Light Department; Norwood Light & Broadband Department; Pascoag (Rhode Island) Utility District; Reading Municipal Light Department; Taunton Municipal Lighting Plant; Wellesley Municipal Light Plant; and Westfield Gas & Electric Department.

2. Pursuant to *Allegheny Defense Project v. FERC*,[3] the rehearing requests filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),[4] however, we are modifying the discussion in the July 2018 Order and continue to reach the same result in this proceeding, as discussed below.[5] In addition, we grant clarification, in part, and deny clarification, in part.

## I. Background

3. Mystic 8 and 9 currently participate in ISO-NE's Forward Capacity Market (FCM). On March 23, 2018, Exelon submitted Retirement De-List Bids for four units located in Boston, Massachusetts, including Mystic 8 and 9.[6] Exelon indicated that, unless it obtained cost-of-service compensation for Mystic 8 and 9, it would retire those units. Mystic 8 and 9 are fueled exclusively by the Everett Marine Terminal (Everett), a liquefied natural gas (LNG) import terminal. Exelon stated that it was in the process of purchasing Everett in order to secure fuel for Mystic 8 and 9.[7]

4. On May 1, 2018, in a separate proceeding in Docket No. ER18-1509-000, ISO-NE sought waiver of several provisions of the ISO-NE Transmission, Markets and Services Tariff (Tariff) to enable ISO-NE to enter into the Mystic Agreement to ensure fuel security. On July 2, 2018, the Commission denied the requested waiver.[8] The Commission also instituted a proceeding under FPA section 206[9] in Docket No. EL18-182-000 based on a preliminary finding that the Tariff may be unjust and

---

[3] *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. June 30, 2020).

[4] 16 U.S.C. § 825*l*(a) (2018) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[5] *Allegheny Defense Project*, slip op. at 30. The Commission is not changing the outcome of the July 2018 Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

[6] July 2018 Order, 164 FERC ¶ 61,022 at P 3.

[7] *Id.*

[8] *ISO New England Inc.*, 164 FERC ¶ 61,003 (2018) (Waiver Order).

[9] 16 U.S.C. § 824e (2018).

unreasonable because it fails to address specific regional fuel security concerns.[10] The Commission directed ISO-NE either to submit interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns, as well as permanent Tariff revisions reflecting improvements to its market design that better address regional fuel security concerns, or to show cause as to why the Tariff remains just and reasonable in the short- and long-term such that one or both filings is not necessary.[11]

5. On May 16, 2018, pursuant to section 205 of the Federal Power Act (FPA),[12] in Docket No. ER18-1639-000, Mystic filed the Mystic Agreement. The Mystic Agreement provides for the continued operation and compensation of Mystic 8 and 9 for the two years associated with the capacity commitment periods for Forward Capacity Auction 13 and Forward Capacity Auction 14—i.e., June 1, 2022 through May 31, 2024.[13]

6. In the July 2018 Order, the Commission found that the Mystic Agreement had not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.[14] The Commission also found that the Mystic Agreement raised issues of material fact that cannot be resolved based on the record. The Commission therefore accepted the Mystic Agreement for filing, suspended it for a nominal period, to become effective June 1, 2022, subject to refund and subject to the outcome of the ongoing proceeding in Docket No. EL18-182-000, and established hearing procedures.[15] The Commission also made findings on certain disputed issues and provided guidance on others.

7. First, the Commission found that the record was insufficient to determine whether Mystic's reported capital expenditures were just and reasonable and thus directed the participants to submit evidence on this issue at the hearing.[16] However, the Commission found that Mystic should be allowed to collect actual prudently-incurred costs, on a formulary basis subject to true-up, with the prudence of such costs to be reviewed in a

---

[10] Waiver Order, 164 FERC ¶ 61,003 at P 2.

[11] *Id.*

[12] 16 U.S.C. § 824d.

[13] July 2018 Order, 164 FERC ¶ 61,022 at P 1.

[14] *Id.* P 11.

[15] *Id.*

[16] *Id.* P 19.

future Commission proceeding when the costs are actually known.[17] The Commission also found that, given the inherent difficulty in projecting costs in advance of the Mystic Agreement's effective date, as well as concerns raised about the necessity of certain expenditures, a true-up mechanism was necessary to ensure that the rates established reflect actual costs incurred.[18] The Commission thus directed the participants to present evidence at the hearing regarding the appropriate design of the true-up mechanism.[19] The Commission noted that ISO-NE may choose to address a clawback provision in its filing in Docket No. EL18-182-000.[20]

8. Second, the Commission directed the hearing participants to address the justness and reasonableness of the Fuel Supply Charge and provided guidance on this issue.[21] The Commission rejected arguments that the FPA prohibits any recovery of the Fuel Supply Charge for Everett.[22] The Commission stated that, to accept a public utility's cost recovery under FPA section 205, those costs must be incurred in connection with "the transmission of electric energy in interstate commerce" or "the sale of electric energy at wholesale in interstate commerce," as set forth in FPA section 201(b).[23] The Commission found that, under the Mystic Agreement, costs related to operating Everett are a component of Mystic's proposed cost-of-service rate.[24] The Commission found that such costs are recoverable in light of the extremely close relationship between Everett and Mystic 8 and 9.[25] The Commission noted that ISO-NE had explained in the proceeding in Docket No. ER18-1509-000 that Everett is fully integrated with Mystic 8 and 9, and each depends on the other to operate economically.[26] The Commission explained that, under its general practice regarding cost-of-service rates, it reviews,

---

[17] *Id*. P 20.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* P 34.

[22] *Id.* P 35.

[23] 16 U.S.C. § 824(b)(1).

[24] July 2018 Order, 164 FERC ¶ 61,022 at P 35.

[25] *Id.* P 36.

[26] *Id.*

among other items, a generator's purported costs of fuel, including purchase, transportation, handling, and on-site storage.[27] The Commission found that the relationship between Everett and Mystic 8 and 9 places costs related to the operation of Everett within this general practice.[28]

9. Third, the Commission explained that its finding as to regulatory authority does not mean that Mystic is entitled to recover all costs that it claims in connection with Everett.[29] The Commission stated that recovery of individual components of a cost-of-service rate, including fuel-related costs, turns on whether they are just and reasonable, not on whether the Commission has regulatory authority over all aspects of those rate components.[30]

10. Fourth, the Commission found that, absent some sort of partial credit, Everett has little incentive to make LNG sales to third parties, but it also found that Mystic's proposal to keep 50% of the margin on third-party sales appeared excessive.[31] The Commission noted that Mystic was amenable to having up to 100% of third-party sales credited against the costs of the Mystic Agreement.[32] While the Commission stated that it would not prohibit Mystic from retaining a percentage of the margin on third-party sales, it directed the participants to address at hearing the appropriate amount of the margin on third-party sales that Mystic could retain.[33]

11. Finally, the Commission found that any cost allocation method that ISO-NE proposed and that the Commission accepted in Docket No. EL18-182-000 would apply to the Mystic Agreement.[34]

---

[27] *See, e.g.*, 18 C.F.R. pt. 101, § 501 (2019).

[28] July 2018 Order, 164 FERC ¶ 61,022 at P 36.

[29] *Id.* P 37.

[30] *Id.*

[31] *Id.* P 38.

[32] *Id.*

[33] *Id.*

[34] *Id.* P 41.

12. On December 3, 2018, the Commission accepted Tariff revisions providing an interim mechanism for the retention of a resource for fuel-security reasons by use of a cost-of-service agreement (Fuel Security Retention Mechanism).[35]

13. On December 20, 2018, the Commission issued a further order in this proceeding, accepting the Mystic Agreement, subject to condition, effective June 1, 2022, directing a compliance filing, and directing a paper hearing on the issue of return on equity.[36]

14. On April 15, 2020, in Docket No. ER20-1567-000, ISO-NE filed its proposed long-term market solution.

## II. Rehearing and Clarification Requests

15. Massachusetts AG seeks clarification that the July 2018 Order does not reach any decision on the prudence, justness, or reasonableness of Mystic's proposed capital expenditures. More specifically, Massachusetts AG requests that the Commission clarify that: (1) Paragraph 20 of the July 2018 Order does not allow Mystic to include in its cost-of-service all capital expenditures, subject only to a later prudence finding and true-up against actuals; (2) the Commission has not reached any decision on the justness or reasonableness of capital expenditures that Mystic has claimed to date in this proceeding; and (3) before Mystic may include any capital expenditures in its cost of service, Mystic must demonstrate, and the Commission must determine, that the expenditure is just and reasonable. If the Commission does not grant this clarification, Massachusetts AG seeks rehearing.[37]

16. Massachusetts AG also seeks rehearing of the July 2018 Order. Massachusetts AG argues that the Commission incorrectly concluded that Everett's operating costs are within the Commission's jurisdiction and may be recoverable under the Mystic Agreement because of the "extremely close relationship" between Everett and Mystic 8 and 9.[38] Massachusetts AG asserts that the finding of an extremely close relationship is not supported by substantial evidence. Massachusetts AG contends that Everett and Mystic 8 and 9 are closely related only geographically. Massachusetts AG adds that Everett itself is a completely separate facility owned by a third party,[39] and Mystic is not

---

[35] *ISO New England Inc.*, 165 FERC ¶ 61,202, at P 5 (2018).

[36] *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018).

[37] Massachusetts AG Rehearing Request at 3-6.

[38] *Id.* at 7 (quoting July 2018 Order, 164 FERC ¶ 61,022 at P 36).

[39] *Id.* at 12.

purchasing it for reasons of fuel security but instead to ensure performance of its capacity supply obligations during upcoming capacity commitment periods. Massachusetts AG claims that, while Everett is the sole source of fuel for Mystic 8 and 9, it is not primarily designed to provide fuel for those generators, and it supplies Mystic 8 and 9 with only 31% of its total capacity.[40]

17. Massachusetts AG argues that, if Everett continued to be owned by a third party during the term of the Mystic Agreement and was not purchased by Exelon, Mystic could not include Everett's fixed operating costs in its cost-of-service. Massachusetts AG argues that a change in ownership here cannot create jurisdiction over Everett operating costs because those costs do not directly affect a wholesale rate and are not connected with a jurisdictional sale.[41]

18. Massachusetts AG also asserts that the Commission erred in finding that whether individual components of a cost-of-service rate, including fuel-related costs, are recoverable turns on whether they are just and reasonable, not whether the Commission has regulatory authority over all aspects of those rate components.[42] According to Massachusetts AG, there is no legal or evidentiary support for the July 2018 Order's holding that the Commission may allow recovery of just and reasonable rate components even if it does not have jurisdiction over those components.[43] Massachusetts AG claims that recoverable costs are limited to costs that directly affect a rate, and the Commission identifies no limiting principle for determining which Everett costs meet the requirement of being expended "in connection with" the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce and thus affect rates in a way that makes them jurisdictional.[44] Massachusetts AG argues that allowing Mystic to recover Everett's operating costs is unprecedented and compares the finding to a power plant owner being able to recover the costs of its coal facility through the power plant's cost of service rate.[45]

19. New Hampshire PUC argues that the Commission erred in asserting jurisdiction over all of Everett's fixed operating costs and in ruling that Mystic is entitled to include

---

[40] *Id.*

[41] *Id.* at 13.

[42] *Id.* at 7 (citing July 2018 Order, 164 FERC ¶ 61,022 at P 37).

[43] *Id.* at 16.

[44] *Id.* at 9-10.

[45] *Id.* at 10-11.

the full fuel supply infrastructure ownership and operating costs of Everett in wholesale electric rates.[46] New Hampshire PUC states that the Commission lacks authority to regulate the rates of LNG import terminals or to include their costs in wholesale rates, except to the extent that the costs are properly included in the fuel costs charged to a wholesale power supplier and recovered through a jurisdictional cost-of-service agreement.[47]

20. New Hampshire PUC maintains that, under no circumstances can the full costs of Everett be recovered from electric customers consistent with the FPA because Everett existed and was operational before Mystic 8 and 9 were constructed and because Everett continues to serve a number of customers other than Mystic 8 and 9. New Hampshire PUC states that the economics of Everett and the relationship between its finances and regional fuel security must be clarified before any conclusive determination may be made regarding the relationship between Mystic 8 and 9 and Everett. New Hampshire PUC questions whether ratepayers should be required to fund what it describes as an uneconomic electric generator with a single source of relatively expensive fuel.[48]

21. ENECOS states that the Commission made three errors in the July 2018 Order that justify granting rehearing. First, ENECOS asserts that the Commission erred in accepting the Mystic Agreement because the Commission had found in the Waiver Order that the Tariff did not allow for cost-of-service agreements to meet regional fuel security concerns. ENECOS argues that the Commission should have rejected the Mystic Agreement because ISO-NE lacked the authority to enter into it, making the Mystic Agreement a "substantive nullity."[49] ENECOS states that the Commission properly rejected an earlier attempt to file of a cost-of-service agreement involving Mystic 8 and 9 for failure to follow the Tariff, and that case controls the outcome here.[50] ENECOS also maintains that, given the limited timeframe for ISO-NE's submission of Tariff revisions, accepting the Mystic Agreement had the effect of discarding the Commission's

---

[46] New Hampshire PUC Rehearing Request at 4, 8.

[47] *Id.* at 5.

[48] *Id.* at 6-8.

[49] ENECOS Rehearing Request at 1-2, 6 (quoting *Mun. Lt. Bds. of Reading and Wakefield v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971) (*Reading*) ("[w]here the filing is so patently a nullity as a matter of substantive law . . . administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket.")), 7.

[50] *Id.* at 7 (citing *Mystic Dev., LLC*, 113 FERC ¶ 61,012 (2005) (*Mystic Development*)).

customary solicitude for regional stakeholder processes in developing new tariff provisions.[51] ENECOS also claims that, when the validity of a filing rests on the outcome of another proceeding, Commission precedent requires that the filing be rejected.[52] ENECOS contends that the Mystic Agreement should have been rejected because the outcome of this proceeding depends on the Commission's show cause directive in the Waiver Order beginning a new proceeding in Docket No. EL18-182-000, which could substantially change the terms of an acceptable agreement.[53]

22. Second, ENECOS maintains that the Commission violated FPA section 205 by requiring changes to the Mystic Agreement that essentially adopt an entirely different rate design that follows a completely different strategy or that is methodologically distinct from the proposed rate.[54] Rather, ENECOS argues that the Commission only had the authority to either approve or reject the proposal. ENECOS postulates two such violations of this stricture in the July 2018 Order: (1) the requirement that a true-up mechanism be added to the Mystic Agreement and (2) the required changes to Mystic's proposal to allocate to customers 100% of Everett's costs, adjusted on the basis of sales to third-party customers. ENECOS claims that these changes would result in a rate that is methodologically distinct from the one that Mystic proposed.[55] ENECOS also states that, due to the expedited hearing schedule, intervenors had just 36 days to respond to Mystic's true-up proposal, which ENECOS states is little more than half the time intervenors are entitled to under FPA section 205(d) when a utility files a proposed rate under section 205. ENECOS maintains that the Commission did not find good cause for depriving intervenors of adequate notice of the proposed rate changes.[56]

23. Third, ENECOS states that the Commission unreasonably failed to direct Mystic to include a provision in the Mystic Agreement that prevents toggling between cost-based and market-based rates. ENECOS states that Commission precedent requires that agreements such as the one under consideration here include provisions to eliminate, or at

---

[51] *Id.* at 8.

[52] *Id.* at 8-9 (citing *PJM Interconnection, LLC*, 150 FERC ¶ 61,251, at PP 31-32 (2015); *Nevada Power Co.*, 153 FERC ¶ 61,227, at P 24 (2015)).

[53] *Id.* at 8-10.

[54] *Id.* at 10-11 (citing *Western Resources v. FERC*, 9 F.3d 1568 (D.C. Cir. 1993); *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017)).

[55] *Id.* at 11-12.

[56] Cite

least minimize, opportunities for toggling.[57] ENECOS asserts that, without such provisions, generators are guaranteed to receive the higher of market-based or cost-based rates, which will undermine the development of competitive markets and/or guarantee generators higher profits than they would earn under the traditional regulated model.[58]

24. Finally, ENECOS requests that the Commission clarify that Mystic cannot assign more than a third of Everett's fixed costs to ISO-NE under the Mystic Agreement. According to ENECOS, this clarification is appropriate because Mystic 8 and 9 cannot consume more than 250 Mcf/day of natural gas, which is approximately 35% of Everett's 715 Mcf/day sustainable vaporization capability and 25% of Everett's 1 Bcf/day peak vaporization capability.[59]

## III. Discussion

25. As an initial matter, we grant Massachusetts AG's request for clarification that, before Mystic may include any capital expenditure in its cost-of-service rate, it must demonstrate, and the Commission must determine, that such an expenditure is just and reasonable. In the July 2018 Order, the Commission found that the record was insufficient to determine the justness and reasonableness of the amount of reported capital expenditures. The Commission therefore directed the participants to submit evidence regarding that issue at the hearing.[60] The need for this evidence presupposes the need to determine that the expenditure is just and reasonable.

26. Turning to the requests for rehearing, we disagree with Massachusetts AG and New Hampshire PUC that the Commission is asserting jurisdiction over Everett or any actions, including any incurrence of costs, by Everett. The Commission's jurisdiction here encompasses Mystic, a public utility making wholesale sales in interstate commerce to ISO-NE. The Commission did not assert jurisdiction over Everett, nor is jurisdiction over Everett a precondition to the Commission's actions.[61] The Fuel Supply Charge is a

[57] *Id.* at 13-14 (citing *R.E. Ginna Nuclear Power Plant, LLC*, 152 FERC ¶ 61,027, at PP 47-49 (2015); *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, at P 21 (2015); *Bridgeport Energy LLC*, 118 FERC ¶ 61,243, at P 66 (2007)).

[58] *Id.* at 14 (citing *ISO New England, Inc.*, 125 FERC ¶ 61,102, at P 45 (2008)).

[59] *Id.* at 15-16.

[60] July 2018 Order, 164 FERC ¶ 61,022 at P 19.

[61] Because the Commission did not assert jurisdiction over Everett or its costs, we do not need to address Massachusetts AG's argument that the Commission did not

component of Mystic's cost-of-service rate and, as a result, is subject to Commission review and approval.[62] The Commission has reviewed such components in the past when, for instance, the Commission has ordered "refunds of excessive payments when fuel costs were found to be excessive or otherwise unjust and unreasonable."[63] The Commission has also explained that, as part of its obligation under FPA sections 205 and 206 to ensure that rates for jurisdictional service are just, reasonable, and not unduly discriminatory or preferential, it "ensures that wholesale customers' rates do not reflect costs that are the result of undue preferences granted to affiliates or that are imprudent or unreasonable."[64]

---

support its assertion of jurisdiction over Everett and its operating costs with substantial evidence.

[62] July 2018 Order, 164 FERC ¶ 61,022 at P 35. In the July 2018 Order, the Commission further explained that the "extremely close relationship" between Mystic 8 and 9 and Everett placed the costs of operating Everett within the Commission's "general practice regarding cost-of-service rates," to include review of "a generator's purported costs of fuel, including purchase, transportation, handling, and on-site storage." *Id*. P 36. To the extent that parties understood the Commission to be invoking a new or different standard, we clarify that, because Mystic and Everett are indeed affiliates, as discussed below, we will no longer refer to Mystic and Everett as having an "extremely close relationship."

[63] *City of Vernon v. Southern Cal. Edison Co.,* 31 FERC ¶ 61,113, at 61,231*, reh'g denied*, 32 FERC ¶ 61,373 (1985); *see also Pub. Serv. Co. of N.H.*, 1 FERC ¶ 63,039 (1977), *aff'd*, 6 FERC ¶ 61,299 (1979) (affirming an initial decision directing the applicant to adjust the prices of spot coal to reflect its generally lower energy (Btu) content and to factor freight costs into the refund calculation.); *Elec. Coops. of Kan.*, 14 FERC ¶ 61,176 (1981) (ordering refunds to correct for improper collection of limestone costs related to pollution control through a fuel clause); *Delmarva Power and Light Co.*, 24 FERC ¶ 61,199 (1983) (finding that estimated permanent disposal costs of spent nuclear fuel are an appropriate cost-of-service item but requiring that there be adequate record evidence to justify the costs before they could be passed through to consumers).

[64] *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 122 FERC ¶ 61,155, at P 3, *order on reh'g*, Order No. 707-A, 124 FERC ¶ 61,047 (2008). The Commission has explained that the concern for undue preference or unreasonable charges is relevant because "self dealing may arise in transactions between affiliates because affiliates have incentives to offer terms to one another which are more favorable than those available to other market participants." *TECO Power Servs. Corp.*, 52 FERC ¶ 61,191, at 61,697 n.41, *order on reh'g*, 53 FERC ¶ 61,202 (1990).

27. Review and approval of the Fuel Supply Charge thus can include consideration of whether it is just and reasonable for Mystic to include in its rates charges traceable to specific costs that Everett incurred and that are included in the Fuel Supply Charge. The Commission's findings may affect or have implications for Everett but do not constitute an assertion of jurisdiction over (i.e., regulation of) Everett or Everett's incurrence of costs. The U.S. Supreme Court has held that effects of the Commission's regulation of wholesale rates on non-jurisdictional matters are a "fact of economic life" that does not "run afoul of" restrictions on the Commission's jurisdiction set by FPA section 201 and, indeed, are "of no legal consequence."[65] We thus disagree with the New Hampshire PUC that the Commission is proposing to regulate the rates of an LNG import terminal. The Commission is not making any determinations on what Everett may or may not do.

28. For these reasons, we find unconvincing Massachusetts AG's argument that the Commission has failed to identify a limiting principle that can determine which Everett costs reflected in the Fuel Supply Charge are sufficiently connected with a wholesale rate to affect the rate and thus be jurisdictional. The Fuel Supply Charge is a component of Mystic's cost-of-service rate. Therefore, the issue presented is not whether the Fuel Supply Charge affects a jurisdictional rate, but rather whether it is just and reasonable. As explained above, the Commission possesses ample authority to consider this issue, in

[65] *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016) (*EPSA*) (holding that the Commission does not exceed the limits on its jurisdiction set forth in FPA section 201(b) "just because it affects—even substantially—the quantity or terms of retail sales").

particular in transactions between affiliates,[66] which is the case here.[67] The Commission thus did not, as Massachusetts AG asserts, hold in the July 2018 Order "that the Commission may allow recovery of just and reasonable rate components even if it does not have jurisdiction over those components."[68] Rather, the Commission held that "[w]hether individual components of a cost-of-service rate . . . are recoverable turns on whether they are just and reasonable, not whether the Commission has regulatory authority over all aspects of those rate components."[69] There are many costs, such as

[66] Order No. 707-A, 124 FERC ¶ 61,047 at P 72 ("the Commission has a longstanding practice of relying on its section 205 and 206 ratemaking reviews to disallow passing non-power goods and services costs through jurisdictional rates if those costs are not just and reasonable"); *Repeal of the Pub. Util. Holding Co. Act of 1935 and Enactment of the Pub. Util. Holding Co. Act of 2005*, Order No. 667, 113 FERC ¶ 61,248 (2005), *order on reh'g*, Order No. 667-A, 115 FERC ¶ 61,096, at P 6, *order on reh'g*, Order No. 667-B, 116 FERC ¶ 61,073 (2006), *order on reh'g*, Order No. 667-C, 118 FERC ¶ 61,133 (2007) (the Commission's rate authority permits it to disallow recovery in rates of unjust and unreasonable costs incurred in affiliate transactions); *Alamito Co.*, 32 FERC ¶ 61,022, at 61,080, *reh'g denied*, 33 FERC ¶ 61,286 (1985) (finding that coal costs under contract signed with an affiliate may not be just and reasonable, that the cost of service effects on the rates may therefore be unjust and unreasonable, and setting the matter for hearing); *Southern Cal. Edison Co.*, 8 FERC ¶ 61,198, at 61,680-81 (1979), *reh'g denied*, 10 FERC ¶ 61,260 (1980) (rejecting inclusion in the cost of service payments to subsidiary fuel exploration and development company as not benefiting customers, but stating that once fuel deliveries begin, the Commission will consider the costs in determining the appropriate price for the fuel).

[67] As wholly-owned subsidiaries of Exelon and, ultimately, of Exelon Corporation, Mystic and Everett currently are under the common control of these companies and thus are affiliates of each other and have been since Exelon acquired Everett in October 2018. *See* 18 C.F.R. § 36.36(a)(iv); *see also* 18 C.F.R. § 358.3(a). We note also that, in its original filing on May 16, 2018, Mystic described its fuel supply proposal as involving an affiliate relationship. At that time, Mystic described that affiliate relationship as one between itself and Constellation LNG, LLC, now superseded by the relationship between Mystic and Everett. Constellation Mystic Power, LLC Tariff Filing, Docket No. ER18-1639-000, Transmittal Letter, at 18 (May 16, 2018).

[68] Massachusetts AG Rehearing Request at 16.

[69] July 2018 Order, 164 FERC ¶ 61,022 at P 37 & n.34 (citing cases discussing various costs (e.g., litigation, environmental liabilities, lease acquisition costs subject to the control of another federal department) recovered by public utilities under

labor costs and taxes, that are recoverable in cost of service rates and that for other purposes are outside the Commission's authority to regulate. Nor is Massachusetts AG correct in maintaining that the Commission's action here is unprecedented. Contrary to Massachusetts AG's claim, the Commission has found, for example, that public utilities may recover in cost-of-service rates the costs of affiliated coal mining operations.[70]

29. Massachusetts AG does not dispute that the Commission has jurisdiction to allow a power plant to recover its fuel costs, but contends that the costs of operating Everett are too far removed from Mystic's jurisdictional sales to ISO-NE to be directly related to those sales and thus the Commission is not authorized to include those costs in Mystic's cost-of-service rate.[71] This argument suffers from two defects.

30. First, Massachusetts AG assumes that a fuel supplier's operating costs are not an ordinary component of fuel supply costs. For instance, Massachusetts AG supports its argument by stating that fixed operating costs incurred by an unaffiliated third-party fuel supplier are not recoverable. Massachusetts AG maintains that a change in ownership here cannot create jurisdiction over such costs. This argument overlooks the fact that third-party suppliers can and do recover such costs through their sales because their business would not be sustainable if they did not. In a market transaction, no distinction need be made between commodity and other components that are included in the price paid by the buyer. Massachusetts AG's distinction between fuel costs and underlying fixed operating costs is a false one. Any fuel supplier's costs include costs underlying the transaction, such as fixed operating costs. The same is true here. Everett acquires fuel, in the form of LNG, and then incurs costs related to transforming it into a form that is usable by a generation unit. The fuel supplied to Mystic is a different product than the fuel acquired by Everett, and fixed operating costs are necessarily incurred in supplying this product. These costs are thus a component of fuel costs. These general observations simply refer to economic facts and do not imply that recovery of all fixed operating costs from ratepayers in a cost of service context such as the one presented here is necessarily just and reasonable. It only demonstrates that changes in facility ownership do not alter the underlying economic realities in the way that Massachusetts AG contends.

31. Second, Massachusetts AG's argument regarding the absence of a direct relationship between Everett's operations and Mystic's sale of electricity at wholesale represents a misapplication of the distinction between direct and indirect effects on

---

Commission-jurisdictional rates which arise from facilities or activities that are not, themselves, subject to Commission regulatory authority).

[70] *Pub. Serv. Co. of N.M.*, 17 FERC ¶ 61,123 (1981).

[71] Massachusetts AG Rehearing Request at 10 (citing *EPSA*, 136 S. Ct. 760 at 774).

jurisdictional rates.[72] The Commission has statutory authority to regulate matters that directly affect jurisdictional rates, but not those that only indirectly or tangentially affect such rates.[73] But, as explained above, rather than affecting a rate, the Fuel Supply Charge is a component of a cost-of-service rate. The issue presented therefore is not the proximity of the causes of the Fuel Supply Charge's components but rather the justness and reasonableness of allowing Mystic to recover those components in its cost-of-service rate. Elements of Massachusetts AG's own argument confirm this point. For instance, Massachusetts AG argues that Everett was not primarily designed to provide fuel for Mystic 8 and 9, and it supplies them with only 31% of its total capacity.[74] This argument raises matters of cost causation and, consequently, raises an issue of justness and reasonableness, not an issue of jurisdiction.

32. We disagree with New Hampshire PUC's view that the Commission made an explicit finding in the July 2018 Order that the full costs of Everett may be recovered through the Mystic Agreement, including fuel supply infrastructure ownership and operating costs of Everett.[75] The Commission only found that the costs related to the operation of Everett are potentially recoverable by Mystic. The Commission made no finding regarding which costs Mystic was entitled to recover and instead set the question of the justness and reasonableness of the Fuel Supply Charge for hearing. In light of the fact that questions as to the Fuel Supply Charge were set for hearing, and because questions of recoverability are being addressed in subsequent proceedings,[76] we do not address New Hampshire PUC's other arguments, which question the justness and reasonableness of matters such as requiring ratepayers to fund costs that it describes as uneconomic.

33. ENECOS's various arguments supporting its contention that the Commission erred in accepting Mystic's filing are unpersuasive. First, we disagree with ENECOS that the Commission's *Mystic Development* order controls the outcome here. According to ENECOS, that case stands for the proposition that the Commission will reject a

---

[72] *Id.* at 11-12 & n.36 (citing NESCOE Protest at 36 (citing Wilson Aff. at P 19)); *see also id*. at 9 (arguing that the limiting principle of "directness" sets the scope of the Commission's "in connection with" jurisdiction).

[73] *EPSA*, 136 S. Ct. 760 at 774.

[74] Massachusetts AG Rehearing Request at 12.

[75] New Hampshire PUC Rehearing Request at 4, 8.

[76] *See Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (addressing certain cost-of-service issues set for paper hearing in the July 2018 Order, directing a compliance filing, and establishing a paper hearing on the issue of return on equity).

cost-of-service agreement filed under FPA section 205 if the agreement is inconsistent with the Tariff.[77] But the Commission found in *Mystic Development* that an entity may file an agreement under FPA section 205 containing provisions that depart from a *pro forma* agreement *if* it secures a prior determination by ISO-NE that alternative provisions are necessary and appropriate.[78] The Commission rejected the filing in *Mystic Development* because that determination had not been secured.[79] Here, ISO-NE has expressed its support for—indeed, it is a signatory to[80]—Mystic's cost-of-service filing,[81] and this distinguishes the instant proceeding from *Mystic Development*.

34. Moreover, contrary to ENECOS's contention, the Commission's denial of ISO-NE's waiver request in Docket No. ER18-1509-000 does not render the Mystic Agreement a "substantive nullity" that the Commission is required to reject. The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has held that "FERC owes no one the duty to reject a rate filing, even if it is patently invalid."[82] Indeed, the D.C. Circuit made much the same point in *Reading*, the case that ENECOS relies on to reach the opposite conclusion. There the D.C. Circuit stated that rejection of a filing "*may be used by an agency* where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket."[83] The language italicized here, which ENECOS omits when quoting this statement, makes clear that rejection of a filing by the Commission is a discretionary matter. The Commission has recognized the discretionary nature of its power to reject filings.[84] While we also acknowledge

---

[77] ENECOS Rehearing Request at 7.

[78] *Mystic Development*, 113 FERC ¶ 61,012 at P 11.

[79] *Id.*

[80] July 2018 Order, 164 FERC ¶ 61,022 at P 1.

[81] ISO New England Inc., Motion to Intervene and Comments, Docket No. ER18-1639-000, at 4 (filed June 6, 2018).

[82] *Papago Tribal Uti. Auth. v. FERC*, 628 F.2d 233, 247 (D.C. Cir. 1980).

[83] *Reading*, 450 F.2d 1341 at 1346 (emphasis supplied).

[84] *Kansas Gas and Elec. Co.*, 20 FERC ¶ 61,093, at 61,199 (1982) (citing *Papago*, 628 F.2d 233 at 247); *Northern Natural Gas Co.*, 59 FERC ¶ 61,143, at 61,531, n.20 (1992) (citing *Papago*, 628 F.2d 233 at 247); *see also Arkla Energy Res.*, 56 FERC ¶ 61,090, at 61,324-25 (1991) (Trabandt, Comm'r, *concurring*).

Commission statements to the contrary cited by ENECOS,[85] the court's decisions are controlling. In any event, accepting the Mystic Agreement has not opened a "futile docket." The Commission accepted the Mystic Agreement subject to refund and subject to the outcome of the ongoing proceeding in Docket No. EL18-182-000, and the Commission established hearing procedures in this proceeding. Therefore, as evidenced by the Commission's actions in the Fuel Security Retention Mechanism Order,[86] the outcome of these proceedings cannot be properly characterized as futile (i.e., serving no useful purpose or incapable of producing a useful result).[87]

35. Nor has ENECOS shown that the timeframe for ISO-NE's submission of Tariff revisions constitutes Commission error. ENECOS states that the Commission's action discards customary Commission solicitude for regional stakeholder processes in developing new tariff provisions. However, none of the cases that ENECOS cites in support of this argument requires the Commission to defer to the stakeholder process,[88] and one of them makes clear that Commission reliance on the stakeholder process in such circumstances is discretionary.[89]

36. The other arguments that ENECOS advances on this topic do not provide reasons that favor an exercise of the Commission's discretionary power to reject a filing. In particular, ENECOS states that, where the validity of a filing rests on the outcome of another proceeding (in this case Commission review of a future filing of interim tariff revisions providing for the filing of a short-term, cost-of-service *pro forma* agreement to address demonstrated fuel security concerns in Docket No. EL18-182-000), Commission

---

[85] ENECOS Rehearing Request at 6 (citing *CPV Shore LLC*, 148 FERC ¶ 61,096 at P 28 (2014) (citing *Ohio Edison Co.*, 43 FERC ¶ 61,316, at 61,881 n.7 (1988))).

[86] *See* P 11 *supra*.

[87] *See, e.g.*, *Definition of Futile*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/futile (last visited June 24, 2020); *Definition of Futile*, EN.OXFORDDICTIONARIES.COM, https://www.lexico.com/en/definition/futile (last visited June 24, 2020).

[88] *See* ENECOS Rehearing Request at 8 n.17 (citing *Braintree Elec. Lt. Dept. v. ISO New England, Inc.*, 128 FERC ¶ 61,008, at PP 50-55 (2009); *Ameren Svcs. Co. v. Midwest Ind. Trans. Sys. Op.*, 121 FERC ¶ 61,205, at PP 93-94 (2007); *Governors of Connecticut*, 112 FERC ¶ 61,049, at PP 40-42 (2005); *Morgan Stanley Capital Group, Inc. v. PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,331, at 62,269-62,270 (2001)).

[89] *Braintree*, 128 FERC ¶ 61,008 at P 50 (stating that the Commission "may" refer a matter to the stakeholder process).

precedent requires that the Commission reject the filing.[90] ENECOS cites two cases as support for this proposition, *PJM* and *Nevada Power*. However, the facts of these cases differ substantially from those presented here.

37. In *PJM*, PJM Interconnection, L.L.C. (PJM) filed changes to provisions of its tariff that would significantly alter how demand resources could participate in its capacity auctions. PJM had filed the changes in response to a D.C. Circuit opinion finding that the Commission had exceeded its statutory authority in issuing regulations requiring that a demand response resource participating in an organized wholesale energy market must be compensated at the locational marginal price. PJM's proposed tariff revisions would have altered demand response resource participation in the capacity market in a manner consistent with the D.C. Circuit's opinion *if* the Supreme Court denied petitions for certiorari of that opinion.[91]

38. The Commission rejected PJM's filing as premature on a number of grounds. It found that accepting the filing would necessarily affect the Commission's options in responding to the D.C. Circuit's decision. The Commission recognized that PJM's goal was to reduce uncertainty surrounding demand response participation in an upcoming auction, but under the circumstances, some degree of uncertainty was inherent in the situation that existed due to the pending appeal. The Commission also stated that it was concerned that PJM's proposal introduced new uncertainties that may exceed those that it sought to avoid, particularly with respect to potential unanticipated spillover effects on state programs and private sector arrangements.[92]

39. ENECOS does not explain how the facts in this proceeding are similar to those found in *PJM*, and we are unable to identify any relevant similarity. The Commission's actions in the July 2018 Order do not affect its options vis-à-vis any pending court decisions, nor do they create new uncertainties that would counsel rejection. We therefore find that *PJM* does not support rejection of Mystic's filing in this proceeding.

40. In *Nevada Power*, the Commission rejected a number of proposed agreements as premature. It found that two of the agreements were premature because they would not become effective unless and until the California Independent System Operator Corporation awarded a transmission project to one of the parties under a competitive

---

[90] ENECOS Rehearing Request at 8 (citing *PJM*, 150 FERC ¶ 61,251 at PP 31-32; *Nevada Power*, 153 FERC ¶ 61,227 at P 24).

[91] *PJM*, 150 FERC ¶ 61,251 at PP 2-11.

[92] *Id.* P 32.

solicitation process.[93] The Commission found that the acceptance of another agreement was premature because it contained contingent amendments, some of which would become effective and some of which would become moot and ineffective, depending on uncertain future events, including events related to the selection and development of the project.[94] The Commission found that accepting the filings in these circumstances could cause confusion for interested parties because there could be agreements on file that would never become effective or that could contain moot terms and conditions that are not part of the final agreement between the parties, depending on the solicitation process.[95]

41. As in the case of *PJM*, ENECOS does not explain how the facts in *Nevada Power* suggest that Mystic's filing should be rejected. We find that there are no contingencies connected with Mystic's filing of the type described in *Nevada Power*.

42. While ENECOS does not identify any facts in this proceeding that are comparable to those in *PJM* and *Nevada Power*, it suggests that the Commission has departed from that precedent by acting prematurely here. Specifically, ENECOS argues that ISO-NE's tariff filing in Docket No. EL18-182-000 could substantially change the terms of an acceptable agreement in ways that differ from the proposed Mystic Agreement, and the Commission's acceptance of the Mystic Agreement jeopardizes intervenors' prospects for due process in this proceeding and will only to lead to more litigation as parties dispute how to apply the cost allocation methods ultimately approved by the Commission.[96] We disagree. ENECOS's arguments regarding due process are set forth in its discussion of *NRG*, which we address below. In addition, ENECOS does not explain how prospects for additional litigation constitute grounds for a grant of rehearing, and, in any event, we find no basis to conclude that acceptance of the Mystic Agreement in the July 2018 Order will lead to more litigation than otherwise might be expected.

43. ENECOS's remaining arguments do not demonstrate Commission error that would support a grant of rehearing. The Commission did not violate the court's ruling in *NRG* by making modifications to Mystic's filing that would produce a rate that is methodologically distinct from the one contained in the filing, as ENECOS claims. ENECOS identifies two determinations in the July 2018 Order that it maintains are inconsistent with *NRG*, viz., the addition of a true-up mechanism to the Mystic Agreement and the "finding that [Mystic] is not entitled to flow-through 100% of

---

[93] *Nevada Power*, 153 FERC ¶ 61,227 at P 24.

[94] *Id.*

[95] *Id.* P 25.

[96] ENECOS Rehearing Request at 9-10.

Everett's [costs]," which ENECOS maintains "inherently requires a different rate structure that is 'methodologically distinct' from what Mystic originally filed."[97] The first of these determinations does not constitute an error under *NRG*, and the Commission did not make the second in the July 2018 Order.

44. In *NRG*, PJM proposed to replace the "unit-specific" exemption to its Minimum Price Offer Rule (MOPR), an exemption based on a generation unit's actual costs of generation, with two new exemptions based on certain pre-established criteria. PJM also proposed to extend the period during which the MOPR applies to a new resource from one year to three years. The Commission accepted the two new exemptions, but it directed PJM to make a compliance filing that retained the unit-specific exemption and that also left in place the one-year applicability of the MOPR.[98] The D.C. Circuit held that, while the Commission may propose minor modifications to a utility's rate filing with the utility's consent, the Commission's proposal in this case exceeded the Commission's authority under FPA section 205 because the extent of the changes harmed utility customers by not affording adequate notice of the changes and an opportunity to comment on them.[99] The court variously described the Commission's action as proposing: (1) an "entirely new rate" that employed a "completely different strategy" than the proposed rate; (2) a modification that was "methodologically distinct" from the utility's proposal; and (3) the Commission's "own original notion of a new form of rate."[100] ENECOS has not identified any proposed changes of this type in the July 2018 Order.

45. The addition of a true-up mechanism to the Mystic Agreement does not reflect an entirely new rate. The Commission found that a true-up mechanism was necessary "given the inherent difficulty in projecting costs in advance of the Mystic Agreement's effective date" and because of "concerns raised as to whether certain expenditures will be necessary to keep the Mystic Units operational during the proposed service period."[101] A true-up mechanism does not change the rate; rather, it is "necessary to ensure that the rates established reflect actual costs incurred."[102] In other words, the true-up mechanism

---

[97] *Id.* at 11.

[98] *NRG*, 862 F.3d 108 at 112-14.

[99] *Id.* at 116.

[100] *Id.* at 115-16 (quoting and citing *Western Resources, Inc. v. FERC*, 9 F.3d 1568 at 1578-79; *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984)).

[101] July 2018 Order, 164 FERC ¶ 61,022 at P 20.

[102] *Id.*

is intended to ensure that the rate proposal is properly implemented. Therefore, we find that it is a minor change that is permissible with the utility's consent.[103]

46. The other proposal that ENECOS describes as impermissible under *NRG* is what it describes as "[t]he July [2018] Order's finding that [Mystic] is not entitled to flow through 100% of Everett's [costs]."[104] As discussed above, the Commission made no findings regarding the Everett costs that Mystic is entitled to recover. As a result, the July 2018 Order contains no determinations on this topic that could be evaluated under the criteria set forth in *NRG*.

47. Given the absence in the July 2018 Order of errors of the type identified in *NRG*, we disagree with ENECOS that the July 2018 Order raises a notice issue of the type the court described in *NRG*. Given the absence of a notice issue, ENECOS's due process argument is reduced to the question of whether there has been a meaningful opportunity to be heard,[105] and rehearing provides parties with that meaningful opportunity.[106]

48. We also disagree with ENECOS's claim that the Commission did not justify the expedited hearing schedule and that this schedule deprived intervenors of adequate notice of proposed rate changes. In instituting an expedited schedule, the Commission balances the need to expedite the hearing proceeding with the due process rights of all affected parties.[107] The July 2018 Order indicates why expedited procedures were needed in this proceeding, viz., the January 4, 2019 deadline for Exelon to determine whether it would unconditionally retire Mystic 8 and 9 and the commencement of the ISO-NE Forward Capacity Auction 13 on February 4, 2019.[108] In addition, the Commission specified the

---

[103] *City of Winnfield*, 744 F.2d 871 at 876.

[104] ENECOS Rehearing Request at 12.

[105] *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976) (due process requires notice and a meaningful opportunity to be heard).

[106] *See Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 115 (D.C. Cir. 2014); *see also Blumenthal v. FERC*, 613 F.3d 1142, 1145-46 (D.C. Cir. 2010).

[107] *Iroquois Gas Transmission Sys., L.P.*, 54 FERC ¶ 61,103, at 61,348 (1991), *reh'g denied*, 58 FERC ¶ 61,280 (1992); *see also Indep. Petroleum Ass'n of Mtn. States v. Panhandle Eastern Pipe Line Co.*, 36 FERC ¶ 61,282, at 61,700 (1986), *reh'g denied*, 37 FERC ¶ 61,056 (1986); *Utah Power & Light Co.*, 41 FERC ¶ 61,283, at 61,753 (1987), *reh'g denied*, 42 FERC ¶ 61,123 (1988).

[108] July 2018 Order, 164 FERC ¶ 61,022 at n14.

issues to address at the hearing and provided guidance.[109] Finally, ENECOS does not explain how the expedited hearing schedule compromised intervenors' due process rights, other than to assert generally that the expedited schedule deprived intervenors of adequate notice of proposed rate changes. The hearing schedule did not deprive intervenors of their due process rights. The hearing provided all parties with ample opportunity to submit testimony and briefs.[110] We find no basis to conclude that this process deprived intervenors of adequate notice of proposed rate changes.

49. We disagree with ENECOS that the Commission erred in not requiring Mystic to include in the Mystic Agreement a provision to eliminate, or at least minimize, opportunities for a generator needed for reliability to toggle between cost-based and market-based rates.[111] As Mystic explained, it submitted a retirement de-list bid, and, as a result, there is currently no path by which it can unilaterally return to the market.[112] In Docket No. ER18-1509-000, ISO-NE explained that the Tariff does not currently permit a resource that is retained for reliability reasons to re-enter the FCM as an existing resource, and resources such as Mystic 8 and 9 that agree to be retained under a cost-of-service agreement must be prepared to retire permanently.[113] Under these circumstances, Mystic 8 and 9 are not in a position to toggle between cost-based and market-based rates without requalifying as a new capacity resource, which obviates the need for an anti-toggling provision in the Mystic Agreement.

50. Finally, we deny ENECOS's request that the Commission "clarify that [Mystic] can assign no more than a third of Everett's fixed costs to ISO-NE under the proposed [Mystic Agreement]."[114] The Everett costs that Mystic is entitled to recover is a matter

---

[109] *Id.* PP 19-20, 34-38, 42.

[110] *See* Order Establishing Procedural Schedule and Rules of Procedure for Hearings, Docket No. ER18-1639-000 (July 27, 2018).

[111] ENECOS Rehearing Request at 13-14.

[112] Constellation Mystic Power, LLC, Answer and Motion for Leave to Answer, Docket No. ER18-1639-000, at 9 (filed June 6, 2018).

[113] ISO New England Inc., Answer, Docket No. ER18-1509-000, at 20 (filed June 7, 2018) (citing Tariff, Market Rule 1, § III.13.2.5.2.5(g)). ISO-NE notes that any de-activated resource may re-enter the market if it qualifies as a New Generating Capacity Resource under Market Rule 1, § III.13.1.1.1.2 of the Tariff.

[114] ENECOS Rehearing Request at 16.

that the Commission set for hearing in Docket No. ER18-1639-000 and was addressed based on the record developed at that hearing.[115] We thus will not address it here.

The Commission orders:

(A) In response to the requests for rehearing, the July 2018 Order is hereby modified and the result sustained, as discussed in the body of this order.

(B) The requests for clarification are hereby granted, in part, and denied, in part, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

( S E A L )

Kimberly D. Bose,
Secretary.

[115] *See Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Constellation Mystic Power, LLC Docket Nos. ER18-1639-001

(Issued July 17, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's orders because I do not believe that the Commission can or should use its authority over wholesale sales of electricity to bail out a liquefied natural gas (LNG) import facility. In doing just that, today's orders exceed the Commission's authority under the Federal Power Act (FPA). The Commission's efforts to justify that remarkable assertion of authority are arbitrary and capricious and unsupported by the record. Taking the arguments in today's orders seriously would confer on the Commission precisely the sort of limitless, marauding jurisdiction that the Supreme Court has repeatedly rejected.

2. On a broader note, fuel security is a multi-faceted issue that cannot be comprehensively or effectively addressed solely through the Commission's authority over the bulk power system.[1] Instead, fuel security demands a more holistic solution than that which the FPA alone can provide. Accordingly, I continue to believe that the

[1] *See Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) (Glick, Comm'r, dissenting at 1) (December 2018 Order) (explaining that the Commission's actions "confined the fuel-security debate to options available under the [FPA], even though it was evident at the time that the FPA is an inadequate vehicle for addressing many of the factors that go into fuel security"); *ISO New England Inc.*, 165 FERC ¶ 61,202 (2018) (Glick, Comm'r, concurring at 3) (observing that some approaches to resolving fuel security concerns directly, such as "gas demand response," may require action under state law); *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (2018) (Glick, Comm'r, dissenting at 1) (July 2018 Order) (concluding that the "consequence of the Commission's action will be New England ratepayers bearing significant additional costs without even a cursory examination by the Commission of other options for addressing potential fuel security concerns more efficiently"); *ISO New England Inc.*, 164 FERC ¶ 61,003 (2018) (Glick, Comm'r, dissenting in part at 3) ("Fuel security is a multi-faceted issue, only certain aspects of which fall under the Commission's jurisdiction. By preliminarily determining that ISO-NE's Tariff is unjust and unreasonable, the Commission is prematurely focusing the conversation on the wholesale rates subject to its jurisdiction, potentially cutting off other, potentially more fruitful avenues for addressing fuel security concerns.").

Commission erred when, in 2018, it initiated a section 206 proceeding into ISO-New England's tariff that, for all intents and purposes, shoehorned the fuel security debate into the confines of the FPA and set us on a path to today's orders. Although that conclusion does not change the standard of review we must apply today, it underscores the extent to which the awkward situation in which the Commission now finds itself could have been avoided.

* * *

3. Let's first be clear about what the Commission is doing. Faced with speculation about the potential for brief natural gas shortages in New England, the Commission is forcing consumers to pay the full cost of service for Constellation Mystic Power, LLC's (Mystic) electric generating facility in order to bail out the Everett Marine Terminal (Everett), an LNG import facility. Because Everett does not rely on the interstate pipeline grid to acquire natural gas (instead receiving it via ship), it can provide another source of natural gas for the region when the pipeline system becomes constrained, as may happen during stretches of cold weather when heating needs cause demand for natural gas to surge.[2] But Everett apparently depends on its sales to Mystic to remain financially solvent, and letting Mystic retire could indirectly lead Everett to close.[3] Nevertheless, it is Everett, not Mystic, that, in fact, provides the purported fuel security benefit underlying this proceeding.[4] Accordingly, the Commission has chosen to use its authority under the FPA to retain Mystic in order to keep Everett from going under.

---

[2] December 2018 Order, 165 FERC ¶ 61,267 at P 7.

[3] *Id.* P 8.

[4] *See id*. (Glick, Comm'r, dissenting at 5-6 & n.23). ISO New England Inc.'s expert witness in the proceeding that paved the way for the Commission to accept Mystic's cost-of-service agreement suggested that the Everett LNG import facility provides the principal fuel security benefit and that, even under the conservative assumptions in ISO New England's analysis, Everett can increase its injections of LNG into the pipeline system to avoid load shedding with or without Mystic. *Id*. (Glick, Comm'r, dissenting at n.23); ISO New England Petition for Waiver, Docket No. ER18-1509-000, Exhibit ISO-1 at 43 (Brandien Testimony). ISO New England's independent market monitor concurred. Potomac Economics Comment, Docket No. ER18-1509-000 at 4-9; *id.* at 6 (figure comparing demand for natural gas and oil with and without the Everett LNG import facility). Although today's orders sidestep these issues, the evidence before the Commission indicates that the real motivating factor behind all these proceedings is Mystic's contribution to Everett's financial solvency, not Mystic's ability to generate and sell electricity.

4. What is more, throughout this proceeding, the Commission has attempted to structure its regulation of Mystic in order to induce Everett to sell more natural gas. For example, in its December 2018 Order, the Commission expressly set the profit margin that Everett could recoup on its third-party sales of natural gas, while also providing a "sliding scale" that increased that profit margin as its sales volume increased.[5] Today's orders back off that directive, recognizing that it "may exceed the scope of the Commission's authority."[6] That conclusion is undoubtedly correct, and I am pleased to see the Commission walk back the most egregious examples of its jurisdictional overreach. But that step in the right direction does not change the underlying fact that the Commission is still using its authority over Mystic for the purposes of bailing out an LNG import terminal.

5. The Commission has "limited" authority under the FPA. Our role is to ensure that "'rates and charges made, demanded, or received by any public utility for or in connection with' interstate wholesale [electric] sales" as well as the "rules and regulations affecting or pertaining to such rates or charges" are just and reasonable and not unduly discriminatory or preferential.[7] "Taken for all it is worth, that statutory grant could extend [the Commission's] power to some surprising places," including the "inputs" used to produce electricity, such as "steel, fuel, and labor."[8] Indeed, it would allow the Commission to "regulate now in one industry, now in another, changing a vast array of rules and practices to implement its vision of reasonableness and justice."[9] But that is not what Congress had in mind when it enacted the FPA.[10]

6. To prevent such illogical results, the Court has repeatedly interpreted the FPA to confine the Commission's authority to the wholesale electricity sector, ensuring that it does not take advantage of that sector's position within the larger energy economy by aiming at matters beyond its purview. For example, to limit the Commission's jurisdiction over matters that "affect" wholesale rates, the Court has adopted a "common-sense" interpretation that permits the Commission to regulate only those rules or practices

---

[5] December 2018 Order, 165 FERC ¶ 61,267 at PP 134-135.

[6] *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,044 at P 66 (2020) (December 2018 Rehearing Order).

[7] *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773 (2016), *as revised* (Jan. 28, 2016) (*EPSA*) (quoting 16 U.S.C. § 824d(a) (2018)).

[8] *Id.* at 774.

[9] *Id.*

[10] *Id*. ("We cannot imagine that was what Congress had in mind" for the FPA.).

that "'*directly* affect the wholesale rate.'"[11] Similarly, the Court has also observed that the Commission transgresses the FPA's jurisdictional bounds when it exercises its jurisdiction to aim at something outside its proper bailiwick under the statute.[12] It would, after all, be bizarre for the Court to so carefully limit the Commission to regulating only those matters that directly affect wholesale rates, but then permit the Commission to use those effects as the pretext for aiming at that which inarguably falls outside its jurisdiction. Permitting that outcome would seem to sanction exactly the sort of "surprising" jurisdictional consequences that *EPSA* could "[]not imagine . . . Congress had in mind" when it enacted the statute.[13]

7. And yet, sanction such surprising jurisdictional consequences is exactly what today's orders do. The Commission is bailing out Mystic in order to keep a separate and unquestionably non-jurisdictional entity, the Everett LNG facility, financially afloat.[14] As discussed above, the region's real fuel security "need," such as it is, appears to be the non-pipeline-dependent access to natural gas the Everett LNG facility provides, not the Mystic unit itself.[15] Instead, Mystic is relevant only insofar as it is necessary to keep Everett in operation and provides a not entirely implausible locus for Commission action under the FPA. I see nothing in the FPA, however, that suggests that the Commission

---

[11] *Id.* (quoting *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004)); *see also id.* ("As we have explained in addressing similar terms like 'relating to' or 'in connection with,' a non-hyperliteral reading is needed to prevent the statute from assuming near-infinite breadth.").

[12] *Id.* at 776-77 (citing *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 383 (2015)); *see Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996) (stating that FERC may not "do indirectly what it could not do directly" (citing *Nw. Central Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 512 (1989))).

[13] *EPSA*, 136 S. Ct. at 774.

[14] Exelon, Mystic's ultimate corporate parent, has now purchased Everett. *See Constellation Mystic Power, LLC*, 172 FERC ¶ 61,043 at n.62 (2020) (July 2018 Rehearing Order) ("As wholly-owned subsidiaries of Exelon and, ultimately, of Exelon Corporation, Mystic and Everett currently are under the common control of these companies and thus are affiliates of each other and have been since Exelon acquired Everett in October 2018.") Nevertheless, shared corporate parentage neither changes the limitations on the Commission's jurisdiction nor excuses the Commission's actions today. It should go without saying that the FPA does not give the Commission jurisdiction over otherwise non-jurisdictional facilities simply because they are affiliated with a public utility.

[15] *Supra* PP 3-4.

can—much less should—wield its jurisdiction to address an issue so far upstream from the markets the Commission regulates. It may well be that the Commission lacks the means to bail out Everett directly and that its Mystic bank shot is the best option it has. But while "it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail,"[16] that temptation cannot justify the Commission acting beyond its statutory limits.

8. The specifics of this proceeding emphasize the extent to which the Commission is meddling in areas where it simply does not belong. Although, as noted, the Commission appears to have (rather tersely) backed off its attempt to use Mystic to regulate the profit margin on Everett's third-party sales,[17] it continues to set Everett's recoverable costs based on the Commission's assessments of Everett's operations and to define which entities are the primary beneficiaries of those operations continuing.[18] For example, the Commission determines that, although Everett makes sales of natural gas vapor to third parties—*i.e.*, entities other than Mystic—those third-party sales somehow benefit Mystic and, therefore, the full cost of the infrastructure needed to make those sales is appropriately attributed to Mystic.[19] The only support for that conclusion is the Commission's observation that Everett is Mystic's sole source of fuel.[20] Although factually accurate, that statement does not explain why electricity customers should bear the full cost of infrastructure that is equally used to make sales to third parties, unless, of course, you recall that the whole purpose of this proceeding is to have electricity customers foot the bill for an LNG bailout.[21]

---

[16] Abraham H. Maslow, *The Psychology of Science: A Reconnaissance* 15-16 (1966).

[17] *See supra* P 4.

[18] December 2018 Rehearing Order, 172 FERC ¶ 61,044 at PP 64-65.

[19] *Id*. P 64. The Commission suggests that those sales help to "manage" Everett's tank, which, in turn, purportedly benefits Mystic. What is never explained, however, is why third parties do not also benefit from "tank management" or why the Commission can so confidently conclude that all tank-related benefits go to and ought to be paid for by electricity customers.

[20] *Id.*

[21] *Id.* While I support the Commission's decision to abandon its extra-jurisdictional directive regarding third-party sales, that decision completely pulls the rug out from under the Commission's determination that it is just and reasonable to allow Mystic to recover 100% of Everett's fixed costs associated with natural gas vapor sales. Trial Staff's proposal—which the Commission adopted in the December 2018 Order—

9. None of the ever-changing justifications offered by the Commission during these proceedings provides a reasoned rationale for its extra-jurisdictional escapades. Today's orders, for example, contend that the Commission's assertion of jurisdiction is permissible because Mystic's costs are included in a jurisdictional rate filed pursuant to section 205 of the FPA.[22] In other words, the argument seems to go, because the relevant arrangement would be governed by a Commission-jurisdictional tariff, it must fall within the Commission's jurisdiction.[23] That tautology, however, is not a reasoned basis for exercising jurisdiction and would permit public utilities' decisions regarding what to put in their tariffs to override the express limitations imposed by Congress.[24]

10. In any case, the courts have already rejected the proposition that the Commission's jurisdiction automatically extends to anything in a jurisdictional tariff. In *Columbia Gas Transmission Corp. v. FERC*, the Commission took the position that it had jurisdiction to enforce tariff provisions that governed otherwise non-jurisdictional activity.[25] The court rejected that argument out of hand, explaining that the Commission cannot use a tariff as a "jurisdictional boot-strap" to expand its authority beyond its statutory limits.[26] And just

---

recognized that if all of Everett's fixed costs associated with vapor sales are allocated to Mystic, Mystic should receive a revenue credit on any third-party vapor sales Everett makes. *See* Trial Staff Initial Brief at 94-95 ("[I]t is reasonable to credit Mystic a portion of the incremental revenue . . . from third parties because all of Everett's fixed costs . . . will be collected from Mystic's rate payers including any level of return."); December 2018 Order, 165 FERC ¶ 61,267 at P 133. Today's orders are an unfortunate double whammy for ratepayers, who will now be responsible for paying all of Everett's fixed costs, while receiving no credit for sales Everett is able to make to third parties using the facilities they have paid for. This is certainly not a just and reasonable result.

[22] December 2018 Rehearing Order, 172 FERC ¶ 61,044 at PP 22-24; July 2018 Rehearing Order, 172 FERC ¶ 61,043 at PP 27-28.

[23] December 2018 Rehearing Order, 172 FERC ¶ 61,044 at P 22 ("The Fuel Supply Charge is a component of Mystic's cost-of-service rate and, as a result, is subject to Commission review and approval."); July 2018 Rehearing Order, 172 FERC ¶ 61,043 at P 26 (same).

[24] *But see Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 652 (1973) ("Parties, of course, cannot confer jurisdiction; only Congress can do so.").

[25] 404 F.3d 459, 462 (D.C. Cir. 2005).

[26] *Id.* at 462-63; *see id.* at 463 ("[A]s a statutory entity, the Commission cannot acquire jurisdiction merely by agreement of the parties before it." (quoting *Am. Mail Line Ltd. v. FMC*, 503 F.2d 157, 170 (D.C. Cir. 1974))).

as the Commission "may not bootstrap itself into an area in which it has no jurisdiction,"[27] a private party cannot do that work for the Commission by proposing to put anything and everything into its tariff pursuant to FPA section 205.[28]

11. The Commission's transparent effort to recast the jurisdictional question as being only about whether the proposal is just and reasonable fails for the same reason. It attempts to bypass the jurisdictional prerequisites of the FPA and proceed to the substantive question, which is exactly what *Columbia Gas* prohibits.[29] Given the facts before us, I can appreciate why the Commission is so eager to find a way to skip the jurisdictional analysis, but that desire, understandable as it may be, does not excuse cutting jurisdictional corners.

12. The Commission also contends that using Mystic to bail out Everett is just a run-of-the-mill example of a generator recovering its fuel costs through a cost-of-service rate.[30] That argument overlooks the fact that the typical fuel-cost recovery arrangement is not used as a pretext to bail out the source of that fuel. Here, where the record suggests that, under any reasonable set of assumptions,[31] the Everett LNG facility is the font of the supposed fuel security benefits, the Commission cannot escape the jurisdictional objections by citing to a series of distinct cases in which those objections are not presented.

13. Side-stepping the issue is par for the course in this proceeding. In multiple previous orders, the Commission rested its assertion of jurisdiction on a series of unprincipled theories, none of which could withstand the slightest scrutiny. For example, the crux of the Commission's jurisdictional theory in its July 2018 and December 2018 orders was what it described as an "extremely close relationship" between Everett and Mystic.[32] The Commission, however, never defined that "extremely close relationship" standard or provided a reason to believe that it was anything more than an arbitrary and

---

[27] *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (quoting *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

[28] *Columbia Gas*, 404 F.3d at 462.

[29] *Id.* at 463 ("FERC may neither accept the filing of a tariff provision that covers non-jurisdictional activity . . . nor assert jurisdiction over such an activity.").

[30] December 2018 Rehearing Order, 172 FERC ¶ 61,044 at PP 24-26.

[31] *Supra* PP 3-4.

[32] December 2018 Order, 165 FERC ¶ 61,267, at P 106; July 2018 Order, 164 FERC ¶ 61,022 at P 36.

capricious "know-it-when-we-see-it" test.[33] Given the foreseeable problems that would have arisen in administering such a mushy standard, I am not surprised to see the Commission jettison it in today's orders.[34] Nevertheless, the Commission's failure to settle on a consistent story—not to mention its willingness to unceremoniously abandon both its prior reasoning and its prior directives—underscores the extent to which the Commission's LNG bailout lacks firm legal footing.[35]

14. However you look at it, today's orders support an untenable expansion of the Commission's authority under the FPA. They fail to articulate coherent limits on the Commission's jurisdiction, and the various justifications for the Commission's actions would, if taken seriously, give the FPA the "near-infinite breadth" that the Supreme Court has flatly rejected.[36] As a result, today's orders "constitute[] a clear error of judgment because the logical extension of the bases offered to support [them] lacks a limiting principle."[37] That makes them not only in excess of the Commission's

---

[33] *City of Vernon, Cal. v. FERC*, 845 F.2d 1042, 1048 (D.C. Cir. 1988) (explaining that the Commission's "'know-it-when-we-see-it' approach . . . does not provide a reasoned explanation of an agency decision").

[34] Today's orders do not explain their departure from the theory on which the Commission previously relied. The only discussion of the "extremely close relationship" standard is in a single footnote, in which the Commission "clarifies" that the standard is no longer relevant because Everett and Mystic are now affiliates. December 2018 Rehearing Order, 172 FERC ¶ 61,044 at n.54; July 2018 Rehearing Order, 172 FERC ¶ 61,043 at n.62. Why that affiliate status is relevant to the jurisdictional analysis or how Exelon's common ownership of the two facilities supports the outcome in today's orders is never explained.

[35] In the July 2018 Order, the Commission relied on three tenuously related cases to support its assertion of jurisdiction. July 2018 Order, 164 FERC ¶ 61,022 at P 37 & n.54. Today's orders on rehearing make no mention of those cases—wisely in my view, as they did not support the Commission's conclusions. *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (Glick, Comm'r, dissenting at n.7). As a result, however, the Commission cannot point to even one judicial precedent supporting its theory of jurisdiction.

[36] *EPSA*, 136 S. Ct. at 774.

[37] *United States v. Reynolds*, 710 F.3d 498, 510 (3d Cir. 2013); *see also Stewart v. Azar*, 366 F. Supp. 3d 125, 154 (D.D.C. 2019) (explaining that a statutory interpretation is arbitrary and capricious where it is "not subject to any kind of limiting principle" such that it becomes "utterly unreasonable in its breadth").

jurisdiction, but also arbitrary and capricious in their failure to present a coherent jurisdictional theory in the first place.

* * *

15. Maintaining the reliability of the bulk power system is one of the Commission's chief responsibilities, especially in New England where, on a cold winter day, the "consequences of not being able to generate enough electricity could be catastrophic."[38] But high stakes cannot excuse jurisdictional overreach or arbitrary and capricious agency action. To the contrary, the best way to ensure the region's long-term fuel security and electric reliability is through a durable approach to identifying and resolving reliability needs, not by bending the rules to put in place half-measures and regulatory Band Aids. The winter period covered by Mystic's cost-of-service agreement will not begin for over two years, which provides plenty of time for a court to correct the Commission's jurisdictional misadventures and nudge us back onto a path toward a sustainable approach to ensuring the reliability of ISO New England's electric grid.

For these reasons, I respectfully dissent.

_____

Richard Glick
Commissioner

[38] Statement of Commissioner Glick, Docket No. ER19-1428-001 at P 3 (2019); *ISO New England Inc.*, 164 FERC ¶ 61,003 (Glick, Comm'r, dissenting in part at 1) ("Few, if any, of the Commission's responsibilities are more important than ensuring the reliable operation of the bulk power system. That is certainly true during the winter months in New England when the loss of electricity can have dire consequences.").