172 FERC ¶ 61,044
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. ER18-1639-002

ORDER ON CLARIFICATION, DIRECTING COMPLIANCE, AND ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued July 17, 2020)

1. On December 20, 2018, the Commission accepted, subject to condition, an executed cost-of-service agreement (Mystic Agreement) among Constellation Mystic Power, LLC (Mystic), Exelon Generation Company, LLC (Exelon), and ISO New England Inc. (ISO-NE).[1] The Mystic Agreement 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).

2. Attorney General for the Commonwealth of: Massachusetts (Massachusetts AG); Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, and Connecticut Office of Consumer Counsel (collectively, Connecticut Parties); Eastern New England Consumer-Owned Systems (ENECOS);[2] Environmental Defense Fund (EDF); Mystic; New England States

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[1] *See* Constellation Mystic Power, LLC, FERC FPA Electric Tariff, Cost of Service Agreement, Rate Schedule FERC No. 1, 0.0.0.

[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.

Committee on Electricity (NESCOE); NextEra Energy Resources, LLC (NextEra); and Repsol Energy North America Corp. (Repsol) seek rehearing, clarification, and/or reconsideration of the Commission's December 20, 2018 Order in this proceeding.[3] Pursuant to *Allegheny Defense Project v. FERC*,[4] 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),[5] however, we are modifying the discussion in the December 2018 Order and setting aside the order, in part, as discussed below.[6] In addition, we are granting clarification, in part, and denying clarification, in part, and directing additional compliance.

I. Background

3. To ensure a sufficient supply of capacity, ISO-NE operates a Forward Capacity Market (FCM), which requires resources to offer their supply into an annual Forward Capacity Auction (FCA). Resources that clear the auction receive a Capacity Supply Obligation to be fulfilled for a one-year period, starting three years later. Suppliers awarded Capacity Supply Obligations receive payments in exchange for committing to offer their capacity into ISO-NE's day-ahead and real-time energy markets on a daily basis. A resource that enters the FCM is automatically re-entered into every FCA, unless it affirmatively seeks to remove its capacity from the market permanently, referred to as retirement, or for a single capacity commitment period.

4. An existing resource seeking to retire must submit a Retirement De-list Bid 11 months before the FCA corresponding to the capacity commitment period for which it intends to retire. If ISO-NE determines that a resource is needed because the absence of the capacity would result in a violation of Northeast Power Coordinating Council, Inc. or North American Electric Reliability Corporation (NERC) criteria or other ISO-NE system rules, it may request that the resource stay in service. If the resource owner chooses to remain in service, it may decide to receive compensation in the form of its Commission-accepted Retirement De-List Bid or it may file a cost-of-service rate with

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

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

[5] 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.").

[6] *Allegheny Defense Project*, slip op. at 30.

the Commission under section 205 of the Federal Power Act (FPA).[7] Under the Tariff, once the reliability need is resolved, the resource will retain its Capacity Supply Obligation through the end of the capacity commitment period for which it was retained for reliability and then must retire.

5. Exelon owns the Mystic Generation Station in Boston, including the Mystic 8 and 9 combined-cycle generators, which have a combined winter seasonal capacity rating of just over 1,700 MW. The only fuel source for Mystic 8 and 9 is re-gasified liquefied natural gas (LNG) purchased from the Everett Marine Terminal (Everett), currently owned by Exelon and located adjacent to the Mystic Generation Station. Everett provides Mystic 8 and 9 with a fuel source that is not subject to the region's historical interstate natural gas pipeline constraints.[8] On March 23, 2018, Exelon submitted Retirement De-List Bids for all four Mystic units. Through those bids, Exelon notified ISO-NE of its intention to retire the generators at its Mystic Generation Station when the existing Capacity Supply Obligations associated with the Mystic Generation Station expire on May 31, 2022.[9]

6. In January 2018, ISO-NE published an Operational Fuel-Security Analysis (OFSA),[10] which evaluated the level of operational risk posed to the bulk power system under various fuel-mix scenarios. In the OFSA, which was completed prior to Exelon submitting the Retirement De-List Bids for Mystic 8 and 9, ISO-NE concluded that it would need Mystic 8 and 9 for the winter of 2024-25 to maintain reliability. Subsequent to the OFSA and Exelon's submission of the Mystic 8 and 9 Retirement De-List Bids, ISO-NE conducted an analysis similar to that performed in the OFSA to assess implications to system operations if Mystic 8 and 9 were retired or otherwise unable to operate during the 2022-23 and 2023-24 capacity commitment periods (Mystic Retirement Studies). In the Mystic Retirement Studies, ISO-NE concluded that unacceptable reliability impacts would occur with the loss of Mystic 8 and 9. ISO-NE

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[7] Once ISO-NE has informed a resource that it is needed for reliability, it has 10 days to decide whether to remain in service or retire. The resource must then elect to receive either the Commission-accepted Retirement De-List Bid or a cost-of-service rate within six months of ISO-NE filing the FCA results with the Commission. ISO-NE Tariff, § III.13.2.5.2.5.1(b). As relevant here, Mystic elected to be compensated under a cost-of-service rate.

[8] *See ISO New England Inc.*, 164 FERC ¶ 61,003, at P 4 (2018) (Waiver Order).

[9] *See* December 2018 Order, 165 FERC ¶ 61,267 at P 7.

[10] ISO-NE, *Operational Fuel-Security Analysis* (Jan. 2018), https://iso-ne.com/static-assets/documents/2018/01/20180117_operational_fuel-security_analysis.pdf.

further concluded that, if Mystic 8 and 9 retired, Everett might no longer be financially viable and that, if Everett also retired, the region's risk of operating reserves depletion and load shedding would increase, as would the length and severity of such events.[11]

7. On May 1, 2018, in Docket No. ER18-1509-000, ISO-NE requested waiver of multiple provisions of its Transmission, Markets and Services Tariff (Tariff) to enable it to enter into a cost-of-service contract with Exelon to retain Mystic 8 and 9 in order to meet the region's fuel security needs during the capacity commitment periods associated with FCA 13 and FCA 14 (i.e., June 2022 through May 2024).[12] The Commission rejected the request for waiver, stating that, rather than seeking a waiver of existing Tariff provisions, ISO-NE's request "creates an entire process that is not in the [Tariff] in order to allow for a cost-of service agreement to meet regional fuel security concerns."[13]

8. The Commission found, however, that the OFSA and the Mystic Retirement Studies indicated that the Tariff may be unjust and unreasonable because it contained no mechanism to address fuel security concerns for the region.[14] The Commission instituted a proceeding under FPA section 206,[15] directing ISO-NE to submit interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns and to submit by July 1, 2019 permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns or show cause as to why the Tariff remained just and reasonable absent such revisions.[16]

9. On May 16, 2018, Exelon filed the Mystic Agreement, which provided for cost-of-service compensation for the continued operation of Mystic 8 and 9. Fuel supply for Mystic 8 and 9 is provided by Everett under the terms of the Fuel Supply Agreement, a cost-of-service agreement between Mystic and its affiliate, Constellation LNG, LLC (Constellation LNG) (Everett Agreement). Because Everett is not a jurisdictional entity, the Everett Agreement is not on file with the Commission and is not a jurisdictional rate. Nevertheless, Mystic included the Everett Agreement as an attachment to the Mystic Agreement transmittal letter, along with a cost-of-service study and testimony

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[11] *See* December 2018 Order, 165 FERC ¶ 61,267 at P 8.

[12] *See* Waiver Order, 164 FERC ¶ 61,003 at P 12.

[13] *Id.* P 47.

[14] *Id.* P 49.

[15] 16 U.S.C. § 824e (2018).

[16] Waiver Order, 164 FERC ¶ 61,003 at P 55.

substantiating the components of Everett's full cost-of-service rate to demonstrate the "prudence" of Mystic's fuel costs.[17] On July 13, 2018, the Commission accepted the Mystic Agreement, suspended it for a nominal period to become effective June 1, 2022, as requested, subject to refund and subject to the outcome of the Commission proceedings that ultimately resulted in the development and acceptance of interim Tariff provisions governing fuel security agreements.[18] The Commission noted that "ISO-NE submitted evidence showing that, if Mystic 8 and 9 do not provide capacity during the capacity commitment periods associated with FCA 13 and FCA 14, ISO-NE will not be able to ensure fuel security in the region."[19] However, while the Commission accepted the Mystic Agreement, provided guidance, and made certain findings, it set several contested issues for hearing and settlement judge proceedings.[20] The Commission directed the Presiding Judge to conduct hearing procedures and certify the record to the Commission without issuing an initial decision.[21] On October 12, 2018, the Presiding Judge certified the record to the Commission.[22] Participants then submitted initial briefs and reply briefs to the Commission.

10. In the December 2018 Order, the Commission accepted the Mystic Agreement, subject to condition, to become effective June 1, 2022. The Commission also directed Mystic to submit a further compliance filing, within 60 days and directed additional briefing on the issue of return on equity.

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[17] *See* Mystic Transmittal Letter, Docket No. ER18-1639-000, at 18.

[18] *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (2018) (July 2018 Order). On August 31, 2018, ISO-NE submitted proposed interim Tariff revisions, which the Commission accepted on December 3, 2018 to become effective October 30, 2018, as requested. *ISO New England Inc.*, 165 FERC ¶ 61,202 (2018) (Interim Fuel Security Provisions Order).

[19] July 2018 Order, 164 FERC ¶ 61,022 at P 4 (citing Waiver Order, 164 FERC ¶ 61,003).

[20] *Id.* PP 19-20, 34-38, 41.

[21] *Id.* P 12.

[22] Certification of Record, Docket No. ER18-1639-000 (Oct. 12, 2018).

II. Discussion

A. Procedural Matters

11. Connecticut Parties, ENECOS and Mystic filed answers to one or more requests for rehearing. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2019), prohibits answers to requests for rehearing. Accordingly, we reject the answers filed by Connecticut Parties, ENECOS and Mystic.

B. Jurisdiction over the Everett Agreement

1. December 2018 Order

12. In the July 2018 Order, the Commission accepted the Mystic Agreement but found that the record was insufficient to determine whether the Fuel Supply Charge in the Mystic Agreement was just and reasonable. The Commission rejected arguments that the FPA prohibits any recovery of the Fuel Supply Charge component of the Mystic Agreement.[23] The Commission explained that the Mystic Agreement falls within the Commission's FPA section 201(b) authority because it sets forth the rates, terms, and conditions for the "sale of electric energy at wholesale in interstate commerce,"[24] specifically, the sale of energy, ancillary services, and capacity from Mystic 8 and 9 into ISO-NE markets.[25] The Commission stated that the "costs related to operation of [Everett] are a component of Mystic's proposed cost-of-service rate" and noted that those "costs are reflected in the proposed annual fixed revenue requirement for [Everett] that is included in the [Everett Agreement] that Mystic" submitted in support of the Mystic Agreement.[26]

13. More specifically, the Commission explained that the fact that Everett is an LNG facility does not render costs related to Everett's operation unrecoverable by Mystic.[27] The Commission explained that, under its "general practice regarding cost-of-service

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[23] July 2018 Order, 164 FERC ¶ 61,022 at P 35. The Fuel Supply Charge refers to the Monthly Fuel Supply Cost, as referenced in the Mystic Agreement and defined in the Fuel Supply Agreement, which is referred to here as the Everett Agreement. *See id.* at n.22.

[24] 16 U.S.C. § 824(b).

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

[26] *Id.* P 35 & n.51.

[27] *Id.* P 36.

rates, the Commission reviews, among other items, a generator's purported costs of fuel, including purchase, transportation, handling, and on-site storage."[28] The Commission determined that the "extremely close relationship" between Everett and Mystic 8 and 9 places costs related to the operation of Everett within this general practice.[29] Finally, the Commission clarified that "[w]hether 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."[30]

14. In the December 2018 Order, the Commission reiterated its finding that it could review Mystic's fuel costs, and the Commission found certain aspects of those costs unjust and unreasonable.[31] In describing the Commission's jurisdiction over the Everett Agreement, the Commission again explained that, while the Everett Agreement is not a jurisdictional rate, whether a cost was recoverable *by Mystic* turned on whether that cost was just and reasonable. Applying this logic, in the December 2018 Order, the Commission found that Mystic could not recover certain components of the Everett Agreement but stopped short of directly ordering modifications to the Everett Agreement itself. Specifically, among other things, the Commission directed Mystic to (1) limit Mystic's fuel costs such that only 91% of Everett's costs are recovered from Mystic to reflect the percentage of Everett's sales associated with vapor gas, as opposed to liquid gas, which cannot be used to service Mystic 8 and 9; (2) apply a true-up mechanism to all items in the Mystic Agreement, with the exception of those that are fixed or must be modified under FPA section 205; and (3) make various other modifications to the annual

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[28] *Id.* (citing 18 C.F.R. pt. 101, § 501 (2019)).

[29] *Id.*

[30] *Id.* P 37 (citing *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1296-97 (D.C. Cir. 2004) (the "salient criterion" for recovery of non-jurisdictional litigation costs "is whether the underlying activity being defended in the litigation serves the interests of ratepayers"); *Grand Council of Crees v. FERC*, 198 F.3d 950, 957 (D.C. Cir. 2000) ("The environmental issues posed by construction and operation of energy facilities will invariably be reviewed under other [statutory] provisions [than FPA section 205]; if those reviews (or other forces such as liability risks or firm commitment to environmental quality) cause the utility to incur costs, such costs would feed into the Commission's normal rate calculation."); *Pub. Serv. Comm'n v. FERC*, 589 F.2d 542, 558 (D.C. Cir. 1978) ("We need not consider how much weight the [Federal Power Commission (FPC)] may give to national [offshore] leasing policy in ratemaking because it has not yet discussed the matter at all. We hold only that the FPC cannot abdicate its responsibility to give reasoned consideration simply because leasing involves another department.")).

[31] December 2018 Order, 165 FERC ¶ 61,267 at P 106.

fixed revenue requirement included in Everett's monthly Fuel Supply Charge, which is recovered under the Mystic Agreement.[32] With respect to the Fuel Supply Charge, the Commission found that "it is just and reasonable to include a Fuel Supply Charge that ensures that [Mystic's] sole source of fuel continues operating and recovers the majority of its costs."[33]

2. <u>Rehearing Requests</u>

15. Mystic seeks rehearing of the Commission's determination that certain of Everett's costs should not be recovered. Specifically, Mystic maintains that inquiries into and determinations regarding components of the Fuel Supply Charge are improper and inappropriate.[34] Mystic argues that, if Mystic procured its LNG from a non-affiliate such as the Canaport LNG facility, then those fuel costs would be recoverable in its cost-of-service agreement as long as they were not imprudent. According to Mystic, the fact that Everett is an affiliate does not change the result here because Mystic is entitled to recover the fuel supply contract costs from an affiliated entity provided the costs are just and reasonable. In making this assertion, Mystic argues that the Commission should look solely at whether the contract price exceeds the market price and that, if this "market-test standard" is satisfied, no further inquiry is permitted.[35] Mystic also contends that the individual components of the Everett Agreement are not relevant to the market-test standard. Mystic argues that, if its fuel contract is competitive in the market, looking beyond the market test creates a perverse incentive that would encourage Mystic to procure more expensive fuel from a non-affiliate and therefore raise prices.[36]

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[32] *Id.* PP 133, 177-78, 223.

[33] *Id.* P 107.

[34] Mystic Rehearing Request at 57-63.

[35] *Id.* at 59 (citing *Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 254 (D.C. Cir. 1995) (internal citations omitted) ("Under that [market-test] standard, the Commission gives 'special scrutiny' to fuel supply contracts between a utility and its subsidiary or an affiliated company by comparing the price of the challenged contract to other contracts in the relevant market. This comparison serves as 'an objective test that prevents rate manipulation' by 'provid[ing] a substitute for the arms-length negotiations that provide objectivity and fair dealing in non-affiliate transactions.'")).

[36] *Id.* at 56, 58-61.

16. Mystic contends that there is no dispute that the cost of the Everett Agreement is not only comparable to market alternatives but also the least-cost option.[37] Mystic argues that the recovery of the cost of fuel from Everett is therefore just and reasonable under the Commission's market test for fuel supply contracts from affiliates. Mystic also asserts that, under Commission precedent, inquiries into the components of those costs and a cost of service analysis are improper and inappropriate.[38] Mystic thus maintains that the Commission's inquiries into, and determinations regarding, the recovery of a return on and of Everett's purchase price, the removal from rate base of capital expenses associated with third party sales, the allowance of only 91% of Everett's costs, and the limitation on forward sales to 10% of the associated margin are all irrelevant and erroneous.

17. Massachusetts AG argues that there is no support for the Commission asserting jurisdiction over Everett to allow for recovery of Everett's costs in Mystic's rates. Massachusetts AG contends that the cases cited by the Commission in the July 2018 Order and December 2018 Order do not support the position that the Commission has the authority to allow for recovery of all the costs of operating Everett, regardless of whether it has jurisdiction over those costs. Massachusetts AG asserts that these cases either concern a narrow category of non-jurisdictional expenses that did not harm ratepayers,[39] involved environmental costs of developing and operating a facility that were clearly directly related to rates,[40] or are not relevant to the issue of recovery of what Massachusetts AG describes "extra-jurisdictional" costs.[41]

18. Massachusetts AG asserts that the "extremely close relationship" between Everett and Mystic noted in the July 2018 Order does not support Commission jurisdiction over these costs, adding that the Commission's assertion of jurisdiction here is inconsistent

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[37] In the December 2018 Order, the Commission stated that "[w]e do not contest Mystic's statements that purchasing Everett was the least-cost option for Mystic's fuel supply, and therefore we find that certain costs related to Everett are properly recoverable under the [Mystic] Agreement." December 2018 Order, 165 FERC ¶ 61,267 at P 148.

[38] Mystic Rehearing Request at 7 (citing 18 C.F.R. § 35.14; *Ind. Mun. Power Agency v. FERC*, 56 F.3d 247 at 254; *Pub. Serv. Co. of N.M.*, 17 FERC ¶ 61,123, at 61,252, 61,245-46 (1981) (Opinion No. 133); *U.S. ex. rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

[39] Massachusetts AG Rehearing Request at 12-13 (citing *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263 at 1296-97).

[40] *Id.* at 13 (citing *Grand Council of Crees v. FERC*, 198 F.3d 950 at 957).

[41] *Id.* at 13-14 (citing *Pub. Serv. Comm'n v. FERC*, 589 F.2d 542 at 558).

with past Commission practice and record evidence.[42] Massachusetts AG also argues that, without some limiting principle, asserting Commission authority over Everett's fixed operating costs[43] is the theoretical equivalent to asserting jurisdiction over production inputs such as markets in steel, fuel, and labor that the U.S. Supreme Court found unsupportable in *EPSA*.[44]

19. Massachusetts AG considers LNG fuel terminal operations, including items such as maintenance, capital expenditures, personnel costs, tank congestion costs, and management fees, beyond the scope of what can be considered to affect a rate. Massachusetts AG contends that the Commission has not produced evidence showing that the Everett's fixed operating costs are directly related to Mystic's sale of wholesale electricity and instead the Commission has simply asserted jurisdiction over Everett because of the extremely close relationship between Everett and Mystic.[45]

20. Massachusetts AG also argues that the record does not contain substantial evidence of an extremely close relationship between Mystic and Everett. Massachusetts AG asserts that Everett is closely related to Mystic only geographically, that Everett is a completely separate fuel storage and supply facility that was not designed to provide fuel to Mystic, and that, while Everett is Mystic's sole fuel source, this does not create Commission jurisdiction. Massachusetts AG contends that, if being a sole fuel source created jurisdiction in this case, it would do so in any case where a generator has only one source of fuel, which is not consistent with FPA section 205.[46] Massachusetts AG challenges the Commission's characterization of the allocation of Everett's operating costs as similar to the Commission's routine determination of a generator's costs of fuel, including purchase, transportation, handling, and on-site storage.[47] Massachusetts AG asserts that the Commission's holding that it has jurisdiction over all the costs related to

[42] *Id.* at 5 nn.22-23.

[43] In this order, "fixed operating costs" refers to the "fixed operations and maintenance/return on investment component" of Everett fuel supply costs, as first described by Mystic witness Dr. Heintz. *See* Mystic Transmittal Letter, Docket No.ER18-1639-000, Ex. MYS-006 (Prepared Testimony of Alan C. Heintz; Schedule 3 of the Everett Agreement).

[44] Massachusetts AG Rehearing Request at 8 (citing *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 774 (2016) (*EPSA*)).

[45] *Id.* at 2, 8.

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

[47] *Id.* at 3 n.16 (citing December 2018 Order, 165 FERC ¶ 61,267 at n.297).

the Everett facility means that at least 91%, or perhaps all, of Everett's operating costs contained in the Fuel Supply Charge meet the "connection with wholesale sale" jurisdictional requirement of the FPA and are recoverable in this matter is erroneous.[48]

21. Massachusetts AG also argues that the December 2018 Order does not address the fact that, if a third party owned Everett, Mystic could not include Everett's costs in the Mystic Agreement and, therefore, the Commission is erroneously relying on the fact that Mystic's parent company purchased Everett.[49]

3. Determination

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.[50] While we find that the Commission is properly exercising its authority to review the components of Mystic's proposed Fuel Supply Charge, we disagree with Massachusetts AG that in reviewing Everett's fixed and variable operating costs the Commission is asserting jurisdiction over Everett. Massachusetts AG reiterates here the arguments it made on rehearing of the July 2018 Order, and we address those arguments in our concurrent order addressing those rehearing requests.[51] In brief, Massachusetts AG's arguments on jurisdiction are based on a fundamental misconception—that the Commission is asserting jurisdiction over Everett. This is incorrect. The Commission's jurisdiction in its review of these costs is over Mystic;[52] the Commission did not assert jurisdiction over Everett, nor is jurisdiction over Everett a precondition to the Commission's actions.[53] The Fuel Supply Charge is a component of Mystic's cost-of-service rate and, as a result, is subject to

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[48] *Id.* at 4.

[49] *Id.* at 11.

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

[51] *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,043 at PP 26-31(2020).

[52] For the same reasons, *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 462 (D.C. Cir. 2005) is inapposite. The Commission is not using the Mystic Agreement as a "jurisdictional boot-strap"; rather, as discussed above, the Commission is simply reviewing a component of Mystic's cost-of-service rate. *Id.*

[53] 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 support such assertion with substantial evidence.

Commission review and approval.[54] 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."[55]

23. 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. As noted above, Commission review and approval of charges by affiliated fuel suppliers is an established practice. 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 set by FPA section 201 and, indeed, are "of no legal consequence."[56]

24. For these reasons, we find unconvincing Massachusetts AG's argument that the Commission failed to identify a limiting principle that can determine which Everett costs

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[54] 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."

[55] *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).

[56] *EPSA,* 136 S. Ct. 760 at 776 (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").

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 it affects a jurisdictional rate but rather whether it, as the component of a rate, is just and reasonable. As noted above, the Commission is not proposing to regulate what Everett may do, only what Mystic may recover. The fact that the Commission's regulation of Mystic's cost-of-service rate may have implications for Everett is simply a fact of economic life, not an assertion of Commission jurisdiction. Moreover, Massachusetts AG is incorrect in arguing that the Commission must have jurisdiction over any cost for which it allows recovery.[57] There are many costs, such as 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.

25. With respect to fuel costs, 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 to authorize the Commission to include those costs in Mystic's cost-of-service rate.[58] This argument suffers from two defects.

26. 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 and 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 and 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 and 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

[57] Massachusetts AG Rehearing Request at 11.

[58] *Id.* at 7 (citing *EPSA*, 136 S. Ct. 760 at 774).

facility ownership do not alter the underlying economic realities in the way that Massachusetts AG contends.

27. 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 jurisdictional rates. The Commission has statutory authority to regulate matters that directly affect jurisdictional rates but not those that only indirectly or tangentially affect such rates.[59] But, as explained above, rather than affecting a rate, the Fuel Supply Charge is a component of a cost-of-service rate. Therefore, the issue presented 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.[60] This argument raises matters of cost causation and, consequently, an issue of justness and reasonableness, not an issue of jurisdiction.

28. We also disagree with Massachusetts's AG's argument that the Commission has jurisdiction over the fuel costs included in Mystic's Fuel Supply Charge but not over Everett's fixed operating costs included in that charge.[61] The Fuel Supply Charge, which includes fixed operating costs as well as fuel costs, is a component of a jurisdictional rate. We acknowledge that the Commission's authority to review the Fuel Supply Charge does not automatically render all components of the Fuel Supply Charge recoverable. Rather, these components must be properly justified and allocated, as appropriate, to Mystic. In Section II.E below, we address Mystic's and Massachusetts AG's arguments concerning the proper allocation of Everett's costs to Mystic and find that the Commission properly allocated Everett's costs.

29. While Mystic is correct that, in prior cases, the Commission has used the market-test standard to determine whether affiliate transactions are presumptively just and reasonable, Mystic has not adequately supported its claim that the Everett Agreement passes the market-test standard. First, we disagree with Mystic that Everett's status as an affiliate is not significant to the Commission's consideration of the justness and reasonableness of Mystic's fuel costs. The Commission has traditionally been concerned with ensuring "that wholesale customers' rates do not reflect costs that are the result of

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

[60] Massachusetts AG Rehearing Request at 9.

[61] *Id.* at 7.

undue preferences granted to affiliates or that are imprudent or unreasonable."[62] The Commission has explained that "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."[63] For this reason, the Commission has explained that its FPA section 205 and 206 authority includes authority to disallow recovery in rates of non-utility affiliate costs that the Commission finds to be unjust and unreasonable.[64] The affiliate relationship thus involves a concern not ordinarily raised

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[62] *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 122 FERC ¶ 61,155, *order on reh'g*, Order No. 707-A, 124 FERC ¶ 61,047 (2008).

[63] *TECO Power Servs. Corp.*, 52 FERC ¶ 61,191, at 61,697 n.41, *order on reh'g*, 53 FERC ¶ 61,202 (1990).

[64] 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). Similarly, the Commission has authority to review the books and records of non-jurisdictional affiliates engaged in transactions with affiliate entities in order to prevent cross-subsidization. 16 U.S.C. §§ 825(b), (c) (2018) (granting Commission authority to access and examine books and records of jurisdictional public utilities and affiliated companies); *Empire Dist. Elec. Co.*, 171 FERC ¶ 61,182, at P 38 (2020) (granting waiver of affiliate restrictions and relying, in part, on the Commission's ability to access the public utility's books and records to ensure that costs are allocated appropriately and that no inappropriate cross-subsidization is occurring); *MDU Resources Group, Inc.*, 169 FERC ¶ 61,090, at P 23 (2019) (same).

with non-affiliates and a concomitant need for heightened scrutiny of the specific facts involved in affiliate transactions.

30. Second, while Mystic asserts that the cost of fuel from Everett is comparable to market alternatives, it does not provide support for this assertion; it merely states that this is not disputed. Mystic instead relies on the claim that Everett represents the least-cost alternative. According to Mystic, it is the least-cost alternative because of the substantial expenditures on infrastructure that would be required to bypass Everett. Mystic proceeds to argue on this basis that the Everett Agreement therefore satisfies the market-test standard. But Mystic misreads the Commission precedent upon which it relies.

31. Mystic relies primarily on Opinion No. 133[65] to explain how it complies with the market-test standard. Opinion No. 133 involved coal purchases by Public Service Company of New Mexico from its affiliate, Western Coal Company (Western). The Commission found that the reasonableness of the cost of coal purchased from Western should be determined by comparison to the prices of coal available from non-affiliated suppliers. The Commission stated that ratepayer interests would be best protected by permitting utilities that purchase coal from affiliates to recover no more from their ratepayers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier.[66] Of particular note here is the fact that the coal fields and generator were surrounded by an Indian reservation, and the evidence indicated that a railroad may not be constructed through the reservation. As a result, there appeared to be no economically feasible means of transporting coal from third party suppliers to or from the site in question.[67] Mystic treats this economic impediment as equivalent to the infrastructure investment that would be necessary to obtain fuel from a supplier other than Everett as the basis for demonstrating that its proposal meets the market-test standard.[68] However, in applying the market-test standard, the Commission does not look to an alternative hypothetical procurement approach for comparison. Rather, the market-test standard relies on a comparable situation to assess the reasonableness of the fuel purchase. Indeed, in Opinion No. 133, the Commission stated that the location problem simply was an example of "the difficulties in identifying comparable prices."[69] In order to pass the market-test standard, it is still necessary to identify such prices; the location issue is thus not dispositive proof

[65] Opinion No. 133, 17 FERC ¶ 61,123.

[66] *Id.* at 61,245-46.

[67] *Id.* at 61,246 n.19.

[68] Mystic Rehearing Request at 62-63.

[69] Opinion No. 133, 17 FERC ¶ 61,123 at 61,246.

that the market-test standard has been met. Here, it is still necessary to identify comparable prices, which Mystic has not done. We therefore have inadequate record evidence to support the application of the market-test standard.

32. In previous cases where there was inadequate record evidence to support application of the market-test standard, the Commission has considered a cost-of-service analysis as an alternative for evaluating the justness and reasonableness of affiliate transactions. We are not persuaded that Opinion No. 133 supports Mystic's assertion that "a cost-of-service inquiry into the affiliate's provision of fuel is inappropriate" in all cases.[70] Mystic bases this argument on language in Opinion No. 133 that discusses the difficulties with applying a cost-of-service analysis in that context. Specifically, in that proceeding, the Commission stated that it had little expertise in the coal industry and that fuel prices that appear reasonable under a cost-of-service analysis of affiliate operations may be higher than prices from non-affiliated suppliers because industries that operate under cost-of-service regulation may be less innovative and efficient than those that are subject to a competitive market.[71]

33. In response, we note first that, while the Commission may not have expertise in the coal industry, it does have expertise with respect to certain LNG-related issues.[72] In addition, Mystic has neither provided evidence concerning prices of non-affiliated gas suppliers, nor is there reason here to presume that the effects of market incentives would be particularly informative in the unusual circumstances presented in this proceeding.

34. Because we find that Mystic does not satisfy the market-test standard, we reject Mystic's arguments that no further inquiry into components of the Everett Agreement (e.g., Everett's rate base or fixed operating costs) is permissible. While Mystic has not adequately supported its argument that it passes the market-test standard, Mystic did provide support for a cost-of-service analysis of Everett's costs. We find that the Commission's analysis of Everett's cost of service was not only appropriate but was necessary to ensure just and reasonable rates given Mystic and Everett's affiliate relationship.

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[70] Mystic Rehearing Request at 59.

[71] *Id.* at 59-60 (citing Opinion No. 133, 17 FERC ¶ 61,123 at 61,246).

[72] *See, e.g.*, 15 U.S.C. § 717b(e) (conferring on the Commission the "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal").

C. Clawback Mechanisms for Mystic 8 and 9 and for Everett

1. December 2018 Order

35. In the December 2018 Order, the Commission considered whether the Mystic Agreement should include a clawback mechanism for capital expenditures related to Mystic 8 and 9, under which, if Mystic chose to continue participating in ISO-NE's markets after the termination of the Mystic Agreement, it would be required to refund "specified monies that it received under the [Mystic] Agreement" to ratepayers.[73] The Commission found that the Mystic Agreement was not just and reasonable because it did not contain a clawback provision for capital expenditures related to Mystic 8 and 9 and directed Mystic to revise the Mystic Agreement to include a clawback provision similar to that in the Midcontinent Independent System Operator's (MISO) tariff.[74] The MISO tariff specifies that a resource owner that re-enters the market after its cost-of-service agreement ends is required to "refund to the Transmission Provider with interest at the FERC-approved rate, all costs, less depreciation, for repairs and capital expenditures that were needed to continue operation of the Generation Resource" during the term of the cost-of-service agreement.[75] In the December 2018 Order, the Commission was silent with respect to the applicability of a clawback mechanism to capital expenditures related to Everett.

36. In the December 2018 Order, the Commission directed Mystic to clarify that the clawback mechanism would not apply if ISO-NE chose to extend the Mystic Agreement but would apply if Mystic chose to return to the market when it was no longer retained under a cost-of-service contract.[76] The Commission denied Mystic's request for an exception from the clawback requirement if it sought to re-enter "a market that has been restructured in a way that values Mystic's fuel security benefits."[77] The Commission stated that it had previously found that a clawback mechanism is just and reasonable because it prevents a resource from toggling between cost-of-service and market-based rates and also prevents a resource from recovering the costs of investments and repairs from ratepayers incurred during the term of a cost-of-service contract, when those

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[73] December 2018 Order, 165 FERC ¶ 61,267 at P 197.

[74] *Id.* P 208 (citing Midcontinent Indep. Sys. Operator, Inc., FERC Electric Tariff Module C (53.0.0), § 38.2.7.e(ii)).

[75] *Id.* P 208 n.438 (citing Midcontinent Indep. Sys. Operator, Inc., FERC Electric Tariff Module C (53.0.0), § 38.2.7.e(ii)).

[76] *Id.* P 208.

[77] *Id.* P 210.

investments would benefit the resource for years after the end of the contract.[78] In Opinion No. 556, the Commission stated that it had made clear that "the main intent" of a clawback provision was "to prevent the inequitable recovery from [System Support Resource (SSR)] customers for repairs that provide significant benefits beyond the term of the SSR Agreement should the SSR later return to regular utility service."[79] Thus, the Commission found that a clawback provision was necessary to ensure just and reasonable rates.

37. The Commission rejected Mystic's argument that cost-of-service agreements for transmission purposes and cost-of-service agreements for fuel security purposes merit different clawback treatment.[80] The Commission stated that, at the end of a cost-of-service agreement for transmission purposes, the need for the unit to provide relief for a transmission constraint would be resolved by a transmission upgrade and that, in this case, the need for cost-of-service treatment for Mystic will be resolved by a market-based mechanism for fuel security. The Commission stated that, "[u]nder a market-based mechanism, if Mystic is not the most economic alternative to meet a fuel security need, then Mystic will not be selected to provide capacity and/or fuel security. The clawback mechanism helps place Mystic on similar footing with other resources that would not have benefitted from a cost-of-service agreement in the new market-based mechanism."[81]

2. Rehearing Requests

38. Mystic states that the Commission erred in determining that Mystic should be required to pay a clawback if it remains in or returns to service to participate in a new market for fuel security. Mystic states that, if it participates in a future ISO-NE market construct aimed at improving fuel security, it will be providing the same fuel security service to the same beneficiaries as during the term of the cost-of-service agreement. Mystic contends that a clawback will make Mystic 8 and 9 artificially less competitive, adding that it has no more of a competitive advantage than the other New England assets that at one time recovered some costs through cost-of-service rates.[82] Mystic

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[78] *Id.* (citing *Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 556, 161 FERC ¶ 61,059, at PP 55, 59 (2017) (finding that the main intent of a clawback provision is "to prevent the inequitable recovery" from customers for expenses that provide significant benefits beyond the term of an RMR agreement)).

[79] *Id.* (citing Opinion No. 556, 161 FERC ¶ 61,059 at P 59).

[80] *Id.* P 211.

[81] *Id.* (footnote omitted).

[82] Mystic Rehearing Request at 76-83.

distinguishes its situation from a typical Reliability Must Run (RMR) context, where a resource is retained for reliability under a cost-of-service agreement. Mystic argues that, typically, an RMR resource is replaced by a transmission upgrade and therefore that resource would no longer contribute to reliability if it were allowed to re-enter the market. In contrast, Mystic argues that the Mystic 8 and 9 units will not be similarly situated to traditional RMR units if they are chosen to provide fuel security through ISO-NE's market mechanism because they will still be providing benefits to customers. On this basis, Mystic asserts that it should not be required to return investment payments to customers. It further notes that requiring the Mystic 8 and 9 units to return payments to customers could make it impossible for Mystic 8 and 9 later to be chosen to provide fuel security, and customers might therefore lose their most economical option.[83] Mystic also argues that removal of the clawback provision would place Mystic on a similar footing with other generation in New England, much of which was previously owned by a franchised utility operating at cost-of-service rates, rather than giving Mystic 8 and 9 an unfair advantage over those other generators, and "the actual effect of a Mystic-only clawback is to single out Mystic for unduly discriminatory rate treatment."[84]

39. In addition, NESCOE requests clarification on whether the clawback provision would apply to consumer-funded investments and repairs in connection with both Mystic 8 and 9 *and* Everett. NESCOE asserts that it understands the Commission's order to apply to both Mystic 8 and 9 and Everett to prevent toggling between market-based and cost-of-service rates and to ensure that a resource does not inequitably recover investments and repairs that consumers funded during the cost-of-service period. If the Commission does not grant clarification, NESCOE asks the Commission to grant rehearing and apply the clawback mechanism to Everett as well.[85]

3. <u>Determination</u>

40. As the Commission found in the December 2018 Order, a clawback mechanism is just and reasonable because it will prevent customers from paying for investments and repairs that were made during the term of a cost-of-service contract, if those expenditures continue to benefit the resource after that contract ends and the resource subsequently returns to the market.[86] None of Mystic's arguments regarding its particular situation overcome this finding.

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[83] *Id.* at 79-80.

[84] *Id.* at 81.

[85] NESCOE Request for Clarification at 3-5.

[86] *See* December 2018 Order, 165 FERC ¶ 61,267 at P 210 (citing Opinion No. 556, 161 FERC ¶ 61,059 at PP 55, 59 (the main intent of a clawback provision is

41. Contrary to Mystic's argument, there is no distinction for purposes of a clawback mechanism between a resource that receives an RMR contract and is then replaced by a transmission upgrade, and Mystic 8 and 9, which may be replaced by a long-term fuel security mechanism. Whether a resource retained for fuel security or retained for reliability later re-enters the market, it is appropriate for a resource returning to the market to return to customers capital expenditures less depreciation, which were funded during the term of the agreement and benefit the resource beyond that term.[87] Mystic suggests that, absent a clawback, Mystic 8 and 9 could be the least-cost units offering into a competitive market to provide fuel security and that it would harm customers not to receive the benefits of such least-cost generation. But if a generator in a competitive market can only provide its capacity to customers at lower costs than its competitors because it has previously benefited from direct compensation from those customers under a cost-of-service agreement, the entirety of that transaction does not benefit customers.[88] As to Mystic's assertion that it is being treated differently from other generation in New England because much of that generation was also developed under cost-of-service treatment, this argument ignores the fact that Mystic, unlike all other generators in

"to prevent the inequitable recovery" from customers for expenses that provide significant benefits beyond the term of the RMR agreement)).

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

[88] The Commission has previously noted the possibility that out-of-market reliability arrangements could permit generators to benefit from having obtained payments under cost-based compensation, and then use those benefits to compete unfairly in the market. See *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, at P 21 (2015), *order on reh'g*, 155 FERC ¶ 61,076 (2016), *order on reh'g*, 161 FERC ¶ 61,189 (2017), *order on reh'g*, 163 FERC ¶ 61,047 (2018) ("proposal should also include rules to eliminate, or at least minimize, incentives for a generator needed for reliability to toggle between receiving RMR compensation and market-based compensation for the same units. . . . [T]he tariff provisions should not provide an incentive for a generation resource to re-enter the market after having received accelerated recovery of the cost of additional investments made under its RMR agreement.").

New England, sought to permanently retire from the competitive market in 2018 and specifically sought cost-of-service treatment as a condition of its remaining in service.

42. Finally, Mystic argues that, although the Commission found elsewhere in the December 2018 Order that costs incurred for operation during a particular time period cannot be reallocated beyond that time period,[89] the clawback would do that by reallocating costs incurred solely to provide fuel security during the term of the Mystic Agreement to a period after the term. This assertion is inaccurate. The clawback provision will only come into effect if Mystic 8 and 9 seek to continue to provide service to customers after the term of the Mystic Agreement.[90] If that happens, the costs involved in the clawback provision (i.e., costs incurred to enable Mystic 8 and 9 to stay in service) will, by definition, *not* have been incurred solely to provide service during the term of the Mystic Agreement.

43. We deny the clarification requested by NESCOE and are not persuaded by its alternative request for rehearing. In the December 2018 Order, the Commission did not require a clawback provision for expenditures made to keep the Everett plant in service, even if Everett remains in service after the term of the Mystic Agreement. The clawback mechanism for Everett's capital costs suggested by NESCOE would not apply to payments that Mystic received under a jurisdictional rate, but rather would apply to payments that Everett received under the non-jurisdictional Everett Agreement. As noted above, even though Mystic included the Everett Agreement as an attachment to the Mystic Agreement transmittal, the Everett Agreement is not on file with the Commission and is not a jurisdictional rate because Everett is not a jurisdictional entity. Thus, we find that the Commission lacks jurisdiction to require a clawback, true-up, and/or refund of Everett's costs. Additionally, if Mystic 8 and 9 retire but Everett does not, the Mystic Agreement would be terminated; therefore, there would be no rate within the jurisdiction of the Commission through which to order a refund.

D. Anticompetitive Impacts on the Market

1. December 2018 Order

44. During the hearing, several parties raised concerns about anticompetitive behavior. In the December 2018 Order, the Commission dismissed these concerns as outside of the

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[89] Mystic Rehearing Request at 83 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 149).

[90] As noted above, the tariff does not currently permit a resource that is retained for reliability reasons to re-enter the FCM as an Existing Generation Capacity Resource. Mystic would first need to qualify as a New Generating Capacity Resource.

scope of this proceeding.[91] However, the Commission stated that it intended to monitor the New England natural gas and electricity markets during the term of the Mystic Agreement to address concerns regarding anti-competitive behavior by both Mystic and Everett. Specifically, the Commission noted that it has authority under section 4A of the Natural Gas Act[92] to address market manipulation in the natural gas markets, particularly in connection with Commission-jurisdictional transactions.[93] The Commission acknowledged ISO-NE's and the Internal Market Monitor's (IMM) assurance that they will monitor Mystic and Everett's behavior during the term of the Mystic Agreement.[94] The Commission also noted additional procedural options available to participants to address anticompetitive concerns, including bringing those issues to the attention of the IMM, referring the matter to the Office of Enforcement, or filing a complaint under FPA section 206.[95]

2. Rehearing Requests

45. Several parties request rehearing of the Commission's failure to address the anticompetitive impacts of the Mystic Agreement on the natural gas and electricity markets in the December 2018 Order.[96] EDF points to the potential anticompetitive effects of the cost-of-service arrangement and claims ISO-NE acknowledged that the transaction could flood the market with LNG.[97] EDF and ENECOS disagree that this concern is outside the scope of this proceeding, arguing that the Commission has "a responsibility to deal with anticompetitive practices in the power industry"[98] and has

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[91] December 2018 Order, 165 FERC ¶ 61,267 at P 218.

[92] 15 U.S.C. § 717c-1.

[93] December 2018 Order, 165 FERC ¶ 61,267 at P 219.

[94] *Id.*

[95] *Id.* P 197.

[96] EDF Rehearing Request at 2-4; ENECOS Rehearing Request at 18-22; NextEra Rehearing Request at 7-8, 22-26; Repsol Rehearing Request at 1, 3-7.

[97] EDF Rehearing Request at 3 n.10.

[98] *Id.* at 4 n.12 (citing *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 767 (1973)), 5 n.15 (citing *FPC v. Conway Corp*., 426 U.S. 271, 279 (1976) ("[t]he Commission must arrive at a rate level deemed by it to be just and reasonable, but in doing so it must consider the tendered allegations that the proposed rates are discriminatory and anticompetitive in effect")).

done so in other cases.[99] ENECOS argues that, when the Commission deliberates on whether rates are just and reasonable in the hearing process, it sets for hearing all issues that are relevant to the assessment of the just and reasonable standard.[100] EDF, NextEra, and Repsol argue that allowing the transaction to proceed without considering record evidence of potential anticompetitive effects or imposing meaningful protections against this threat renders the Commission's approval arbitrary and capricious.[101] Repsol adds that (1) the Commission's finding that the general functioning of natural gas and electric markets is beyond the scope of this proceeding falls short of the reasoned decision-making required by the Administrative Procedure Act,[102] (2) the December 2018 Order is inconsistent with Commission precedent and at odds with the Commission's obligations under the FPA, and (3) the Commission should grant rehearing and either reject the Mystic Agreement outright or require modifications that address intervenors' market impact concerns.[103]

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[99] *Id.* at 4 n.13 (citing *Transcontinental Gas Pipe Line Corp*., 60 FERC ¶ 62,153, at 63,378 (1992) ("Transactions between affiliates create special concerns due to the fact that these are not arms-length transactions"); *Commonwealth Atlantic Ltd. P'ship*, 51 FERC ¶ 61,368, at 62,249 (1990) (comparing market power to self-dealing and requiring "updated evidence to substantiate the continued absence of self-dealing and reciprocal dealing if Commonwealth seeks changes to the rate that we are accepting today"). EDF adds that protections against these types of threats are particularly acute in a cost of service context, where Mystic 8 and 9 will be operating in a manner akin to a franchised public utility with captive customers. Order No. 707, 122 FERC ¶ 61,155 at P 4 (explaining "that a franchised public utility and an affiliate may be able to transact in ways that transfer benefits from the captive customers of the franchised public utility to the affiliate and its shareholders")); ENECOS Rehearing Request at 18-19 (citing *Trans-Allegheny Interstate Line Co.*, 121 FERC ¶ 61,009, at P 9 & n. 13 (2007); *accord: Long Island Lighting Co.*, 83 FERC ¶ 61,076, at 61,378 (1998); *Cincinnati Gas & Elec. Co.*, 59 FERC ¶ 61,072, at 61, 291 (1992)).

[100] ENECOS Rehearing Request at 18-19.

[101] EDF Rehearing Request at 3-4; NextEra Rehearing Request at 7-8, 22-26; Repsol Rehearing Request at 1, 3-4.

[102] Repsol Rehearing Request at 4.

[103] *Id.* at 1, 6 (citing *Devon Power LLC*, 103 FERC ¶ 61,082 (2003) (assessing reliability-must-run agreements to make a just and reasonableness determination when intervenors had raised concerns about the potential price suppressive effect of the agreements), *order on reh'g*, 104 FERC ¶ 61,123 (2003) (limiting the recovery to

46. Regarding impacts to the markets, ENECOS and Repsol argue that the proposed Mystic Agreement and related provisions of the Everett Agreement will allow Exelon to exercise market power in relevant natural gas and electricity markets as a pivotal supplier of natural gas during a period of pipeline constraint in New England due to high heating demand.[104] ENECOS contends that the Everett Agreement, winter penalties, and plans to procure gas for the coldest winter in 50 years will at times require Exelon to withhold natural gas from the market when pipelines are constrained, leading to distortions in rates.

47. Similarly, NextEra and Repsol assert that the Mystic Agreement and Everett Agreement create incentives for Exelon to over-procure, hoard, and then dump excess LNG, resulting in severe market distortions, including of market signals for other potential sources of gas supply and storage, suppressed energy clearing prices, and incentives for other capacity resources to retire or seek cost-of-service agreements.[105] NextEra states that the Mystic Agreement provides for no meaningful review of Exelon's LNG procurement, resale, and associated potential gaming.[106] According to NextEra, the Everett Agreement allows Everett to procure and resell LNG based on manipulated projected profits on paper of which it would receive a substantial share even if the resales ultimately result in an actual loss that would be borne by ratepayers under the Mystic Agreement rather than by Exelon. ENECOS states that the Commission should require Exelon to remove the "Fuel Opportunity Cost" provision from the Mystic Agreement so that the customers who ultimately bear the costs of the Mystic Agreement are not negatively impacted by the market power in New England natural gas and electricity markets.[107]

48. NextEra and Repsol maintain that the Commission did not address how specific provisions in the Everett Agreement would incent anti-competitive behavior and its

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forward maintenance costs and requiring ISO-NE to modify its market power mitigation mechanism to address price impacts)).

[104] ENECOS Rehearing Request at 18-21; Repsol Rehearing Request at 4.

[105] NextEra Rehearing Request at 11-13; Repsol Rehearing Request at 4-5.

[106] NextEra Rehearing Request at 2.

[107] According to ENECOS, the Fuel Opportunity Cost provision of the Mystic Agreement allows Exelon to receive an opportunity cost that is either the difference between the Algonquin Citygate fuel index price and the world LNG index or the opportunity cost associated with a limited supply of fuel. ENECOS Rehearing Request at 21-22.

effects on competitive markets.[108] NextEra maintains that the Commission's failure to consider the Everett Agreement's effects on competitive markets is arbitrary and capricious and premised upon a misstatement of law; is inconsistent with Commission precedent and an abdication of the Commission's obligation to determine whether terms are just and reasonable; and is particularly damaging because the Everett Agreement's suppressive effect on the markets exacerbates ISO-NE's fuel security issues.[109] NextEra notes that in other RMR proceedings the Commission considers the effect that such agreements have on competitive markets.[110]

49. ENECOS and Repsol maintain that the Commission's identification of procedural options that are available to participants to address market power issues if they come to fruition does not justify its failure to proactively address the problems identified.[111] Repsol states that the third option—to file a complaint—is not a good one given that the relief offered by FPA section 206 is prospective-only in nature and the harm will already have occurred.

50. In addition, NextEra argues that ill-defined terms and Exelon's *ex ante* calculation of hypothetical profits would increase the likelihood of manipulation, resulting in improper profits, excessive gas imports, and anti-competitive price suppression in the gas and electric markets resulting from resales at a loss borne by ratepayers rather than Exelon.[112] More specifically, while NextEra does not take issue with the sliding-scale incentive adopted by the Commission, NextEra asserts that the Commission's finding that profit can be awarded based on an *ex ante* calculation of forward margin at the time of the transaction is unjust and unreasonable because these calculations are open to gaming.[113] NextEra states that the Commission's acknowledgement of the risk of gaming and then its failure to require any modification of the contracts is legally erroneous.[114]

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[108] NextEra Rehearing Request at 2-3, 11; Repsol Rehearing Request at 4-5 (citing Ex. REP-001 at 13:20-17:1).

[109] NextEra Rehearing Request at 2-3, 11-15.

[110] *Id.* at 16 (citing *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077, at P 31, *reh'g denied*, 113 FERC ¶ 61,311 (2005), *reh'g denied*, 114 FERC ¶ 61,265 (2006)).

[111] ENECOS Rehearing Request at 21-22; Repsol Rehearing Request at 1, 7.

[112] NextEra Rehearing Request at 7.

[113] *Id.* at 23-24.

[114] *Id.* at 26.

3. Determination

51. Based on our evaluation of the anti-competitive arguments raised in the rehearing requests, we continue to reach the same result that the Commission reached in the December 2018 Order. We agree with NextEra that, in *Bridgeport*, the Commission stated that RMR contracts are "a tool of last resort" that may be "contrary to the intent of the competitive marketplace."[115] However, the facts here are distinguishable from *Bridgeport*. Specifically, in *Bridgeport*, the Commission was considering whether RMR treatment was necessary for the generator to remain available to ISO-NE.[116] Here, the Commission has already determined the need to retain Mystic for reliability reasons in a separate proceeding.[117] Therefore, we reiterate that concerns related to anticompetitive behavior and the general functioning of natural gas and electric markets are beyond the scope of this proceeding, which is limited to whether the rate, terms, and conditions of the Mystic Agreement are just and reasonable.[118]

52. For similar reasons, we find that the issues raised on rehearing about market manipulation and the general functioning of natural gas and electric markets also are beyond the scope of this proceeding. Thus, the Commission did not err in failing to take into account potential market manipulation as it relates to the Mystic Agreement because sufficient protections exist to protect against this behavior. We reiterate that the Commission will continue to monitor, as always, the New England natural gas and electricity markets during the term of the Mystic Agreement for anti-competitive behavior and market manipulation.[119] Further, as explained in the December 2018 Order, in the event any such manipulation occurs, the Commission has authority under section 4A of the Natural Gas Act to address market manipulation in the natural gas markets, particularly in connection with Commission-jurisdictional transactions.[120] We note that ISO-NE and the IMM have also committed to monitor the markets for anti-competitive

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[115] *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077 at P 31.

[116] *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243, at P 59 (2007).

[117] As the Commission has previously noted, "ISO-NE submitted evidence showing that, if Mystic 8 and 9 do not provide capacity during the capacity commitment periods associated with FCA 13 and FCA 14, ISO-NE will not be able to ensure fuel security in the region." July 2018 Order, 164 FERC ¶ 61,022 at P 4 (citing Waiver Order, 164 FERC ¶ 61,003).

[118] December 2018 Order, 165 FERC ¶ 61,267 at P 218.

[119] *Id.* P 219.

[120] *Id.* (citing Section 4A of the Natural Gas Act, 15 U.S.C. § 717c-1).

behavior during the term of the Mystic Agreement.[121] NextEra's assertion that the Commission's finding that profit can be awarded based on an *ex ante* calculation of forward margin at the time of the transaction creates opportunities for gaming is speculative. The Commission has the authority to investigate anti-competitive activity and market manipulation when those actions occur and take steps to deter any future occurrence of such behavior.[122]

E. Everett's Fixed Operating Costs and Third-Party Sales Incentive

1. December 2018 Order

53. According to Mystic, prior to filing the Mystic Agreement, ISO-NE expressed a concern to Mystic that allowing Mystic to recover 100% of Everett's fixed operating costs would disincentivize Everett from making sales to third parties.[123] Mystic states that it agreed to ISO-NE's request to remedy this disincentive by including a revenue crediting mechanism in the Everett Agreement that would allow Everett to keep 50% of the margins on third party sales rather than crediting them back to Mystic. Per the Everett Agreement, Mystic would recover from ratepayers 100% of Everett's fixed operating costs, but, to the extent Everett made sales to customers other than Mystic, Everett would be allowed to keep half of the revenue of those sales rather than crediting all of that revenue back to ratepayers.[124]

54. During hearing and settlement procedures, multiple parties opposed this arrangement and argued for an alternative. Most parties argued that Mystic should only be allowed to recover that portion of Everett's fixed operating costs that directly benefit Mystic and that, to the extent Everett makes sales to third parties, Everett should be allowed to keep all of those revenues. These parties proposed a range between 25% and

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[121] *Id.*

[122] *See Availability of E-Tag Info. to Comm'n Staff,* Order No. 771, 141 FERC ¶ 61,235, at P 15 (2012) (noting that under the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), the Commission has "authority over the prohibition of market manipulation in connection with the purchase or sale of electric energy and transmission" subject to the Commission's jurisdiction in FPA section 222, 16 U.S.C. 824(f)).

[123] Mystic Transmittal Letter, Docket No. ER18-1639-000 at 20.

[124] *Id.*; December 2018 Order, 165 FERC ¶ 61,267 at P 113.

91% of Everett's fixed operating costs that they asserted were attributable to serving Mystic.[125]

55. In the December 2018 Order, the Commission adopted a recommendation offered by Trial Staff, which allowed Mystic to recover 91% of Everett's fixed operating costs.[126] Trial Staff had argued that 9% of Everett's fixed operating costs are associated with LNG sales, none of which are delivered to Mystic, which only accepts vapor natural gas from Everett.[127] Unlike other parties who argued that Everett should be allowed to keep 100% of the revenue associated with sales to third parties, Trial Staff had recommended a sliding scale revenue sharing mechanism, whereby the more MMBtus of natural gas that were sold to third parties, the more third party sales revenue Everett would be allowed to keep.[128] The Commission agreed with Trial Staff and directed Mystic to amend the Mystic Agreement to provide that it will recover 91% of Everett's fixed operating costs and use Trial Staff's recommended sliding scale mechanism.[129]

2. Rehearing Requests

56. Mystic argues that the Commission appropriately found that Everett was the least-cost option but erroneously failed to apply that fact to reach the required conclusion that Mystic is entitled to recover the entirety of Everett's fuel supply costs.[130] As discussed above, Mystic asserts that, if it procured its LNG from a non-affiliate (e.g., the Canaport LNG facility), those fuel costs would be recoverable in its cost of service as long as they were not imprudent, and the fact that Everett is an affiliate does not change the result in this case.[131] Therefore, Mystic states that the recovery of the cost of fuel from Everett is just and reasonable under the Commission's market test for fuel supply contracts from affiliates.

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[125] These percentages are based on historical sales and vary depending on how cost causation principles were applied.

[126] December 2018 Order, 165 FERC ¶ 61,267 at P 133.

[127] *Id.*

[128] *Id.* P 120.

[129] *Id.* P 133.

[130] Mystic Rehearing Request at 7, 57-63 (citing Mystic Initial Brief at 136-142; Exh. No. MYS-0053 at 25).

[131] *Id.* at 58 (citing 18 C.F.R. § 35.14 (a)(2)).

57. Connecticut Parties, ENECOS, Massachusetts AG, and NextEra request rehearing of the Commission's decision to allow Mystic to recover of 91% of Everett's fixed operating costs because it was not supported by substantial evidence.[132] Massachusetts AG acknowledges that, under FPA section 205, the Commission has jurisdiction to allow a power plant to recover its fuel costs, which are directly related to the sale of wholesale electricity, but disagrees with the Commission's exercise of jurisdiction over a fuel facility's operating and maintenance costs and costs related to transactions with third parties.[133] Massachusetts AG argues that the operating and maintenance costs may not be recovered under the contract when a third party owns the fuel facility and should not be recoverable when the facility is affiliated with Mystic.[134] Massachusetts AG also challenges the Commission's assertion that "there is no bar to the Commission's exercising jurisdiction to allow Mystic's recovery of 100% of Everett's fixed costs," because Everett "is fully integrated with Mystic 8 and 9, and each depends on the other to operate economically."[135]

58. Massachusetts AG and NextEra claim that the FPA does not grant the Commission authority over LNG sales to third parties and that the Commission's adoption of Trial Staff's cost allocation methodology is arbitrary and capricious and unsupported by the FPA. NextEra does not oppose any recovery of Everett's costs; rather, it opposes recovery of those costs associated with the non-jurisdictional sales of LNG to third parties, which according to NextEra are unrelated to Mystic's own fuel supply costs. While NextEra states that the jurisdictional premise for Everett cost recovery is that, without Everett, Mystic would have no fuel, NextEra asserts that Mystic offered no evidence of the amount of cost recovery that Everett would require to stay in business and, thus, failed to meet its burden on this issue.[136]

59. Connecticut Parties and NextEra argue that, while the Commission acknowledged that Mystic cannot use Everett's liquid delivery facilities, the Commission erred by ignoring Everett facilities that Mystic can use only partially or, in some cases, not at

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[132] Connecticut Parties Rehearing Request at 2; ENECOS Rehearing Request at 15-17; Massachusetts AG Rehearing Request at 2, 14-16; NextEra Rehearing Request at 3-4, 16-20.

[133] Massachusetts AG Rehearing Request at 7, 14-15.

[134] *Id.* at 11.

[135] *Id.* at 3 nn.14-15 (citing December 2018 Order, 165 FERC ¶ 61,267 at PP 106, 133).

[136] *Id.* at 7; NextEra Rehearing Request at 3-6, 16-20.

all.[137] Specifically, Connecticut Parties claim that Mystic can receive gas only from Everett's high pressure vaporization systems and does not use other piping systems that exclusively serve other customers. Thus, Connecticut Parties argue that the Commission's allocation of 91% of Everett costs as Mystic fuel costs violates cost causation principles because it does not accurately reflect an appropriate split of costs, relies on historical average sales volumes, and incorrectly assigns the cost of all vapor sales to Mystic.[138] NextEra contends that any allocation made by the Commission should be based on the ratio between Everett's equipment that is dedicated to serving Mystic specifically and a portion of those other fixed costs that can be attributed to meeting Mystic's fuel requirements, as compared to those serving other unaffiliated entities.

60. NextEra argues that the December 2018 Order is flawed because it does not identify the factors upon which the Commission based its decision (e.g., why Trial Staff's proposal was chosen over others put forth by intervenors).[139] NextEra adds that the cost allocation associated with Everett, in which Exelon does not bear the risk of making unprofitable third-party sales, will result in uneconomic transactions that harm competitive markets.[140] Similarly, Massachusetts AG notes that the Commission relied on Trial Staff's reasoning that "Everett should be allowed to recover 91% of its fixed [operating] costs, the percentage associated with non-liquid deliveries, the remainder being liquid natural gas sales via Everett's LNG truck refueling station, which do not benefit Mystic 8 and 9."[141] Massachusetts AG argues, however, that Mystic cannot use, and New England ratepayers should not pay for, more than 39.16% of the costs of the Everett facility because Mystic 8 and 9 are capable of using only 39.16% of Everett's total capability under even the most extreme circumstances. Massachusetts AG argues that the Commission is violating the cost causation principle, which provides that customers "should be charged rates that fairly track the costs for which they are responsible."[142]

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[137] Connecticut Parties Rehearing Request at 3; NextEra Rehearing Request at 20-22.

[138] Connecticut Parties Rehearing Request at 3-8.

[139] NextEra Rehearing Request at 3-7, 20-22.

[140] *Id.* at 5-6.

[141] Massachusetts AG Rehearing Request at 15 n.62 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 117 (citing Trial Staff Initial Br. at 76-78)).

[142] *Id.* at 16 n.66 (citing *Pa. Elec. Co. v. FERC*, 11 F.3d 207, 211 (D.C. Cir. 1993)).

61. Similarly, ENECOS states that this allocation rests on an implicit, but unsupported, assumption that Exelon, as Everett's owner, will cease selling vaporized natural gas to third-party customers. According to ENECOS, historical data and projected estimates of Everett's third-party sales shows that the assumption implicit in allocation of Everett's fixed costs is counterfactual, which makes the allocation unjust and unreasonable, contrary to cost causation principles, and unsupported by substantial evidence.[143]

62. Connecticut Parties argue that, by allowing Exelon to keep some of the margin that should otherwise be credited to ratepayers, the Commission over-compensates Exelon and subjects ratepayers to excessive charges.[144] Connecticut Parties contend that, because Exelon will keep only some margin on only some sales, it will have less incentive to make third party sales than would be the case if costs were properly allocated and Exelon could keep all the margins on its third party sales.[145] Connecticut Parties add that this arrangement will undermine fuel security and that the allocation of almost all Everett costs to Mystic will largely eliminate Everett's need to make third party sales to cover its costs.[146]

3. <u>Determination</u>

63. As discussed in Section II.B above, we disagree with Mystic that it should be allowed to recover all of Everett's fixed operating costs under the terms of the Mystic Agreement because we find that the Everett Agreement does not satisfy the market-test standard.

64. Turning, then, to the question of how much of Everett's fixed operating costs Mystic should be allowed to recover, we apply cost causation principles and consider the percentage of those costs that are attributable to serving Mystic.[147] While Everett's sales of liquid gas from its trucking station are exclusively used to serve third parties, Everett's

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[143] ENECOS Rehearing Request at 15-17.

[144] Connecticut Parties Rehearing Request at 9.

[145] *Id.*

[146] *Id.* at 12.

[147] *N. States Power Co.*, 64 FERC ¶ 61,324, 63,379 (1993) ("The fundamental theory of Commission ratemaking is that costs should be recovered in the rates of those customers who utilize the facilities and thus cause the costs to be incurred."); *see also Pa. Elec. Co. v. FERC*, 11 F.3d 207 at 211 ("utility customers should normally be charged rates that fairly track the costs for which they are responsible.").

sales of vapor gas primarily benefit Mystic. We acknowledge that some vapor sales are made to third parties, but those third-party sales benefit Mystic by helping to manage Everett's tank.[148] Those benefits are not trivial.[149] Because Everett is Mystic's sole source of fuel, we find it is just and reasonable to allow Mystic to recover all of the fixed operating costs associated with providing vapor gas, which is roughly 91% of Everett's fixed operating costs.

65. Commenters' argument that Everett should recover only 39.16% of its fixed operating costs, not 91%, is based on a misconception of what fixed costs include. The Commission has stated that "fixed costs are considered to be those which do not vary with the amount of energy produced."[150] Massachusetts AG maintains that Everett should recover only 39.16% of its fixed operating costs because Mystic is capable of using only 39.16% of Everett's total capability. Assuming that this statement of Mystic's use of capacity is correct, Massachusetts AG's argument implies that, if Mystic were modified to use additional capacity, it should be responsible for a greater amount of the fixed operating costs. However, as noted above, fixed costs do not vary with the amount of energy produced; consequently, fixed operating cost expenditures do not vary with demand.

66. This determination of the proper cost allocation based on cost-causation principles obviates the need for the sliding-scale revenue crediting incentive mechanism recommended by Trial Staff and adopted by the Commission in the December 2018 Order. Moreover, directing this incentive mechanism, which focuses directly on Everett's conduct rather than Mystic's, may exceed the scope of the Commission's authority, as discussed above. We therefore set aside the December 2018 Order in part and no longer require that the Mystic Agreement include the sliding scale mechanism or any other revenue crediting mechanism.

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[148] *See* Mystic Initial Br. at 116-118.

[149] In *Illinois Commerce Commission v. FERC*, the court explained that the Commission may allocate costs if it "has an articulable and plausible reason to believe that the benefits are at least roughly commensurate with" the assigned costs. *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, at 477 (7th Cir. 2009). However, the court held that Commission is "not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members." *Id.* at 476.

[150] *Southern Co. Servs., Inc.*, 61 FERC ¶ 61,075, at 61,307 (1992), *reh'g denied*, 64 FERC ¶ 61,033 (1993).

F. Tank Congestion Charge

1. December 2018 Order

67. As the Commission explained in the December 2018 Order, Everett schedules LNG shipments months in advance in order to lower its costs. Everett's tank is approximately the same size as a standard LNG shipment. Therefore, in order to accept a shipment, Everett must sometimes sell gas at discounted rates, or burn gas by selling it to Mystic at a loss in order to empty the tank.[151] Sales to third parties during the term of the Mystic Agreement will increase the demand for LNG from Everett, which in turn would increase the number of scheduled shipments and the risk of potential losses as a result of tank management.[152]

68. Under the Everett Agreement, as proposed by Mystic, ratepayers would receive a share of the profits earned from third-party sales in the form of a revenue crediting mechanism.[153] ISO-NE argued that, because ratepayers receive a percentage of the revenue from third-party sales, they should also take on a share of the risk of additional tank congestion costs due to the signing of third-party contracts.[154] Under the initial Everett Agreement, ISO-NE and Mystic agreed to negotiate an appropriate methodology for calculating tank congestion charges. These charges would reduce the margin that would be credited back to ratepayers.[155]

69. Parties requested that the Commission require Mystic to file the tank congestion charge methodology and receive Commission approval as part of an FPA section 205 proceeding. In the December 2018 Order, the Commission denied this request, finding that the Everett Agreement, including any provisions related to the tank congestion charge, is not a rate on file with the Commission.[156] The Commission also found that the prudency of these charges was more appropriately handled as part of the true-up.[157]

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[151] December 2018 Order, 165 FERC ¶ 61,267 at PP 155-56.

[152] *Id.* P 160.

[153] *See* Section II.E, above.

[154] December 2018 Order, 165 FERC ¶ 61,267 at P 160.

[155] *Id.* P 161.

[156] *Id.* P 163.

[157] *Id.* P 164.

2. Rehearing Requests

70. Mystic states that the Commission erred if it intended to impose a new, heightened prudence review of Mystic's costs in the true-up with a changed and unreasonable burden of proof. Mystic notes that, in connection with tank congestion charges for third-party sales, the Commission stated that "the prudency of these individual sales is more appropriately reviewed during the true-up process, including whether Mystic reasonably recovered the variable costs of third-party natural gas sales in accordance with the [Mystic] Agreement."[158] Mystic seeks clarification that the Commission's intent is limited to the expectation that ISO-NE will audit and ensure that the tank congestion charge is properly calculated. Mystic argues that such a reading of the Commission's directive would allow the type of after-the-fact second-guessing of fuel supply practices that the Commission rejected elsewhere in the December 2018 Order.[159]

71. On rehearing, EDF disputes the Commission's findings that the Mystic Agreement adequately addresses tank management and congestion costs and that the Tank Congestion Charge does not need to be filed with the Commission.[160] EDF states that Schedule A of the Everett Agreement sets forth a model that will be used to calculate the expected tank congestion costs in conceptual terms only. EDF argues, therefore, that tank congestions costs are calculated pursuant to a methodology that is not yet determined. EDF asserts that the Commission cannot conclude that the Mystic Agreement adequately addresses tank management and congestion costs because the manner by which such charges will be determined has not been finalized.[161]

72. EDF also asserts that the Commission improperly ruled that the Tank Congestion Charge does not need to be filed with the Commission because the Everett Agreement, including any provisions related to the tank congestion charge, is not a rate on file with the Commission.[162] EDF argues that, under FPA section 205, the Commission has the authority to regulate "all rates and charges . . . in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission" to ensure such rates or charges are just and reasonable. EDF contends that, therefore, public utilities such as Mystic are required to file with the Commission "schedules showing all rates and charges

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[158] Mystic Rehearing Request at 8-9, 96 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 164).

[159] *Id.* at 95-96.

[160] EDF Rehearing Request at 2-3.

[161] *Id.* at 7.

[162] *Id.* at 8 n.31 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 163).

for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."[163] EDF asserts that, generally, the Commission has determined that a contract is related to or affects rates when it contains "a charge connected to jurisdictional services," such as the Tank Congestion Charge.[164] EDF argues that the Tank Congestion Charge is central to a determination of the jurisdictional rates customers will ultimately pay. EDF contends that, even assuming *arguendo* that the Commission does not have jurisdiction over the Everett Agreement, the Commission should require ISO-NE and Mystic to file the Tank Congestion Charge methodology pursuant to FPA section 205 of the FPA, consistent with Commission precedent.[165]

3. **Determination**

73. We deny Mystic's request for clarification as moot. As discussed in Section II.E above, we no longer find that a revenue crediting mechanism for third party sales is necessary to ensure that the Fuel Supply Charge is just and reasonable. The Tank Congestion Charge was intended to share the financial risk of managing Everett's tank level among third parties and ISO-NE ratepayers. Because we no longer require revenue from third-party sales to be credited back to ISO-NE ratepayers, the Tank Congestion Charge will no longer be applied to revenues flowing back to Mystic. Therefore, the prudence review of whether the Tank Congestion Charge was properly applied to which Mystic requests clarification is no longer required. For the same reason, it is not

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[163] *Id.* at 8-9 nn.33-34 (citing 16 U.S.C. §§ 824d(a) and (c)).

[164] *Id.* at 9 n.35 (citing *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,991, *order on reh'g*, 65 FERC ¶ 61,081 (1993)).

[165] *Id.* at 9 n.38 (citing *Central and Southwest Servs., Inc.*, 48 FERC ¶ 61,197, at 61,733-34, *reh'g denied*, 49 FERC ¶ 61,118 (1989) (despite having no authority to fix planning reserve margins, directing the utility to file its planning reserve because the planning reserve level is central to a determination of certain inter-company payments, and therefore, the rates customers pay); *American Municipal Power-Ohio, Inc. v. Ohio Edison Co.*, 57 FERC ¶ 61,358, at 62,161 (1991), *reh'g denied*, 58 FERC ¶ 61,182 (1992) (requiring the filing of an agreement providing for the customer payment of contribution in aid of construction, even though construction activity itself is outside the scope of the Commission's jurisdiction); *N. Natural Gas Co. v. FERC*, 929 F.2d 1261, 1270 (8th Cir. 1991) (broadly construing the Commission's authority to require the filing of rates for certain services, even when the physical act of providing the services is not jurisdictional, when the rates are "in connection with" the provision of jurisdictional service)).

necessary for Mystic to file of the methodology for the Tank Congestion Charge, as EDF requests.

G. True-up/Reporting Requirements

1. December 2018 Order

74. In the December 2018 Order, the Commission accepted in part Mystic's proposed true-up mechanism and clarified that the true-up mechanism should apply to all costs in the Mystic Agreement with the exception of items that are fixed or must be modified through an FPA section 205 filing (i.e., return on equity).[166] The Commission found that Mystic's proposal to true-up only a narrow subset of costs would produce an unreasonable result and lack transparency.[167] Furthermore, the Commission disagreed with Mystic's argument that the Commission should limit the true-up to Mystic's proposed narrow set of costs because a true-up of all items would lead to additional litigation. The Commission noted that Mystic's true-up protocols already provide both informal and formal dispute resolution measures.[168]

75. The Commission disagreed with Mystic's argument that the true-up does not require revenues to be considered along with costs. The Commission stated that, if Mystic were to only true-up its costs and ignore revenues already recovered from customers, then additional revenue provided by ratepayers to Mystic could exceed Mystic's actual revenue requirement and the actual resulting rate would likely be unjust and unreasonable.[169] Therefore, the Commission directed Mystic to include revenues in the true-up process to ensure both that the rates ultimately charged by Mystic are just and reasonable and that Mystic recovers its prudently incurred costs as required by the July 2018 Order.[170]

76. In addition, the Commission directed Mystic to implement two revisions to the true-up mechanism to provide greater information sharing and to require Mystic to demonstrate that it is not delaying necessary capital projects to recover more of the

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[166] December 2018 Order, 165 FERC ¶ 61,267 at P 174.

[167] *Id.* P 177.

[168] *Id.* P 178.

[169] *Id.* P 179.

[170] *Id.* (citing July 2018 Order, 164 FERC ¶ 61,022 at P 19).

costs of those projects from ratepayers under the Mystic Agreement. Specifically, the Commission required Mystic to:

> (1) provide information to interested parties and allow interested parties to seek information regarding the timing of a capital project's completion; and
>
> (2) demonstrate that neither of the following occurred: (a) the capital expenditure project was scheduled before the term of the [Mystic] Agreement but delayed until the term of the [Mystic] Agreement, or (b) the project is scheduled to be completed during the term of the [Mystic] Agreement but should have been completed prior to the term of the [Mystic] Agreement.[171]

77. The Commission did not require Mystic to undergo additional audit processes or procedures because the Commission found sufficient ISO-NE's commitment that it will audit and verify the accuracy of all reports, statements, invoices, charges, or computations under the Mystic Agreement. However, the Commission directed Mystic to expand section 6.2 of the Mystic Agreement to allow ISO-NE access to all information in Everett's possession to allow ISO-NE to more accurately perform its audit.[172] The Commission did not require ISO-NE to make audited information public or send the reports to state public utility commissions because ISO-NE explained that public access to such information is already possible.[173]

78. The Commission stated that this determination is consistent with *Mirant Kendall, LLC*, in which the Commission denied requests by a protestor who argued that an RMR unit should provide additional cost information to the public and that an individual protestor should have the right to audit. The Commission explained that, in *Mirant Kendall, LLC*, the Commission denied the requests and found that the agreement provided a sufficient safeguard because it allowed ISO-NE "to audit and verify reports,

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[171] *Id.* P 180.

[172] *Id.* P 192.

[173] *Id.* PP 193-194. Section 6.2 currently includes rights for ISO-NE to review: (1) Exelon's copies of any contracts between Exelon or Everett and third parties for the sale of fuel from the Everett during the term of the Mystic Agreement and any contracts between Exelon/Everett and third parties for the supply of fuel to the Everett during the Mystic Agreement; (2) copies of any affiliate fuel supply agreements involving Everett in effect during the Mystic Agreement; and (3) documentation of the margin earned on any third party sales of LNG re-gasified through Everett for purposes of verifying the crediting of such margin against the cost of the Mystic's fuel supply from Everett. *See id.* P 193 n.418.

statements, invoices, charges, or computations pursuant to the agreement."[174] In the December 2018 Order, the Commission stated that, similarly, ISO-NE would make its reports available and perform audits pursuant to the Mystic Agreement, also noting that the expansion of section 6.2 will ensure ISO-NE has sufficient information to meaningfully exercise its audit rights and inform both the public and state public utility commissions consistent with ISO-NE's information policy.[175]

2. Rehearing Requests

79. Mystic argues that the Commission erred in requiring the true-up of all costs other than return on equity. Mystic claims that the items in question, such as rate base and depreciation as of the end of the test period, have already been litigated and would not change in the years to come. Mystic asserts that, as a result, no further information is needed to determine whether those items are just and reasonable. Mystic adds that interim capital expenditures and depreciation incurred between 2018 and 2022 are already subject to true-up. Mystic contends that the Commission failed to show that the Commission's finding does not unreasonably increase the risk of litigation or contribute to administrative inefficiency.[176]

80. Mystic argues that the requirement to true-up revenues in addition to costs is unsupported and contrary to the record. Mystic states that the monthly revenues it will receive from ISO-NE equal the annual revenue requirement derived from Mystic's projected costs and any revenue derived from the ISO-NE markets, as well as any other revenue from Mystic 8 and 9's sales, will be included as a revenue credit against the annual fixed revenue requirement under the Mystic Agreement.[177]

81. Mystic also contends that the Commission erred by requiring a demonstration of the timing of a capital expenditure as a prerequisite to recovering costs as an expense that are solely required to operate the units during the term of the Mystic Agreement. Mystic asks the Commission to clarify or reverse its directive to include additional language in the true-up protocols that, among other things, requires Mystic to demonstrate that neither of the following occurred: (a) the capital expenditure project was scheduled before the term of the Mystic Agreement but delayed until the term of the Mystic Agreement, or (b) the project is scheduled to be completed during the term of the Agreement but should

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[174] *Id.* P 195 (citing *Mirant Kendall, LLC*, 110 FERC ¶ 61,272, at PP 19-20 (2005)).

[175] *Id.* P 196.

[176] Mystic Rehearing Request at 84-85.

[177] *Id.* at 84-90.

have been completed prior to the term of the Mystic Agreement. Mystic asserts that it is unreasonable to require a demonstration that a project was not delayed into the term, for any reason, or should have been completed before the term as a prerequisite before capital expenditures can be recovered as an expense. Mystic argues that the Commission failed to address its proposal to provide information on timing of a capital project that is only informational in purpose. Mystic maintains that the time of incurrence is irrelevant to recovery.[178]

82. EDF and NextEra state that the Commission ignored record evidence demonstrating the need for enhanced reporting requirements and stricter, mandatory provisions for review of Exelon's transactions under the Mystic Agreement; NextEra characterizes the Commission's refusal to adopt such provisions as arbitrary and capricious and not the result of reasoned decision-making.[179]

83. EDF asks the Commission to reconsider its finding that no additional protective measures are needed beyond those specified in section 6.2, arguing that its proposed reporting requirements would be valuable in determining whether Everett is being utilized as an efficient fuel security asset. EDF claims that the Commission's failure to consider this argument contravenes its obligation to respond meaningfully to the arguments raised before it.[180]

84. NextEra contends that nothing in the Mystic Agreement or Everett Agreement requires Exelon to develop a transparent process to arrange a specific number of cargos, set limits on the number of cargos, or provide direction with respect to cancelling, reselling, reducing, or diverting cargos as they turn out not to be needed. NextEra adds that there is no meaningful penalty if Exelon fails to act prudently.[181]

85. NextEra asserts that ISO-NE's redaction of information in its audit filings will deprive a market participant of the precise information necessary to initiate and meet its burden of proof in an FPA section 206 proceeding. NextEra disagrees with the

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[178] *Id.* at 90-95.

[179] EDF Rehearing Request at 5; NextEra Rehearing Request at 8-9, 26-30.

[180] EDF Rehearing Request at 6 n.20 (citing *Pub. Serv. Comm'n v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005)).

[181] NextEra Rehearing Request at 9, 27.

Commission's reliance on *Mirant Kendall, LLC*, which according to NextEra is distinguishable because Everett will also make sales to third parties.[182]

3. **Determination**

86. We disagree with Mystic's assertion that rate base items as of the end of the test period have been fully litigated and the results found just and reasonable. In the December 2018 Order, the Commission stated that the gross plant-in-service and accumulated depreciation values determined in Mystic's corrected original cost test are subject to true-up.[183] In addition, we disagree with Mystic that the true-up requirement increases the risk of litigation or contributes to administrative inefficiency. As explained in the December 2018 Order, Mystic's proposed true-up protocols already contain both informal and formal dispute resolution measures that aim to reduce formal litigation and do not unreasonably increase the chance of litigation.[184] We continue to find that the true-up requirement is not administratively inefficient; rather, it is appropriately transparent to render the rate just and reasonable.[185] Accordingly, we are not persuaded by Mystic's request for rehearing on whether rate base items should be subject to true-up.

87. However, we agree with Mystic's request for rehearing and clarify the additional language in the true-up protocols specifying the requirement that Mystic demonstrate the timing of capital expenditure projects.[186] First, we clarify that the Commission's requirement is informational; it would not necessarily preclude Mystic from recovering capital expenditures incurred prior to the term of the Mystic Agreement. Second, we agree with Mystic that, to meet this requirement, Mystic could "[i]nclude a description of the project(s), the need for the project(s), the alternatives considered with respect to the least-cost alternatives, the expected start and completion date(s), and the project costs,"[187] but should also include documentation of when the project was initially scheduled and justification for the proposed start and completion date(s). Lastly, we direct Mystic to

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[182] *Id.* at 27-30.

[183] December 2018 Order, 165 FERC ¶ 61,267 at P 64.

[184] *Id.* P 178.

[185] *See id.* P 177 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 83 (2013) ("Both a formula rate and its inputs must be transparent; it is essential to their being just and reasonable"), *reh'g denied*, 146 FERC ¶ 61,209 (2014)).

[186] *See* Mystic Rehearing Request at 90-95.

[187] Mystic Rehearing Request at 92 (citing Exh. No. MYS-0051 at 12).

revise the language in the true-up protocols because, as currently written, it implies that Mystic would not be able to recover costs under the Mystic Agreement under scenarios (a) and (b) below. Accordingly, we direct Mystic to submit, in a further compliance filing, within 60 days of the date of this order, the following language to allow Mystic to provide information to improve transparency of the true-up process:

> (2) require Mystic to ~~demonstrate that neither of the following occurred~~ identify if either of the following occurred for projects that it is proposing to expense over the term of the Agreement, and if so, explain why: (a) the capital expenditure project was scheduled before the term of the Agreement but delayed until the term of the Agreement, or (b) the project is scheduled to be completed during the term of the Agreement but should have been completed prior to the term of the Agreement

88. Further, we agree with Mystic's argument that, in this case, it is not necessary to true-up the revenues it will recover under the Mystic Agreement in addition to the costs described elsewhere in this order and the December 2018 Order. As Mystic points out, the Mystic Agreement already contains provisions that will credit revenues Mystic earns against its annual fixed revenue requirement. Therefore, we set aside the December 2018 Order in relevant part, and no longer require Mystic to true-up revenues.

89. In addition, with respect to EDF's argument that the Mystic Agreement poses a threat to the New England markets and thus additional protective measures, such as reporting, are necessary, we reiterate our finding in Section II.D above that the Commission monitors the markets for manipulation and that sufficient protections against market manipulation already exist. In the absence of specific anti-competitive activity in the record, we find that the additional issues raised about anticompetitive behavior, market manipulation, and the general functioning of natural gas and electric markets are beyond the scope of this proceeding. We do not find it reasonable to increase the reporting burden beyond that directed in the December 2018 Order based on EDF's speculation that alleged affiliate abuse and the potential exercise of market power is possible. There is no evidence before us that suggests that the existing reporting requirements are insufficient.

90. Similarly, we reject NextEra's arguments that increased transparency is needed regarding cargos to ensure that costs are prudently incurred. As the Commission stated in the December 2018 Order, section 6.2 of the Mystic Agreement allows ISO-NE to conduct routine and frequent audits of reports, statements, invoices, charges, or computations to assess whether the fuel supply costs incurred by Mystic were prudently incurred. ISO-NE may access all information in Everett's possession to ensure ISO-NE has sufficient information to meaningfully exercise its audit and inform both the public

and state public utility commissions consistent with its Information Policy.[188] We find that this process provides a sufficient safeguard to ratepayers and should provide entities with the information necessary to initiate and meet their burden of proof in a FPA section 206 proceeding. We also reject NextEra's assertion that *Mirant Kendall, LLC* is distinguishable from this case because, as discussed in Section II.E above, we no longer require that the Mystic Agreement include a sliding scale revenue crediting mechanism that incorporates third party sales.

H. Accumulated Depreciation

1. December 2018 Order

91. In the December 2018 Order, the Commission found that Mystic had not adequately supported its proposed depreciation rates.[189] Therefore, the Commission directed Mystic to use the depreciation rates that the Commission had already established for Mystic 8 and 9 in another proceeding.[190] The Commission required Mystic to recalculate its accumulated depreciation reflecting a 2.74% depreciation (i.e., a 36.5 year useful life) throughout the entire life of the plant and any related cost-of-service elements (e.g. depreciation expense and ADIT).[191] The Commission did not require Mystic to take into consideration previously recognized impairments, as calculated through Generally Accepted Accounting Principles (GAAP). In the December 2018 Order, the Commission stated that "as a general matter, we disagree with arguments that impairments taken for GAAP accounting purposes must necessarily be reflected in accumulated depreciation for [Uniform System of Account (USofA)] purposes."[192]

2. Rehearing Requests

92. Mystic argues that the Commission erred in denying Mystic a return of and on investment by lowering its rate base through a determination that the original cost accounting test applies retroactively to asset sales between merchant entities that were transacting under market-based rate authority and were not subject to the USofA or original-cost accounting. Mystic asserts that the December 2018 Order creates a new,

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[188] December 2018 Order, 165 FERC ¶ 61,267 at P 196.

[189] *Id.* P 70.

[190] *Id.* (citing *Mystic Dev., LLC*, 118 FERC ¶ 61,144 (2007)).

[191] *Id.* P 64.

[192] *Id.* P 70 (citing *FirstEnergy Generation Corp.*, 141 FERC ¶ 61,239 (2012), *order granting clarification*, 144 FERC ¶ 61,103 (2013)).

third method for conducting the original cost test that does not measure either construction cost or the investment of the current owner but instead adjusts depreciated original cost based on some (but not all) purchase prices paid by prior owners. Mystic argues that this error will materially harm Mystic by reducing Mystic's rate base to reflect putative losses in value from prior purchase prices paid by the prior merchant owners of Mystic 8 and 9 who operated the units at market-based rates, while refusing to recognize offsetting gains in value reflected in other, more recent purchase prices.[193] Mystic asserts that the benchmark sought by the Commission was not needed. Mystic claims that, because all of the prior owners' purchases were arm's length transactions at prices disciplined by market forces, there is no need to use original cost accounting to ensure that the purchase prices were not inflated with the aim of increasing cost of service recovery. Mystic asserts that Exelon is entitled to a return of and on its own investment and that Exelon's investment is the only one that matters because it is Exelon, the current owner, that seeks (through Mystic) cost-of-service rates based on Exelon's investment, so long as the investment was not inflated. Mystic asserts that depreciated original cost provides a yardstick to compare actual construction cost less physical depreciation against the investment that the new owner seeks to recover, which answers the question of whether the new owner is asking ratepayers to pay more than they would have paid if the units had never changed hands.[194]

93. Mystic argues that, if the December 2018 Order stands, it will reduce Mystic's rate base substantially below the actual cost to construct and the capital investments to maintain Mystic 8 and 9 over the years (appropriately depreciated) without an allegation or showing that the purchase price was inflated or that it was somehow affected by the prior purchase prices. Mystic asserts that there is no precedent for or reason to use original-cost accounting as a benchmark for merchant-to-merchant asset transfers and that price inflation is not a concern when assets making power sales are sold at arm's-length because the price the merchant purchaser is willing to pay is based on projected revenues from market-based power sales revenues. Mystic asserts that importing past merchant-to-merchant asset purchase prices into cost-of-service accounting will not produce a just and reasonable benchmark for determining a cost-of-service rate base because asset purchase prices are based on projected revenue streams, which are different for market-based assets and cost-based assets.[195]

94. Mystic argues that the Commission's speculative "expectation" that a merchant acquirer will consider a hypothetical future conversion to cost-of-service rates is contradicted by the record because the fair valuations of Mystic 8 and 9 considered the

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[193] Mystic Rehearing Request at 9-10.

[194] *Id.* at 11.

[195] *Id.* at 11-15.

discounted cash flow of the likely revenue stream from market sales.[196] Mystic asserts that the Commission erroneously relied on *PacifiCorp* for the proposition that "there is no provision in the [USofA] for excluding depreciation accumulated on properties devoted to public service, regardless of the rate treatment afforded to the facilities prior to their acquisition," which incorrectly assumes that the USofA are relevant to begin with.[197]

95. Mystic further argues that, even if *arguendo* the original cost test is to be applied to merchant-to-merchant transactions, it should only apply to the most recent one. Mystic claims that the appropriate point of comparison, under the original cost test, is the cost to construct the facilities—the original cost to the original owner plus subsequent capital expenditures by any owner—as properly depreciated to reflect loss in service value due to wear and tear.[198] Mystic asserts that the Commission adopted a discriminatorily one-sided view that changes in market value should only matter when market value goes down. Mystic contends that, while the Commission declared that its goal is to reproduce the effect of accounting under the USofA, the Commission failed to recognize that if the USofA had applied, Mystic 8 and 9 would have recovered costs under cost-based rates and would have avoided market volatility.[199]

96. Mystic argues that the December 2018 Order fundamentally changes the original cost test by injecting past transaction prices (i.e., purchase prices for ownership changes prior to Exelon's acquisition of Mystic 8 and 9) that reflect neither the current owner's investment, nor any owners' capital expenditures, nor any depreciation in the form of wear and tear on the units. Mystic asserts that the Commission has never before applied the original cost test for each prior change in merchant ownership, even though it has been previously presented with that fact pattern. Mystic states that the amount paid for an asset can only affect rates if the output of the facility is sold on a cost-of-service basis; when the output of Mystic 8 and 9 was sold at market-based rates, the rates to ratepayers bore no relationship to the purchase price of the assets or to depreciated original cost. Mystic argues that, prior to the December 2018 Order, there was no way for the purchase price paid by prior merchant owners to affect any ratepayer, past, present or future, so causing a downward ratchet in depreciated original cost to reflect such purchases does not serve the ratepayer protection intent of the original cost test, but instead arbitrarily

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[196] *Id.* at 16 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 66).

[197] *Id.* at 17 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 65).

[198] *Id.* at 18-19.

[199] *Id.* at 19.

and capriciously deprives a generator of the ability to earn just and reasonable compensation for the service it provides.[200]

97. Mystic asserts that the new test assumes without reason that every purchase price below depreciated original cost represents an actual loss of service value, rather than a snapshot in time of a fluctuating market. Mystic adds that this new test assumes that every purchase price above depreciated original cost represents an inflated purchase price intended to be recovered under cost-based rates.[201] Mystic argues that the modified original cost test is strictly, and unduly preferentially, one-sided because the Commission locks in GAAP accounting reductions but unreasonably gives no credit for GAAP accounting increases.[202] Mystic argues that the Commission's one-sided approach is unjust and unreasonable because it will upset the FPA's balance between ratepayer and investor interest, asserting that this approach fails to recognize legitimate investment because it says that actual values of generating units should only ever decrease. Mystic claims that this approach treats payment of higher purchase prices as mistakes that should have never been made. Mystic argues that the Commission's failure to adequately explain its rationale in light of these facts in the record is arbitrary and capricious.[203]

98. Mystic asserts that one-sided, value-based accounting, which it alleges here, is unreasonable for RMR units in particular because recognizing prior owner purchase prices as downward ratchets on rate base will lock in the effects of market downturns and create a "Catch 22" for RMR units by embedding that effect into cost-based rates meant to provide just and reasonable compensation in the face of market failure.[204]

99. Mystic claims that, if Mystic 8 and 9 had not been distressed, there would not have been fire sale pricing for prior ownership changes. Mystic argues that, as a result, the purchase prices would not have varied substantially from depreciated original cost and the original cost test would not produce a lower result than the rate base proposed by Mystic. Mystic asserts that, if anything, it would have been higher because there would have been no reason to sell a rate-based asset for less than depreciated original cost.[205]

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[200] *Id.* at 20-21, 23.

[201] *Id.* at 25.

[202] *Id.*

[203] *Id.* at 26-27.

[204] *Id.* at 27-29.

[205] *Id.* at 31.

Furthermore, Mystic argues that, even if Exelon had decided to forego the benefits of light-handed regulation, it has no control over prior owners' bookkeeping decisions.[206]

100. Mystic contends that the use of the words "in all likelihood" in the December 2018 Order demonstrates that the statement is speculative, given the unlikelihood that anyone acquiring Mystic 8 and 9 in 2012 would have anticipated, and accounted for, a cost-of-service agreement for a then-unrecognized service: fuel security.[207] Mystic argues, therefore, that the Commission's speculation that fair market valuation purchase prices of merchant units operating with waiver of the USofA were actually tied to original cost accounting is factually incorrect and theoretically unsound.

101. Mystic asserts that the Commission unreasonably assumed that, when Exelon acquired Mystic 8 and 9 in 2012, it should have known that, in 2018, the Commission would (a) retroactively apply to Mystic accounting rules that the Commission found that Mystic was exempt from and (b) change those rules as described above. Mystic argues that the Commission did not satisfy a non-exhaustive list of five factors to assist in determining whether to grant an exception to the general rule permitting "retroactive" application of a rule, as required by the D.C. Circuit.[208]

102. ENECOS requests clarification of the Commission's finding that Exelon's August 2003 booking of accumulated depreciation against the plant value of Mystic 8 and 9 effected a permanent reduction in that plant value that cannot be restored through subsequent accounting treatment. ENECOS notes that, in the December 2018 Order, the Commission stated that "in a cost-of-service ratemaking context, a utility may only earn a return on (and recovery of) the lesser of the net original cost of plant or, when plant assets change hands in arms-length transactions, the purchase price of the plant."[209] ENECOS contends that, because Exelon realized substantial and contemporaneous income tax benefits from the removal of its equity investment in Mystic 8 and 9, a contrary result in this case would require ISO-NE Regional Network Service transmission customers to pay a return on investment that Exelon removed from these units in August 2003, prior to

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[206] *Id.* at 33.

[207] *Id.* (citing December 2018 Order, 165 FERC ¶ 61,267 at P 66).

[208] *Id.* at 36 (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987)).

[209] ENECOS Rehearing Request at 3-4 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 63).

transferring them in lieu of foreclosure in a settlement ultimately implemented in May 2004.[210]

103. ENECOS also notes that the Commission stated that it "will not require Mystic to take into account previously recognized GAAP impairments" in re-calculating accrued depreciation consistent with the Commission's original cost principle.[211] ENECOS reads "GAAP impairments" as shorthand for impairment charges taken against goodwill by US Power Generating Company when it controlled Mystic 8 and 9, and not to a deliberate and specific reduction in asset values effected to avoid transferring value exceeding construction lending balances in lieu of foreclosure. ENECOS argues that clarification of the Commission's intent is needed so that Mystic's February 18, 2019 cost-of-service compliance filing does not seek to take advantage of the discontinuity between the conflicting statements with regard to the August 2003 impairment charge it booked against Mystic 8 and 9 plant values,[212] which would result in an incomplete and incorrect filing.

104. If the Commission does not grant this clarification, ENECOS requests rehearing, alleging that the Commission erred in disagreeing "with arguments that impairments taken for GAAP accounting purposes must necessarily be reflected in accumulated depreciation for USofA purposes" and that it "will not require Mystic to take into consideration previously recognized GAAP impairments" in restating the accumulated depreciation for Mystic 8 and 9 in accordance with the Commission's original cost principle.[213]

3. Determination

105. We disagree with Mystic's assertion that it is inappropriate to apply the original cost test to Mystic's costs because there has been no allegation or showing that the prices are inflated, as such an allegation or a showing is not a prerequisite for the original cost test.[214] We also disagree with Mystic that the Commission created a new methodology

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[210] *Id.* at 3-4.

[211] *Id.* at 4-5 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 71).

[212] *Id.* (citing December 2018 Order, 165 FERC ¶ 61,267 at PP 63, 71).

[213] *Id.* at 11 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 71).

[214] *See Montana Power Co. v. FERC,* 599 F.2d 295, 300 (9th Cir. 1979) ("There is no allegation in this case that Montana Power attempted to artificially inflate its rate base when it acquired the transmission line from the railroad. Yet the purpose of the FPC's original cost accounting rules is to obviate the need for such allegations. By permitting utilities to include in their rate base accounts only the depreciated original cost of

for conducting the original cost test. The Commission's prescribed corrections to Mystic's methodology mimic the application of the original cost test for utility property subject to the USofA. When a utility property subject to the USofA is purchased by an entity and remains subject to the USofA, the difference between the net original cost of the plant (i.e., gross plant in service plus net capital additions minus accumulated depreciation) is either added to Account No. 108 (accumulated provision for depreciation of electric utility) or to Account No. 114 (electric plant acquisition adjustments), when the purchase price is below or above the net original cost, respectively. The accumulated depreciation amounts are included in ratemaking calculations involving that plant, but acquisition premiums are excluded from ratemaking calculations involving that plant unless the utility satisfies the Commission's test for including acquisition premiums in rates, which Mystic has not done here.[215]

106. As the Commission stated in the December 2018 Order, and we reiterate here, Mystic 8 and 9 were not subject to USofA accounting requirements throughout the entirety of their history. We continue to find this fact irrelevant. We reject Mystic's assertion that, if Mystic 8 and 9 had been subject to USofA accounting throughout their service lives, then Mystic would have been subject only to cost-based rates throughout their service lives. The USofA is an accounting system, not a ratemaking paradigm, and the USofA and market-based rates are not mutually exclusive. We reject Mystic's assertion that the Mystic 8 and 9 assets would never have been distressed (and therefore, never subject to fire-sale pricing) had the units been subject to cost-based rates, which Mystic supports only with a speculative theory that there would never be any reason for a utility to sell assets subject to cost-based rates for less than the depreciated original cost. This theory is contradicted by instances in which assets subject to cost-based rates were sold for less than depreciated original cost (and thus require the original cost test in the first place). We further disagree with Mystic's assertion that the Commission attempted to recreate a depreciated original cost for Mystic 8 and 9 as though the USofA had applied throughout their service lives, which Mystic considers a *de facto* nullification of the waivers the Commission granted for those units. In December 2018 Order, the Commission created a benchmark for ratemaking purposes, not to recreate accounting records for Mystic 8 and 9 according to the USofA rules and standards. We also reject Mystic's assertion that the Commission retroactively reversed Mystic 8 and 9 rate orders.

107. We disagree with Mystic's assertion that the Commission did not need the ratemaking benchmark because prior sales of the facilities had been at arms' length. The Commission's standards for cost-based ratemaking must be applied broadly and evenly to avoid discriminatory rates. If in determining a cost-based rate, the Commission only

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acquisitions, the FPC rules provide an objective method of valuation without the need for independent assessments of the fair market value of individual acquisitions.").

[215] *Locust Ridge Gas Co.*, 29 FERC ¶ 61,052, at 61,114 (1984).

considers the most recent sales price of a facility that has not been subject to the USofA against the net original cost for that facility without considering the sales history of the facility (as Mystic advocates), then that facility could have an undue advantage over other facilities subject to the USofA for whom the Commission must consider all past sales history. By its own admission, Mystic's proposed methodology would produce a different end result than if the facilities had been subject to the USofA throughout their service lives. But the fact that Mystic 8 and 9 charged market-based rates and were not subject to the USofA at prior points in its history should have no bearing on the methodology the Commission uses to determine the proper amount of rate base for a *cost-based* rate. Furthermore, assuming, *arguendo*, that investors seeking to capture market-based revenue streams do not consider the potential of converting to a cost-based revenue stream (as Mystic has emphasized), this necessarily means that the amount the investors would be willing to pay would be an economic valuation, rather than an accounting-based *cost* valuation. Therefore, it is necessary and appropriate to create a ratemaking benchmark for *cost-based* ratemaking purposes because the Commission does not determine cost-based rates according to economic valuations.

108. We disagree that the original cost test serves as a yardstick to compare a utility's investment against actual construction costs and *physical depreciation*. We also disagree that any loss in service value must be related to *physical* reasons, such as damage to the units. Mystic provides no support for this argument, which is contrary to the Commission's findings in *Locust Ridge* and *Central Vermont.*[216] The purpose of the original cost test is twofold. First, in the event that the purchase price is less than the depreciated original cost, adding the difference between the depreciated original cost and the purchase price to accumulated depreciation lowers rate base to the level of the actual investment made in the plant by the acquiring investors, which prevents the acquiring investors from earning a return on monies not actually invested. Second, in the event that the purchase price is greater than the depreciated original cost, removing the difference between the depreciated original cost and the purchase price from rate base (absent a sufficient showing justifying its inclusion in rate base) protects ratepayers from both paying higher rates without a corresponding improvement in service and paying capital costs for investments for which ratepayers have already paid (i.e., double recovery).

[216] *Id.* at 61,114 ("There is no basis for assuming that the *service value* of the facility at the time of an acquisition is greater than the arms-length price paid for the facility.") (emphasis added); *Central Vermont Pub. Serv. Corp.*, 120 FERC ¶ 61,143, at P 8 (2007) ("The May 10 Order properly relied on long-standing Commission precedent holding that the difference between the depreciated original cost and the purchase price represents a loss in *service value* that was not already recognized by the previous owner through depreciation.") (emphasis added). As in *Locust Ridge* and *Central Vermont*, we do not find it necessary to define the phrase "service value" here.

109. We disagree that with Mystic's assertion that "[the] $925 million purchase price is the amount Exelon (through Mystic) invested *to provide the fuel security service* to ratepayers."[217] This statement is contradicted by Mystic's own statement that "[the Commission] incorrectly and illogically 'expects' that at the time Exelon acquired Mystic 8 [and] 9, Exelon 'considered the revenue potential of converting to cost-based rates,' as if Exelon, in the 2012 $7.9 billion merger with Constellation, was planning a 2018 rate case for just two of Constellation's units, for a not-yet-invented fuel security service, covering a short two-year period that would not begin until ten years after the merger."[218] Based on the record, it appears disingenuous to assert that the acquisition of Mystic 8 and 9, originally by Constellation and indirectly by Exelon through the 2012 merger, was an investment with the express purpose of providing a service (i.e., fuel security service) that, until this proceeding, had not been defined.

110. We disagree with Mystic's assertion that there is no reason to use original-cost accounting as a benchmark for merchant-to-merchant transfers and that it is unfair to consider only losses in value below depreciated original cost while ignoring gains in value above depreciated original cost. In setting a cost-based rate for an asset, it is expected that the cost-based rate for that asset will decline ratably over that asset's life, unless the asset's owners make further investments in the asset. The fact that current or prior owners may have purchased an asset with the intention of earning market-based revenues and were willing to pay a premium over the depreciated original cost in order to capture such market-based revenues does not justify setting aside long-standing Commission precedent and practice when setting a *cost-based* rate for that asset. Investors—using whatever reasoning and justifications they choose—are free to pay whatever amount they deem appropriate to invest in an asset, but investors should always have the expectation that the Commission's usual ratemaking rules and principles will apply when setting cost-based rates. Like arguments that the investors did not consider the potential of a revenue stream based on cost-based rates in making their investment decisions, arguments that investors would have paid a different amount to capture revenue streams based on cost-based rates than they paid with the expectation of capturing market-based revenue streams are insufficient to warrant a departure from the Commission's long-standing policies. We also reject Mystic's assertion that the Commission's method of incorporating only the effects of sales prices below depreciated original cost in the original cost test for ratemaking purposes is either new or now unfair. As the Commission explained in the December 2018 Order, this method has always been the practical result of the original cost test.[219]

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[217] Mystic Rehearing Request at 11 (emphasis added).

[218] *Id.* at 19-20.

[219] December 2018 Order, 165 FERC ¶ 61,267 at P 65.

111. Finally, we reject Mystic's assertion that the Commission did not support, with record evidence, its expectation that investors acquiring assets to earn market-based revenue streams will consider the potential of earning cost-based revenue streams in their decision to acquire the product. Mystic support for this assertion (i.e., its fair valuation studies based on cash flows) is flawed because the referenced fair valuation studies were done for financial reporting purposes and completed *after* the purchase of the assets. Mystic has not demonstrated that the Commission's expectation is unsupported by economic theory.

112. We deny ENECOS' request for clarification and are not persuaded by its arguments on rehearing. The Commission did not intend paragraph 71 of the December 2018 Order to be shorthand. The Commission stated without qualification that it would not require Mystic to take into account previously recognized GAAP impairments in re-calculating accrued depreciation. ENECOS has not presented any evidence to the Commission that Exelon's August 2003 impairment was used for any purpose other than to satisfy GAAP accounting requirements. This is not to say that Mystic is correct in ignoring the May 2004 transfer in lieu of foreclosure in its net original cost analysis. The August 2003 impairment effectively reduced the book value of the assets to the amount of construction debt the assets secured. In May 2004, Exelon transferred Mystic 8 and 9 and Fore River to the lenders that provided construction financing in lieu of a foreclosure. In practical effect, Exelon sold Mystic 8 and 9 to the lenders for the amount of debt outstanding on the facilities, which was less than Exelon's USofA net book value (and therefore requires an increase to accumulated depreciation added to the units' net book values). As discussed in the Commission's order on compliance, Mystic must include this transfer in lieu of foreclosure in its net original cost study.[220]

I. Everett Rate Base

1. December 2018 Order

113. In the December 2018 Order, the Commission addressed whether it was just and reasonable for Mystic to recover from ratepayers a gross plant-in-service value of Everett that reflects Exelon's investment in Everett. The Commission found that Exelon's original investment in Everett was intended to satisfy Mystic's existing capacity supply obligations and not to meet Mystic's obligations under the terms of the Mystic Agreement.[221] In doing so, the Commission chose not to apply its accounting policy (to use the lesser of net original cost or the purchase price) to determine Everett's gross

[220] *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,045 (2020).

[221] December 2018 Order, 165 FERC ¶ 61,267 at P 148.

plant-in-service value and, instead, applied cost-causation principles.[222] The Commission reasoned that it is just and reasonable to allow Everett to pass through only the incremental capital costs associated with Everett providing fuel service to Mystic during the term of the Mystic Agreement (i.e., capital expenditures, whether capitalized or expensed, incurred for the purpose of satisfying the Mystic Agreement). The Commission found that the price of acquiring the asset itself was not one of those costs.[223]

2. Rehearing Requests

114. For the reasons discussed in Section II.B above, Mystic maintains that inquiries into and determinations regarding components of the Fuel Supply Charge, including Mystic's proposed gross plant-in-service value of Everett, are improper and inappropriate.[224] Alternatively, Mystic argues that, if a cost-of-service inquiry is appropriate, the Commission erred in disallowing inclusion of Exelon's investment in Everett in rate base under what Mystic describes as an improper and unworkable standard that relies on the asset purchaser's subjective intent and disregards the principle that Exelon, the parent of Mystic and the purchaser of Everett, is entitled to a return of and on its investment.[225] Mystic contends that, even under cost-of-service ratemaking, Everett's purchase price and pre-term capital expenditures should be included in gross plant.[226] Mystic asserts that the Commission's related justification that the beneficiary of a purchase—which here it identifies as Exelon, the purchaser of Everett—should pay under cost causation principles is contrary to precedent and the record.[227] Mystic claims that

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[222] *Id.* P 149.

[223] *Id.* ("While the value of the plant may be greater than zero, we find that, under cost causation principles, the beneficiary of the *purchase* of Everett was [Exelon]. The cost of this purchase should properly be recovered in the period prior to the [Mystic] Agreement (i.e., the period for which the purchase was originally made).").

[224] Mystic Rehearing Request at 57-63.

[225] *Id.* at 7.

[226] *Id.* at 64-73.

[227] *Id.* at 64 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 148; *Bluefield Waterworks Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-93 (1923); *Miss. River Fuel Corp.*, 4 FPC 340, 344 (1945), *aff'd in part and remanded*, *Miss. River Fuel Corp. v. FPC*, 163 F.2d 433 (D.C. Cir. 1947)). Mystic states that the return on and of the investment in plant is part of the costs to provide service to ratepayers and is recoverable in a cost of service.

the Commission did not explain why the beneficiaries prior to the term of the Mystic Agreement should bear the entire cost of Mystic's fuel supply, rather than an amortized share.[228] Mystic also asserts that Everett will provide continued benefits during the term of the Mystic Agreement to ISO-NE electricity end-users, arguing that there is no reason such beneficiaries should not pay an amortized share of the costs of the facility, just like any other type of unit retained on a cost-of-service basis for reliability.[229] Mystic claims that the Commission also erred in its alternative holding that Mystic did not justify an acquisition premium in gross plant. Mystic argues that there is no acquisition premium because the purchase price is below the depreciated original cost, adding that, even if there were an acquisition premium, the Commission failed to address the evidence that it should be recoverable.[230]

115. Mystic notes that, in the December 2018 Order, the Commission found that "it is just and reasonable to only allow Everett to pass through the incremental capital costs associated with Everett providing fuel service to Mystic during the term of the cost-of-service [Mystic] Agreement, i.e., capital expenditures (whether capitalized or expensed) incurred for the purpose of satisfying the [Mystic] Agreement."[231] Mystic argues that the Commission erred if it meant that incremental capital expenditures incurred after the purchase, which are not incurred solely to meet the reliability need, are not includable in gross plant. Mystic asserts that incremental capital expenses necessary to maintain the operation of Everett prior to the term of the Mystic Agreement are properly capitalized and included in gross plant-in-service because Everett will not be able to provide reliable service during the term of the Mystic Agreement unless Everett is properly maintained and kept operational, which will necessitate certain capitalized investments prior to the term of the Mystic Agreement.[232]

116. Mystic also argues that, if the Commission intended to exclude Everett's capital expenditures from gross plant prior to the term of the Mystic Agreement, then it erred and other determinations as to Everett's costs must be clarified. Specifically, Mystic asserts that it is unclear what the Commission meant when it found that it is unjust and unreasonable to include in rate base or cost-of-service any cost unrelated to the operation

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[228] *Id.* at 69.

[229] *Id.* at 72-73.

[230] *Id.* at 73-75.

[231] *Id.* at 57 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 149 (emphasis by Mystic omitted)).

[232] *Id.* at 75-76.

of Mystic.[233] Mystic states that the Commission had excluded a portion of Everett's costs that are "unrelated to the operation of Mystic."[234] Mystic asserts that the meaning of the Commission's holding is unclear because capital expenditures that are expensed are only incurred for purposes of meeting the reliability need. Mystic also argues that, if the Commission meant that incremental capital expenditures incurred after the purchase, which are not incurred solely to meet the reliability need are not includable in gross plant, then it erred. Mystic asserts that it is unclear what the Commission determines are costs unrelated to the operation of Mystic requires, and such a conclusion is unsupported by any record evidence. Mystic states that the Commission already excluded a portion of Everett's costs it attributed to third-party, non-Mystic sales of liquids. Mystic argues that there is no testimony or any other evidence in the record to support the further exclusion of any other costs that are unrelated to Mystic's operation.[235]

3. **<u>Determination</u>**

117. First, as discussed in Section II.B above, we reject Mystic's arguments that an inquiry into the components of the Fuel Supply Charge is inappropriate. The Commission's analysis of components of the Fuel Supply Charge, including rate base items, is appropriate and necessary to determine a just and reasonable rate. At the outset, we clarify that, in the December 2018 Order, the Commission allowed Mystic to recover Everett's pass through of the incremental capital costs associated with Everett providing fuel service to Mystic during the term of the Mystic Agreement (i.e., capital expenditures, whether capitalized or expensed, incurred for the purpose of satisfying the Mystic Agreement provided that Everett is not also expensing those same expenditures during the term of the Mystic Agreement).[236] The Commission did not intend to exclude Everett's incremental capital expenditures made after the purchase of Everett (but prior to the term of the Mystic Agreement) from inclusion in Everett's gross plant account. However, for the reasons discussed below, we continue to find that the purchase of the asset itself is not one of those costs.[237]

118. We reject Mystic's argument that Exelon's investment in Everett and its pre-term capital expenditures should be included in gross plant. We continue to find that cost-causation principles should apply to Everett's gross plant-in-service value. We disagree

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[233] *Id.* at 76 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 151).

[234] *Id.*

[235] *Id.*

[236] December 2018 Order, 165 FERC ¶ 61,267 at P 148.

[237] *Id.* P 149.

with Mystic's assertion that the Commission did not explain why the beneficiaries—which Mystic identifies as Exelon, the purchaser of Everett—prior to the term of the Mystic Agreement should bear the entire cost of Mystic's fuel supply, rather than an amortized share. As explained in the December 2018 Order, and according to Mystic's own witness, Exelon did not purchase Everett to maintain Mystic's fuel supply during the term of the Mystic Agreement but rather to meet its prior Capacity Supply Obligations.[238] Exelon was aware that, absent the Commission's acceptance of the Mystic Agreement, Exelon would have had to absorb the cost of its purchase of Everett during the terms of its existing Capacity Supply Obligations. The Commission did not require Exelon to "bear the entire cost of Mystic's fuel supply," as Mystic argues. The Commission only required Exelon to bear the cost of its decision to acquire the asset. Regarding other costs associated with Mystic's fuel supply, the Commission allowed recovery of incremental capital expenditures, and 91% of Everett's fixed operating costs (i.e., those operating costs attributable to serving Mystic 8 and 9) because these costs are necessary for providing service to Mystic 8 and 9. While the continued operation of Everett is necessary for regional fuel security, the acquisition of Everett by Exelon was a business decision undertaken for a variety of reasons and not to maintain fuel security in New England. Our finding here does not rely on determining Exelon's subjective intent, rather it relies on Mystic's witness testimony and application of cost-causation principles.

119. We note that the cost-causation principle applied here with respect to the purchase price and pre-term capital expenditures of Everett is consistent with the way we apply cost-causation principles to Everett's fixed operating costs in Section II.E above. The costs at issue here represent Exelon's initial investments in Everett—an investment which Exelon's own witness explicitly stated was not made to supply Mystic with fuel during the term of the Mystic Agreement but rather to satisfy pre-existing Capacity Supply Obligations.[239] In contrast, Everett's fixed operating costs discussed in Section II.E above are expenditures made to serve Mystic during the term of the Mystic Agreement.

120. We disagree with Mystic's arguments regarding the acquisition premium for Everett. Mystic argues that Everett will be engaged in a new public use because its tank will be managed differently than it was historically managed, and it will undertake heightened performance obligations. Elsewhere, Mystic argues that it has been providing fuel security for the region and has not been properly compensated for this service.[240] Mystic cannot have it both ways. Exelon's acquisition of Everett may result in new

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[238] *Id.* P 148 (citing Exh. MYS-0001 at 11).

[239] *Id.*

[240] Mystic Comments, Docket No. ER18-1509-000, at 2 ("Unfortunately, there is no market mechanism to compensate Mystic 8 & 9 for the fuel security attributes that make these resources so attractive to ISO-NE.").

management techniques of Everett's LNG storage tank, but that is not a new public use. At best, it is an improvement of the existing public use. Moreover, contrary to Mystic's assertation that "[t]he whole point of this proceeding is for ratepayers to purchase, for the first time, fuel security service from Mystic 8 [and] 9 and Everett,"[241] the purpose of this proceeding is for Mystic and Everett to continue to operate as they *have in the past*. The enhanced performance obligations Mystic agreed to in the Mystic Agreement are in exchange for out-of-market, cost-of-service-based compensation, not the purchase of a new fuel security service from Mystic 8 and 9. Mystic's argument that its acquisition of Everett somehow improves fuel security in and of itself is self-serving and unsupported.

J. Capital Structure

1. December 2018 Order

121. The Commission found Mystic's proposal to use Exelon's capital structure for ratemaking purposes unjust and unreasonable.[242] The Commission acknowledged that, when an applicant's capital structure cannot be used as in this case, the Commission's policy has been to look at the capital structure of the organization that does the financing for the regulated entity, provided the result is a just and reasonable rate.[243] The Commission disagreed with Mystic that this analysis required the use of its immediate parent's capital structure.[244] Although Exelon's capital structure fell within the range of capital structures for Mystic's selected proxy companies, the Commission found that Exelon's capital structure was "excessively skewed toward equity such that it is not reflective of the industry."[245] Instead, the Commission found that the capital structure of Mystic's ultimate parent, Exelon Corporation, would be more consistent with the capital

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[241] Mystic Rehearing Request at 74.

[242] December 2018 Order, 165 FERC ¶ 61,267 at P 48. Specifically, Mystic proposed a capital structure of 67.28% equity and 32.72% debt based on its immediate parent, Exelon. *See* Mystic Initial Post-Hearing Brief, Docket No. ER18-1639-000 at 87 (filed Nov. 2, 2018).

[243] December 2018 Order, 165 FERC ¶ 61,267 at P 49 (citing Opinion No. 414-A, 84 FERC; *Enbridge Pipelines (KPC)*, 100 FERC ¶ 61,260, at PP 173, 184-185 (2002)).

[244] *Id.* PP 48-49

[245] *Id.* P 50.

structures previously accepted by the Commission; therefore, the Commission directed Mystic to use Exelon Corporation's capital structure.[246]

2. Rehearing Request

122. Mystic maintains that the Commission erred in finding Exelon's capital structure anomalous in comparison to similarly situated merchant generators. According to Mystic, Exelon's capital structure is a market-driven capital structure of a merchant generator, and the absence of evidence to the contrary makes it an error to find otherwise. Mystic argues that Exelon's capital structure is not atypical under the Commission's established precedent, i.e., when compared to the capital structures for regulated entities approved by the Commission in the past or to the range of capital structures in the proxy group of the most comparable electric utilities. Mystic states that the Commission jettisoned without explanation its established, objective precedent established in Opinion No. 414-A in favor of a vague standard requiring that a capital structure not be "excessively skewed" in relation to the entire universe of electric utilities.[247]

123. Moreover, Mystic asserts that the evidence is uncontroverted that Exelon's equity ratio is typical for a merchant generator and that the capital structure should reflect that of the entity that does the financing for Mystic, i.e., Exelon.[248] Mystic argues that a comparison to traditional electric utilities, however, is inappropriate because those companies face inherently different risk and therefore have inherently different capital structure ratios in light of that risk, as is evidenced by the fact that Exelon and Exelon Corporation have the same bond ratings, BBB and Baa2, respectively, but materially different equity ratios. Mystic asserts that this difference in risk was ignored in the December 2018 Order, and, as a result, the Commission repeatedly failed to conduct an apples-to-apples comparison in rejecting Exelon's equity ratio.[249] Mystic argues that the fact that Exelon's equity ratio is not atypical to other merchant generators with similar risk should end the inquiry, and its capital structure should be approved based on this uncontroverted evidence. Mystic argues that failure to address the unique circumstances

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[246] *Id.* P 49. Here, we distinguish between Exelon, the owner of Mystic 8 and 9, and Exelon Corporation, the ultimate parent of both Exelon and Mystic. In the December 2018 Order, the Commission referred to Exelon Generation Company, LLC as "ExGen" and Exelon Corporation as "Exelon." *See id.*

[247] Mystic Rehearing Request at 41.

[248] *Id.* at 37.

[249] *Id.* at 38.

of Exelon and this unrebutted evidence is arbitrary and capricious and "can hardly be classified as reasoned."[250]

124. In addition, Mystic argues that, unlike an entity with cost-of-service assets, there is no incentive for Exelon to manipulate its capital structure to achieve higher regulated returns. Exelon is a merchant energy supplier and must recover its costs in the market. Mystic asserts that Exelon would not benefit by increasing its equity ratio to achieve higher regulated returns because Exelon does not earn a regulated return on equity for the vast majority of its assets. Mystic argues that there is no incentive to distort that capital structure to earn a return on equity from regulated rates, and a test designed to ensure that is unnecessary. Furthermore, Mystic argues that any suggestion that a cost-of-service recovery for two of Exelon's generating units (Mystic 8 and 9) in 2022-2023 obviates the risk Exelon faces and the capital conditions it confronts is contrary to the evidence in the record. Mystic argues that the Mystic Agreement is not a typical cost-of-service agreement; instead, it was designed to replicate the market incentives that are lost with a cost-of-service agreement. Mystic asserts that it is a capacity resource under the Mystic Agreement that is subject to an increased winter capacity supply obligation, both Pay for Performance penalty exposure and heightened Winter Fuel Security penalties and that the Commission erred in comparing Exelon's equity ratio to electric utilities with less risk and more tolerance for debt in their capital structures.[251]

125. Mystic argues that, in the Commission's finding that Exelon's capital structure is anomalous, the Commission also jettisoned its established precedent in favor of a vague, arbitrary standard that leaves the regulated industry to guess at what constitutes an appropriate capital structure. To the extent this type of analysis is appropriate in this case, Mystic requests that the Commission reconsider its decision and maintain its established capital structure precedent articulated in Opinion No. 414-A, which provides that an equity ratio is not atypical if it is "reasonably related" to other equity ratios approved by the Commission and to the equity ratios of the proxy companies.[252]

126. Mystic first seeks rehearing of the comparison of the subject capital structure to market driven capital structures to ensure it is not atypical to the industry. Mystic claims that the Commission's finding is problematic for two reasons: (1) it modifies the straightforward comparison from the range of capital structures to a vague and unsupported not "within two of the top" formulation, and (2) it changes the assessment from comparable companies in the proxy group to the entire universe of electric utilities

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[250] *Id.* (citing *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)).

[251] *Id.* at 39-41.

[252] *Id.* at 43.

regardless of whether they are comparable.[253] Mystic asserts that neither of these changes is explained with reasoned rationale nor supported. Mystic contends that the "only two are higher" test is unreasonable because it has no limiting principle and because it fails to explain why it is acceptable for two companies to have higher ratios, but not Mystic. Mystic argues that there was no quantification, justification, analysis, or explanation in the record on why only two electric utilities (or any other number) having equity ratios higher than 59% is meaningful (statistically or otherwise) to Exelon's capital structure or the universe of electric utilities as a whole. Mystic claims that this type of vague standard adopted by the Mystic Order has been correctly and consistently rejected by the Commission before, and it was error to ignore and override this precedent.[254] In addition, the Commission arbitrarily ignores the important fact that one of the electric utilities with an equity ratio higher than 59% (i.e., an electric utility with an equity ratio of 74%) is in the proxy group of comparable companies, undercutting the Commission's use of the 59% benchmark.[255]

127. Further, Mystic asserts that the universe of electric utilities is primarily made up of non-comparable public utilities, like Exelon Corporation, who earn a substantial portion of their revenues on a long-term basis through cost-of-service rates, and that under the Commission's revised test, the capital structure must now comport with utilities that have been specifically screened out of the proxy group as non-comparable companies based on the Commission's own proxy group screening criteria, which is unreasoned and arbitrary. Mystic contends that the comparable proxy group is even more important here because Exelon is not like regulated utilities as detailed above but instead is a merchant generator with significantly more risk.[256]

128. Mystic also seeks rehearing of the Commission's determination regarding Opinion No. 414 and the *Pacific Gas Transmission Co.* proceeding. Mystic argues that the Commission did not provide reasoned justification or support for changing how the comparison to its own approved capital structures should be performed nor why Opinion No. 414 provided any necessary demarcation in the determination of what constitutes an atypical capital structure. Mystic contends that the Commission did not explain why it departed from Opinion No. 414, noting that Opinion No. 414-A largely maintained the

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[253] *Id.* at 44.

[254] *Id.* at 44-45 (citing *Transcontinental Gas Pipe Line Corp.*, Opinion No. 414, 80 FERC ¶ 61,157, at 61,657 (1997)).

[255] *Id.* at 46.

[256] *Id.* at 48.

previous policy articulated in Opinion No. 414 regarding capital structures.[257] According to Mystic, in Opinion No. 414-A, the Commission relied on pre-Opinion No. 414 decisions, including specifically relying upon and citing the *Pacific Gas Transmission Co.* proceeding rejected in this case. Mystic asserts that, in Opinion No. 414-B, the Commission rejected the very argument that the December 2018 Order now contrarily adopts—that reliance on pre-Opinion No. 414 proceedings is inappropriate; furthermore, reliance on *Pacific Gas Transmission Co.'s* approved capital structure has continued and is an established practice at the Commission.[258] Mystic asserts that the Commission has not articulated any justification for why reliance on pre-Opinion No. 414 proceedings and the *Pacific Gas Transmission Co.* proceeding should stop, either in general, or for this proceeding in particular, and argues that abandoning its established precedent and practice in this case with no rationale is arbitrary and capricious.

129. Mystic asserts that the Commission has approved higher equity ratios in litigated proceedings in the past.[259] More importantly, according to Mystic, the rejection of the *Pacific Gas Transmission Co.* proceeding on the basis that it is the highest again would create a vague and uncertain test and a downward spiral, and perhaps even a paradox: if no utility can rely on the highest equity ratio, then arguably there cannot be a highest equity ratio. Finally, Mystic argues, the Commission rejected reliance on *Pacific Gas Transmission Co.* because it "involved four natural gas proceedings in 1993 in circumstances that are very different from the case before us," but the "very different" circumstances were left unexplained; if the unnamed difference was the timeframe in which the case was decided, that is not relevant.[260] Mystic argues that the fact that it was a natural gas proceeding also is not somehow an excluding circumstance because the Commission relies on the same capital structure analysis for electric transmission rate proceedings as natural gas proceedings. Further, the Commission has relied on equity ratios approved for natural gas pipelines to demonstrate that equity ratios for electric utilities are not atypical to those approved by the Commission in the past.[261] In short, Mystic concludes adherence to Commission precedent is the appropriate standard to utilize, and the Commission did not provide a reasoned justification for abandoning its

[257] *Id.* at 49.

[258] *Id.* at 51.

[259] *Id.* at 52.

[260] *Id.* at 53 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 51).

[261] *Id.* at 52-53.

established precedent in support of this new vague, uncertain, and unsupported test, or for failing to approve Mystic's proposed use of Exelon's capital structure.[262]

130. Mystic argues that a determination today that Exelon's capital structure is anomalous for purposes of the Mystic Agreement is unsupported and resorting to a proxy capital structure is unfounded because it is simply unknown if Exelon's capital structure will be anomalous during the term of the Mystic Agreement. Mystic argues that it is arbitrary and capricious to isolate in time the determination that Exelon's capital structure numbers are anomalous, while requiring a true up three years from now of the very numbers used to make that determination. Mystic asserts that the ruling on use of Exelon's capital structure therefore is speculative and by definition cannot be supported by substantial evidence, because Exelon's future capital structure cannot be "ascertained from the record."[263] Mystic states that, if the Commission is concerned that there is no limiting principle in the true-up process to the use of Exelon's actual capital structure, the Commission could cap Exelon's equity ratio for use in the true-up at 60%, as it has in the past,[264] and that Mystic will not contest that determination. Finally, to the extent the Commission intends to rely on its calculation of the capital structure, Mystic asserts that it is riddled with errors, which the Commission ignored: for example, the calculation of long-term debt relied upon by the Commission includes short-term debt and long-term debt due within a year; non-recourse and miscellaneous debt; and improperly removes from equity noncontrolling interests. Mystic asserts that these departures from precedent and the record are unexplained and arbitrary.[265]

131. Connecticut Parties argue that Mystic's proposal to use Exelon's actual capital structure, subject to a 60% cap on the equity ratio is untimely, new, and should not be considered.[266]

3. <u>Determination</u>

132. We are not persuaded by Mystic's rehearing request. When a rate applicant cannot use its own capital structure for ratemaking purposes, the Commission has most

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[262] *Id.* at 54.

[263] *Id.* at 55.

[264] *Id.* at 55-56 (citing *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 49 (2009); *ITC Holdings Corp.*, 143 FERC ¶ 61,257, at P 78 (2013)).

[265] *Id.* at 56-57.

[266] Connecticut Parties Answer at 2 (citing Mystic Rehearing Request at 55-56).

often imputed the capital structure of the corporate parent.[267] However, here, we continue to agree with Trial Staff that Mystic adopted Exelon's capital structure without performing an independent analysis to determine whether it was reasonable to do so. Mystic did not dispute Connecticut Parties' contention that the Commission has never accepted a capital structure for an electric utility with greater than 60% equity.[268] Thus, Mystic's proposed capital structure was by definition anomalous because it contained 67.28% equity, higher than any other capital structure accepted by the Commission. The fact that Exelon's capital structure is "market-driven" does not make it less anomalous for the purpose of cost-of-service ratemaking. Although the Commission has often favored market forces for setting just and reasonable rates, it did not err by failing to adopt a market-driven capital structure here. We agree with Mystic that traditional utilities face different risks than merchant generators. However, we continue to find that it would be inappropriate to assign Mystic (which has executed a cost-of-service agreement with ISO-NE) the risk profile of its immediate parent (which is a merchant power supplier) if that parent's capital structure is market-driven.

133. We disagree with Mystic that the Commission has jettisoned its policy and precedent without adequate justification or instituted a new policy. The Commission did not institute a new policy. As the Commission stated in the December 2018 Order, "the Commission's policy is to look at the capital structure of the organization that does the financing for the regulated entity, *provided the result is a just and reasonable rate*."[269] While in *Pacific Gas Transmission Co.* the Commission approved a capital structure with a larger equity ratio than what Mystic proposes here, we do not find that this precedent, in and of itself, gives any capital structure with a smaller equity component the presumption of being just and reasonable. Mystic appears to contend that only those capital structures that are unprecedented may be considered anomalous. We disagree. The burden is on Mystic to demonstrate that its proposed capital structure is just and reasonable. As the Commission noted in the December 2018 Order, of the 39 electric utilities reported by the *Value Line Investment Survey*, only two have equity ratios higher than 59%.[270] As such, the proposed 67.28% equity ratio does not appear to be typical of the industry.

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[267] *See* Opinion No. 414-A, 84 FERC ¶ 61,084 at 61,413; *Williams Nat. Gas Co.*, 84 FERC ¶ 61,080, at 61,356 (1998).

[268] December 2018 Order, 165 FERC ¶ 61,267 at P 36 (citing Connecticut Parties Initial Br. at 45 (citing *ITC Holdings Corp.*, 102 FERC ¶ 61,182, at P 68 (2003))).

[269] December 2018 Order, 165 FERC ¶ 61,267 at P 42 (citing Opinion No. 414-A, 84 FERC at 61,415; *Enbridge Pipelines (KPC)*, 100 FERC ¶ 61,260, at PP 173, 184-185 (2002)) (emphasis added).

[270] December 2018 Order, 165 FERC ¶ 61,267 at 50 (citing Trial Staff Reply Br. at 19).

Additionally, while we note that the Commission has considered historical equity ratios approved for natural gas pipelines in approving capital structures for electric utilities, Mystic has not shown how *Pacific Gas Transmission Co.* demonstrates that its proposed capital structure is not anomalous—i.e., that it is reflective of what publicly-traded companies consider the optimal mixture of debt and equity financing today. Accordingly, Mystic did not meet its burden of showing that its proposed capital structure will result in just and reasonable rates.

134. Finally, we reject Mystic's new proposal to cap the equity ratio at 60%. We typically reject attempts to raise on rehearing a new issue, unless we find that the issue could not have been previously presented.[271] Mystic provides no justification for raising this issue for the first time on rehearing. The purpose of the rehearing requirement is to identify alleged errors in the Commission's decision, not to raise new issues. Because answers to requests for rehearing are prohibited under Rule 713 of the Commission's Rules of Practice and Procedure, raising this argument for the first time on rehearing effectively precludes other parties from responding.[272] We thus find this argument to be procedurally barred.

K. Relocation of the Mystic 7 Boiler

1. December 2018 Order

135. In the December 20 Order, the Commission allowed Mystic to recover certain capital expenditures, specifically capital expenditures associated with moving the boiler from Mystic 7 to Mystic 8 and 9.[273] In doing so, the Commission rejected NESCOE's arguments that Mystic should not be allowed to recover these capital expenditures.

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[271] *See Sw. Power Pool, Inc.*, 163 FERC ¶ 61,111, at P 18 (2018). Rule 713(c)(3) of the Commission's Rules of Practice and Procedure states that a request for rehearing must "[s]et forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order." 18 C.F.R. § 385.713(c)(3).

[272] 18 C.F.R. § 385.713(d)(1). *See, e.g., Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 250 (2016) (novel issues raised on rehearing are rejected "because our regulations preclude other parties from responding to a request for rehearing and such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision") (internal quotations omitted); *Balt. Gas & Elec. Co.*, 92 FERC ¶ 61,043, at 61,114 (2000).

[273] December 2018 Order, 165 FERC ¶ 61,267 at P 97.

The Commission stopped short of allowing full recovery of these costs as proposed by Mystic and noted that they would be subject to the true-up mechanism.[274] The Commission stated that NESCOE, or any other interested party, may challenge the prudence of these costs when Mystic files its true-up filing.[275] In the December 2018 Order, the Commission also stated that Mystic's decision to choose a higher cost option when a lower cost option was available "must be supported with specific and credible explanation of measurable benefits for ratepayers."[276]

2. Rehearing Requests

136. Mystic argues that the Commission's statement that Mystic's decision "must be supported with specific and credible explanation of measurable benefits for ratepayers" is a misstatement of the prudence standard. Mystic asserts that, instead, the Commission's prudence standard provides that "to determine the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility management (or that of another jurisdictional entity) would have made, in good faith, under the same circumstances, and at the relevant point in time."[277] Therefore, Mystic seeks clarification that the Commission did not intend to re-state its prudence standard in the December 2018 Order. In the alternative, Mystic seeks rehearing, arguing that the Commission erred in re-stating its prudence standard.

3. Determination

137. We grant clarification that the Commission's prudence standard differs from the analysis the Commission employs in applying this standard. We agree with Mystic's characterization of the Commission's prudence standard (i.e., whether costs would have been incurred by a reasonable utility management, in good faith, under the same circumstances, at the relevant point in time).[278] In the December 2018 Order, the

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[274] *Id.* P 98.

[275] *Id.*

[276] *Id.*

[277] Mystic Rehearing Request at 97 (citing *New England Power Co.*, Opinion No. 231, 31 FERC ¶ 61,047, at 61,084, *reh'g denied*, Opinion No. 231-A, 32 FERC ¶ 61,112 (1985), *aff'd sub nom. Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986)).

[278] *See* Opinion No. 231, 31 FERC ¶ 61,047 at 61,084.

Commission also referenced the prudence *analysis* (i.e., the assessment of the facts and circumstances surrounding the costs in question) it planned to conduct at the time of a prudence challenge, when it stated that Mystic's choice, if it "were challenged . . . must be supported with a specific and credible explanation of measurable benefits for ratepayers."[279]

138. As explained in the December 2018 Order, Mystic appears to have chosen a higher-cost option, when lower-cost options were available, but did not provide any justification for rejecting the lower-cost option. Based on the information available to the Commission at the time of the December 2018 Order, some portion of Mystic's proposed capital expenditure to relocate the Mystic 7 boiler appears imprudent because the record contained no justification for Mystic to pursue the higher-cost option it proposed to pursue. While we grant utility management wide discretion in the operation and management decisions that utilities face, such discretion should not be mistaken for license to arbitrarily spend more than necessary. Because Mystic had not yet actually performed the work of relocating the Mystic 7 boiler at the time of the December 2018 Order, the Commission deferred making a finding on the issue until such costs may be challenged in the true-up process, at which time Mystic can attempt to provide the prescribed information to demonstrate the prudence of Mystic's proposed expenditures.

The Commission orders:

(A) In response to the requests for rehearing, the December 2018 Order is hereby modified and set aside, in part, 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.

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[279] December 2018 Order, 165 FERC ¶ 61,267 at P 98 (citing Opinion No. 231, 31 FERC ¶ 61,047 at 61,084); *see also BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233, at P 13 (2015) ("Once such serious doubt has been raised, the pipeline has 'the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.'") (quoting *Anaheim v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981)).

(C) Mystic is hereby directed to submit a compliance filing, within 60 days of the date of this order, 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.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Constellation Mystic Power, LLC Docket Nos. ER18-1639-002

(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

[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.").

that which the FPA alone can provide. Accordingly, I continue to believe that the 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.

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[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

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

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to generate and sell electricity.

[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.).

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 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

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[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.

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 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

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[15] *Supra* PP 3-4.

[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.*

course, you recall that the whole purpose of this proceeding is to have electricity customers foot the bill for an LNG bailout.[21]

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

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[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—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.").

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 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.

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[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))).

[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.

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 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

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

[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.

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

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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.

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Richard Glick
Commissioner

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[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").

[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.").