

175 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Vistra Corp.
Dynergy Marketing and Trade, LLC
NextEra Energy Resources, LLC
NRG Power Marketing LLC
LS Power Associates, L.P.
FirstLight Power Inc.
Cogentrix Energy Power Management, LLC

Docket No. EL20-67-000

v.

Constellation Mystic Power, LLC
Exelon Generation Company, LLC
Exelon Corporation

ORDER DISMISSING COMPLAINT

(Issued April 15, 2021)

1. On August 25, 2020, pursuant to sections 206 and 306 of the Federal Power Act (FPA)¹ and Rule 206 of the Commission's Rules of Practice and Procedure,² Vistra Corp.; Dynergy Marketing and Trade, LLC; NextEra Energy Resources, LLC; NRG Power Marketing LLC; LS Power Associates, L.P.; FirstLight Power Inc.; and Cogentrix Energy Power Management, LLC (collectively, Complainants) filed a complaint against Constellation Mystic, LLC (Mystic), Exelon Generation Company, LLC, and Exelon Corporation (collectively, Exelon). Complainants ask the Commission to prevent Exelon from flouting the Commission's rules against toggling from cost-based compensation

¹ 16 U.S.C. §§ 824(e), 825e.

² 18 C.F.R. § 385.206 (2020).

back to market-based compensation and request relief to prevent that action. As discussed below, we dismiss the Complaint.

I. Background

2. ISO New England Inc. (ISO-NE) operates a Forward Capacity Market (FCM), under which it procures capacity by conducting a Forward Capacity Auction (FCA) every year in which resources compete to obtain Capacity Supply Obligations for a Capacity Commitment Period three years in the future. Resources that clear the FCA are committed to provide capacity to ISO-NE during the relevant Capacity Commitment Period, and in return they receive capacity payments.³ Resources that seek to de-list from an FCA (i.e., not participate) and leave the capacity market on a permanent basis submit either Retirement or Permanent De-List bids. In preparation for each FCA, the Tariff requires ISO-NE to conduct reliability reviews of Retirement and Permanent De-list Bids to determine whether the units are needed for either fuel security or for transmission security during the relevant Capacity Commitment Period. If a resource is needed for either purpose, the Tariff provides for the potential retention of that resource by either paying the resource its de-list bid or allowing the resource to negotiate a cost-of-service agreement.⁴

3. Exelon is the parent company of Mystic, which owns the Mystic 8 and 9 generating units (Mystic 8 and 9) in Boston. The sole source of fuel for Mystic 8 and 9 is the Everett Marine Terminal (Everett), a liquefied natural gas (LNG) facility. Everett is owned by another Exelon subsidiary, Constellation LNG, LLC (Constellation LNG).

4. In the process leading up to FCA 13, Mystic's units Mystic 8 and 9 submitted Retirement De-List Bids, indicating that Mystic wished to retire those units. ISO-NE retained Mystic 8 and 9 for fuel security purposes for the Capacity Commitment Periods associated with FCAs 13 and 14 via a cost-of-service agreement with Exelon and Mystic (the Mystic Agreement).⁵ The costs of service of Mystic 8 and 9 include the cost of fuel supplied to those units by Everett, under a separate agreement between Mystic and Constellation LNG (Everett Agreement).⁶

³ ISO-NE Transmission, Markets and Services Tariff (Tariff), § III.13, "Forward Capacity Market."

⁴ See Tariff, §§ III.13.2.5.2.5; III.13.2.5.2.5A.

⁵ See Constellation Mystic Power, LLC, FERC FPA Electric Tariff, Cost of Service Agreement, Rate Schedule FERC No. 1, 0.0.0.

⁶ See *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,044, at P 9 (2020)

5. On May 16, 2018, pursuant to FPA section 205,⁷ Mystic filed the Mystic Agreement with the Commission in Docket No. ER18-1639-000.⁸ 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.⁹ While the Commission accepted the Mystic Agreement, provided guidance, and made certain findings, it set several contested issues for hearing and settlement judge proceedings.¹⁰ The Commission directed the Presiding Judge to conduct hearing procedures and certify the record to the Commission without issuing an initial decision.¹¹ On October 12, 2018, the Presiding Judge certified the record to the Commission.¹² On December 20, 2018, the Commission accepted the Mystic Agreement, subject to condition, to become effective June 1, 2022.¹³ On July 17, 2020, the Commission issued three orders addressing requests for clarification and rehearing and ruling on Mystic's compliance filing.¹⁴ On December 21, 2020, the Commission issued an order modifying the discussion in the

(July 2020 Second Rehearing Order).

⁷ 16 U.S.C. § 824d.

⁸ See *Constellation Mystic Power, LLC*, FERC FPA Electric Tariff, Cost of Service Agreement, Rate Schedule FERC No. 1, 1.0.0.

⁹ *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (2018). ISO-NE submitted proposed interim Tariff revisions on August 31, 2018, which the Commission accepted on December 3, 2018. *ISO New England Inc.*, 165 FERC ¶ 61,202 (2018).

¹⁰ See *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at PP 19-20, 34-38, 41.

¹¹ *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 at P 12.

¹² Certification of Record in *Constellation Mystic Power, LLC* of Presiding Administrative Law Judge Steven L. Sterner, Docket No. ER18-1639-000 (Oct. 12, 2018).

¹³ *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) (December 2018 Order).

¹⁴ *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,043 (2020) (July 2020 First Rehearing Order); July 2020 Second Rehearing Order, 172 FERC ¶ 61,044; *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,045 (2020) (July 2020 Order on Compliance) (collectively, July 2020 Orders).

July 2020 Orders and setting aside the July 2020 Second Rehearing Order and July 2020 Order on Compliance in part.¹⁵

6. Mystic 8 and 9 will retire at the end of the Capacity Commitment Period associated with FCA 14.¹⁶ If Mystic 8 and 9 re-enter the market after the term of the Mystic Agreement and are not retained for any other reliability need (i.e., the units do not retire), Mystic must “refund to [ISO-NE] with interest at the Commission approved rate, all costs, less depreciation, for repairs and capital expenditures of [Mystic 8 and 9]” during the term of the Mystic Agreement, according to a Commission-required clawback provision in the Mystic Agreement.¹⁷

7. As relevant here, when a generating unit in ISO-NE retires, its interconnection rights, which are necessary to enable a resource to participate directly in the ISO-NE markets, terminate.¹⁸ A new unit (either an entirely new unit or a unit that was previously retired but is now returning to service) that seeks to participate in the ISO-NE markets must submit an interconnection request to ISO-NE and is placed in the interconnection queue.¹⁹

II. Complaint

8. Complainants allege that, although Mystic previously represented that Mystic 8 and 9 would retire permanently at the end of the period of the Mystic Agreement, Exelon has sought two new positions in the interconnection queue for units that appear either to

¹⁵ *Constellation Mystic Power, LLC*, 173 FERC ¶ 61,261 (2020) (December 2020 Rehearing Order).

¹⁶ See Tariff, § III.13.2.5.2.5.3(a)(i) (“In the case of a Retirement De-List Bid rejected for reliability, if the reliability need that resulted in the rejection for reliability is met, the resource, or portion thereof, will be retired coincident with the end of Capacity Supply Obligation. . .”)

¹⁷ Section 2.4 of the Mystic Agreement; see also July 2020 Order on Compliance, 172 FERC ¶ 61,045 at P 25; December 2018 Order, 165 FERC ¶ 61,267 at P 208 (citing *Midcontinent Independent System Operator, Inc.*, Opinion No. 556, 161 FERC ¶ 61,059, at PP 55, 59 (2017)).

¹⁸ Tariff, § III.13.2.5.2.5.3(a)(i), Schedule 22, §§ 3.2.1.1 and 3.2.2.1.

¹⁹ See Tariff, Schedule 22, “Large Generator Interconnection Procedures,” **Error! Hyperlink reference not valid.**https://www.iso-ne.com/static-assets/documents/regulatory/tariff/sect_2/sch22/sch_22_lgip.pdf.

be, or to be located at the site of, Mystic 8 and 9.²⁰ Complainants ask the Commission to prevent Exelon from contravening the Commission's rules against toggling and inequitably profiting from costs paid for by ratepayers by reverting from cost-based back to market-based compensation.²¹ Complainants point to Commission precedent that prohibits a resource under such agreements from switching from receiving compensation under a cost-of-service arrangement to receiving compensation through a market mechanism without first fully repaying the customers that paid the resource's costs during the cost-of-service period.²² Based on this precedent, Complainants allege that "failure to subject the [units in the] two Exelon queue positions at the Mystic [8 and 9] interconnection points to the clawback provision of the Mystic Agreement would be unjust and unreasonable."²³ Complainants also assert that permitting Mystic to exclude any costs from the clawback provision solely because they are "expensed" and allowing Mystic to recover the costs of the fuel it acquires from Everett without subjecting those costs to the clawback provision is unjust and unreasonable.²⁴

9. Complainants note that, on August 17, 2020, in Docket No. ER18-1639-004, they requested the same relief in their request for rehearing of the July 2020 Orders (rehearing request), which, at the time they submitted their complaint, was still pending before the Commission. If the Commission does not grant the relief sought in the rehearing request, Complainants ask the Commission to find that the existing Mystic Agreement is unjust and unreasonable and that the following modifications are needed to render the clawback provision just and reasonable: (1) apply the clawback provision in the Mystic Agreement to the resources that would use the two Exelon queue positions at the Mystic interconnection points that appear to rely upon the same Everett fuel source (and potentially other facilities currently in use by Mystic 8 and 9), regardless of whether they re-enter the market in their present form, under different names, or through different corporate entities; (2) delete or give no meaning to the words "that were expensed" in the clawback provision of the Mystic Agreement or otherwise make clear that the clawback

²⁰ Complaint at 7-9.

²¹ Complaint at 2.

²² Complaint at 5-6 (citing *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, at P 21 (2015); *New York Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,189, at PP 83-84 (2017), *order on reh'g*, 163 FERC ¶ 61,047 (2018); *Midwest Indep. Transmission Sys. Operator*, 140 FERC ¶ 61,237, at P 137 (2012); *Greenleaf Energy Unit 2, LLC*, 172 FERC ¶ 61,111 (2020); *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243, at P 66 (2007); *New York Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,076, at P 124 (2016)).

²³ Complaint at 14-19.

²⁴ Complaint at 20-26.

provision does not require any particular accounting treatment for costs to be returned under the clawback; and (3) condition Mystic's ability to recover Everett fuel costs on Mystic returning any of Everett's repair and capital expenditure costs to ratepayers in the event that Mystic 8 or 9 return to the market (in whatever form and through whatever corporate affiliate that may take) after the end of the Mystic Agreement.²⁵

10. Complainants request the earliest possible refund effective date so that no amounts paid under the Mystic Agreement will be exempt from the relief requested in the Complaint.²⁶

III. Notice of Filings and Responsive Pleadings

11. Notice of the Complaint was published in the *Federal Register*, 85 Fed. Reg. 54,373 (Sept. 1, 2020), with interventions and comments due on or before September 14, 2020. Connecticut Parties filed a notice of intervention and a timely motion to intervene.²⁷ Calpine Corporation; Energy New England, LLC; Eversource Energy Service Company; Massachusetts Attorney General Maura Healey; Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc. (Public Systems); New England Power Company, Massachusetts Electric Company, Nantucket Electric Company, and Narragansett Electric Company d/b/a National Grid; New England States Committee on Electricity (NESCOE); and Public Citizen, Inc. filed timely motions to intervene. National Grid filed a motion to intervene out of time.

12. Connecticut Parties, NESCOE, and Public Systems filed comments. Exelon filed an answer, and Complainants filed a response to Exelon's answer.

IV. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R.

²⁵ Complaint at 2, 11-12, 28-29.

²⁶ Complaint at 2, 8.

²⁷ Connecticut Parties consist of the Connecticut Public Utilities Regulatory Authority, which filed a notice of intervention, and the Connecticut Department of Energy and Environmental Protection and the Connecticut Office of Consumer Counsel, which filed a motion to intervene.

§ 385.214(d), we grant National Grid’s late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

14. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 358.213(a)(2) (2020), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We accept Complainants’ answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

15. We dismiss the Complaint. The first and second of Complainants’ requests for relief have become moot. As for the third request for relief, Complainants have failed to support a departure from prior Commission orders on this matter.

1. New Queue Positions

a. Complaint

16. Complainants ask the Commission to prevent Exelon and its affiliates from using interconnection queue positions for new or re-powered units to skirt restrictions the Commission has imposed on Mystic’s recovery of costs in the Mystic Agreement.²⁸ Complainants state that Exelon submitted requests to the interconnection queue for units that share several characteristics with Mystic 8 and 9, and each queue position has an expected in-service date of June 1, 2024, which is the day after the expiration of the Mystic Agreement. Complainants add that “[i]t appears that these queue positions will rely upon Everett as a fuel source.”²⁹ Complainants contend that Exelon seeks to recover the undepreciated capital expenditures and repairs of Mystic 8 and 9, including the reimbursement for undepreciated capital expenditures and repairs for Everett, from captive customers during the period of the Mystic Agreement, and then, if Exelon returns those units to the market (whether as part of different corporate entities, and whether as new or re-powered resources), those units will have lower costs because captive

²⁸ Complaint at 11.

²⁹ Complaint at 8. Complainants also allege that, in a Form 8-K filed with the Securities and Exchange Commission on August 21, 2020, Exelon indicated that it intends to cease operations at its “Mystic Generating Station assets” by May 31, 2024 (the end of the period of the Mystic Agreement); however, an Exelon press release states that Exelon is hopeful that it will be able to continue to operate Everett. *Id.*

ratepayers will have pre-funded the capital expenditures and repair costs for those units without any obligation on Mystic's part to return those costs to ratepayers.³⁰

17. Therefore, Complainants assert that the clawback provision of the Mystic Agreement is unjust and unreasonable, unless it covers the possibility that Mystic 8 and 9 re-enter the market in their present form, under different names, or through different corporate entities. Complainants state that the clawback provision currently applies only to the current Mystic 8 and 9 units and their current owner.³¹ They ask the Commission to require the clawback provision also to apply to interconnection queue positions that would allow new interconnections for the existing equipment that comprises Mystic 8 and 9. They also urge the Commission to find that the clawback provision applies to both the current Mystic 8 and 9 entities and to any entities that own or control the two new queue positions that are likely to use the equipment and/or property of Mystic 8 and 9 and/or to obtain their fuel supply from Everett.³²

b. Answers and Comments

18. NESCOE, Connecticut Parties, and Public Systems support the Complaint. Connecticut Parties and Public Systems urge the Commission to clarify that, if Mystic 8 and 9 continue operating after the cost-of-service agreement, in whatever form, then Exelon must refund costs for repairs and capital expenditures, less depreciation, collected under the Mystic Agreement.³³

19. Exelon explains that it submitted two new queue positions for the Mystic site earlier this year (Mystic 10 and 11) but decided to withdraw them in conjunction with its August 20, 2020 Form 8-K filing and has now done so.³⁴ Exelon adds that

³⁰ Complaint at 10.

³¹ Complainants state that the clawback provision currently applies in the event that "Mystic 8 & 9's Owner and Lead Market Participant" either (1) "continues operation of Mystic 8 and/or 9 after termination of this Agreement on other than a cost-of-service basis," or (2) "returns either unit to service following termination of this Agreement or any other cost-of-service agreement and later retirement of the unit." Complaint at 15 (citing Mystic March 1, 2019 Compliance Filing, Docket No. ER18-1639-003, at 6 (Mystic Compliance Filing)).

³² Complaint at 15-16, 18.

³³ Connecticut Parties Comments at 6-7; NESCOE Comments at 4; Public Systems Comments at 5.

³⁴ Exelon Answer at 3.

Complainants' request that the Commission apply the clawback provision to new or repowered units in the same locations as Mystic 8 and 9 ignores that the Tariff already provides an investment threshold for re-entry that prevents toggling (i.e., the Tariff provides that a resource shall be accepted in the FCM as a new resource only if it makes an investment equal to or greater than \$200 per kilowatt of the resource's summer qualified capacity).³⁵ Exelon asserts that, under ISO-NE's interpretation of this provision, the repowering of Mystic 8 and 9 would require a minimum investment of more than \$450 million, which would make it impossible for Exelon to gain a competitive advantage by repowering "financially challenged" Mystic 8 and 9. Therefore, Exelon claims that the Tariff already protects against the circumstance of Mystic 8 and 9 being brought back as new units and obtaining a competitive advantage through toggling.³⁶

20. In their answer, Complainants argue that the interconnection queue positions sought by Exelon are reflective of Exelon's intent to bring back Mystic 8 and 9 and collect market-based rates following the end of the Mystic Agreement. They assert that the fact that Exelon withdrew the queue positions three days after the Complaint was filed "supports, rather than negates, that intent," noting that Exelon does not state that it is abandoning efforts to develop generation at the Mystic site.³⁷ Complainants further argue that Exelon misinterprets the ISO-NE Tariff when it claims that Tariff section III.13.1.1.1.2 is an anti-toggling provision. Complainants assert that, rather than preventing the repowering of a facility, this Tariff provision merely imposes requirements for how to do so.

c. Commission Determination

21. We find that Complainants' request that the Commission ensure that Mystic 8 and 9, in their present form or otherwise, do not toggle from cost-of-service to market-based compensation is moot because Exelon has withdrawn the two new interconnection queue requests at issue. Accordingly, we dismiss Complainants' request.

22. Separately, as the Commission stated in the July 2020 Order on Compliance in Docket No. ER18-1639-003, the clawback mechanism will apply to Mystic 8 and 9 "if for any reason Mystic 8 and/or 9 do not retire immediately following their retention for fuel security and/or transmission reliability and if Mystic 8 and/or 9 re-enter the market as either a New Generating Capacity Resource or Existing Generating Capacity

³⁵ Exelon Answer at 10 (citing Tariff § III.13.1.1.1.2(b)).

³⁶ Exelon Answer at 10-11.

³⁷ Complainants Answer at 5-6.

Resource.”³⁸ In the December 2020 Rehearing Order, the Commission explained that “this statement does not require further clarification in light of the fact that Exelon secured queue positions for two units matching the characteristics of Mystic 8 and 9 because the statement explicitly contemplates the possibility of these same units re-entering the market as new resources.”³⁹

2. Use of the Term “Expensed”

a. Complaint

23. Complainants raise concerns with the language in the Mystic Agreement that states that the clawback provision only applies to costs for repairs and capital expenditures of Mystic 8 and 9 “that were expensed.” Complainants explain that accountants typically distinguish between costs by treating them as either “capitalized” or “expensed” for the purposes of accounting. Complainants assert that this disparate accounting treatment for certain costs should have no bearing on whether repairs or capital expenditures are subject to the clawback mechanism.⁴⁰

24. Complainants note that, in response to the Commission’s directive to include in the Mystic Agreement a clawback provision modeled upon the Midcontinent Independent System Operator (MISO) Tariff, Mystic proposed section 2.4 of the Mystic Agreement, which provides that “Mystic 8 & 9’s Owner and Lead Market Participant must refund to ISO with interest at the Commission-approved rate, all costs, less depreciation, for repairs and capital expenditures of Mystic 8 and/or 9 (as appropriate) *that were expensed.*”⁴¹ Complainants point out that the Commission accepted Mystic’s clawback language in section 2.4 of the Mystic Agreement as compliant with the Commission’s directive, even though the words “that were expensed” do not appear in the MISO Tariff.

25. Complainants note that, although the Commission did not require Mystic to provide further explanation for its deviations from the MISO language, the Commission determined that the costs subject to refund would be “all costs, less depreciation, for repairs and capital expenditures”⁴² Therefore, Complainants ask the Commission to

³⁸ July 2020 Order on Compliance, 172 FERC ¶ 61,045 at P 25.

³⁹ December 2020 Rehearing Order, 173 FERC ¶ 61,261 at P 41.

⁴⁰ Complaint at 7.

⁴¹ Complaint at 20 (citing Mystic Compliance Filing at 6 (emphasis added)).

⁴² Complaint at 20-21 (citing December 2018 Order, 165 FERC ¶ 61,267 at P 208; July 2020 Order on Compliance, 172 FERC ¶ 61,045 at P 25).

direct Exelon to remove the words “that were expensed” or explain that this language has no meaning and is not dependent on whether these costs are “expensed” or “capitalized” in order to ensure that the clawback provision recovers all appropriate costs regardless of how those costs are labeled in Mystic’s accounting.

b. Answer and Comments

26. Connecticut Parties and Public Systems support Complainants’ request.⁴³ Exelon argues that the concern with the use of “expensed” is a collateral attack on prior Commission orders.⁴⁴

c. Commission Determination

27. In the December 2020 Rehearing Order, the Commission found that the words “that were expensed” render the clawback provision in section 2.4 of the Mystic Agreement unjust and unreasonable and directed Mystic to remove that language.⁴⁵ Accordingly, we dismiss this issue as moot.

3. Inclusion of Everett Costs in Clawback

a. Complaint

28. Complainants argue that the clawback should include the amounts that Mystic will be reimbursed for certain repairs and capital expenditures for Everett.⁴⁶ Complainants contend that, because ratepayers will have paid for the necessary repairs and capital expenditures to keep Everett in operation during the period of the Mystic Agreement, this provision will enable Mystic 8 and 9 (or any replacement or re-powered units) to obtain fuel from Everett at artificially lower fuel costs following the termination of the Mystic Agreement.⁴⁷ Complainants argue that the Commission has jurisdiction over Mystic and future replacement generation at the Mystic site and thus need only place conditions on

⁴³ Connecticut Parties Comments at 8; Public Systems Comments at 6.

⁴⁴ Exelon Answer at 7 (citing Complaint at 20 (stating that, in the December 2018 Order, “the Commission did not require Mystic to provide further explanation for its deviations from the MISO language”)).

⁴⁵ December 2020 Rehearing Order, 173 FERC ¶ 61,261 at P 33.

⁴⁶ Complaint at 5 n.16.

⁴⁷ Complaint at 7.

Mystic's fuel cost recovery, without reaching the question of whether it has jurisdiction to require return of costs directly from Everett.⁴⁸

29. Complainants acknowledge that the Commission has previously found that, because the Everett Agreement is not on file with the Commission and Everett is not a jurisdictional entity, the Commission has no jurisdiction to require a clawback, true-up, and/or refund of Everett's costs.⁴⁹ They argue, however, that the Commission's conclusion that it lacks jurisdiction over the Everett Agreement does not relieve the Commission of its obligation to ensure that captive ratepayers do not pay rates that are unjust and unreasonable *under the Mystic Agreement*, over which the Commission has jurisdiction.⁵⁰ Complainants therefore ask the Commission to condition any cost recovery of Mystic's fuel purchases on Mystic's reimbursement to ISO-NE of any of Everett's undepreciated capital expenditure and repair costs, if Mystic 8 and 9 (or their replacements) rely upon Everett as a fuel source to operate in the market.⁵¹

30. Complainants note that the Commission already employed its power to limit Mystic's fuel costs when Mystic sought 100% recovery of the Everett fixed costs, and the Commission permitted only 91% recovery.⁵² They argue that the Commission should use the same approach to condition the pass-through of fuel costs on the implementation of a mechanism that will protect ratepayers from being forced to subsidize future affiliated generating units that will also use Mystic 8 and 9 facilities such as Everett. Complainants assert that paving the way for a generation owner to toggle from receiving cost-of-service compensation to receiving market-based rates without having to reimburse captive customer for costs they previously paid is unjust and unreasonable. Complainants state that, to ensure that the Mystic Agreement is just and reasonable, the Commission must

⁴⁸ Complaint at 12.

⁴⁹ Complaint at 23-24 (citing July 2020 Second Rehearing Order, 172 FERC ¶ 61,044 at P 43).

⁵⁰ Complaint at 22 (citing July 2020 First Rehearing Order, 172 FERC ¶ 61,043 at P 26 ("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 2020 Second Rehearing Order, 172 FERC ¶ 61,044 at P 24 ("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.")).

⁵¹ Complaint at 24.

⁵² Complaint at 25 (citing July 2020 First Rehearing Order, 172 FERC ¶ 61,043 at P 10).

order that safeguards against toggling are a condition to the recovery of fuel costs in the Mystic Agreement.⁵³

b. Answer and Comments

31. NESCOE, Connecticut Parties, and Public Systems agree with Complainants that allowing Mystic to recover the costs of the fuel it acquires from Everett without subjecting those costs to the clawback provision would be unjust and unreasonable.⁵⁴ Exelon argues that Complainants' request to include Everett's capital costs in the clawback is a collateral attack on the Commission's finding that the clawback mechanism does not apply to capital expenditures relating to Everett.⁵⁵

c. Commission Determination

32. We deny the complaint on this issue, on the basis that we already resolved this question in the July 2020 Second Rehearing Order and Complainants have failed to support a departure from our prior orders. Although Complainants attempt to draw a distinction between their arguments here and the issues addressed in the July 2020 Second Rehearing Order, we see none. In the July 2020 Second Rehearing Order, the Commission determined that the clawback provision should not include Everett-related capital expenses and repair costs:

[A] clawback mechanism for Everett's capital costs . . . 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. . . . [T]he 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.⁵⁶

⁵³ Complaint at 25-26.

⁵⁴ Connecticut Parties Comments at 7; NESCOE Comments at 4; Public Systems Comments at 6.

⁵⁵ Exelon Answer at 6 (citing July 2020 Order on Compliance, 172 FERC ¶ 61,045 at P 28).

⁵⁶ July 2020 Second Rehearing Order, 172 FERC ¶ 61,044 at P 43; *see also* July 2020 Order on Compliance, 172 FERC ¶ 61,045 at P 28 ("Regarding the application of the clawback mechanism to Everett, the Commission addressed this issue in its order

The Commission reaffirmed this finding in the December 2020 Rehearing Order.⁵⁷ If there is no basis to require a clawback of costs related to Everett in the Mystic Agreement at a time when Everett is supplying fuel to Mystic 8 and 9 under the Mystic Agreement, there is similarly no basis to require a clawback of costs related to Everett in the Mystic Agreement that would cover a possible future situation in which Everett is supplying fuel to successors of Mystic 8 and 9, outside of the Mystic Agreement.

33. We disagree with Complainants that, because the Commission limited Mystic's fuel cost recovery of Everett fixed costs to 91% recovery rather than the 100% that Mystic sought, we should use the same approach with respect to the fuel cost recovery of Everett's capital expenditures and repair costs. The two situations are not analogous. The Commission directed Mystic to amend the Mystic Agreement to provide for recovery of 91% of the costs of Everett because that is the amount of Everett's fixed costs associated with service to Mystic 8 and 9, rather than to third party customers.⁵⁸ But, as the Commission made clear, it was reviewing the justness and reasonableness of the *payments that Mystic would receive* as they relate to the amount of Everett-related costs that Mystic could charge to customers.⁵⁹ However, the clawback mechanism for Everett's capital costs that Complainants ask the Commission to impose would not apply

on rehearing of the December 2018 Order and found that it does not apply to capital expenditures to Everett.”).

⁵⁷ December 2020 Rehearing Order, 173 FERC ¶ 61,261 at P 39.

⁵⁸ December 2018 Order, 165 FERC ¶ 61,267 at P 133.

⁵⁹ July 2020 Second Rehearing Order, 172 FERC ¶ 61,044 at PP 22-23 (“The Commission’s jurisdiction in its review of these costs is over Mystic; the Commission did not assert jurisdiction over Everett, nor is jurisdiction over Everett a precondition to the Commission’s actions. 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. 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.’ 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.” (footnotes omitted)).

to payments that Mystic received under a jurisdictional rate, but rather would apply to *payments that Everett received* under the non-jurisdictional Everett Agreement.⁶⁰

The Commission orders:

The Complaint is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁶⁰ July 2020 Second Rehearing Order, 172 FERC ¶ 61,044 at P 43. The Commission also explicitly stated that it “lacks jurisdiction to require a clawback, true-up, and/or refund of Everett’s costs.” *Id.*