

160 FERC ¶ 61,076
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Exelon Generation Company, LLC

Docket No. ER17-933-000

ORDER GRANTING WAIVER AND ADDITIONAL COST RECOVERY

(Issued September 20, 2017)

1. On February 3, 2017, pursuant to section 205 of the Federal Power Act (FPA)¹ and section III.A.15 of Appendix A to Market Rule 1 of the ISO New England Inc. (ISO-NE) Transmission, Markets, and Services Tariff (Tariff), Exelon Generation Company, LLC (Exelon) submitted a request seeking recovery of \$1,495,171 in fuel costs for Units 8 and 9 of the Mystic Generating Station (Mystic) that were not recovered due to market power mitigation applied during the months of October and November 2016, as well as associated regulatory costs. Exelon also requests a limited, one-time waiver of the 60-day filing deadline in section III.A.15.1 of the ISO-NE Tariff. On March 30, 2017, pursuant to the authority delegated to the Director, Division of Electric Power Regulation – East, Office of Energy Market Regulation, in the Commission’s February 3, 2017 Order Delegating Further Authority to Staff in Absence of Quorum,² the Commission accepted, subject to refund and further Commission order, Exelon’s request for cost recovery.³
2. As discussed below, in this further order, we grant Exelon’s request for waiver and request for additional cost recovery.

I. Background

3. Mystic Units 8 and 9 are natural gas-fired facilities located in Everett, Massachusetts, and are directly interconnected with the Everett liquefied natural gas

¹ 16 U.S.C. § 825d (2012).

² *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 (2017).

³ *Exelon Generation Co., LLC*, Docket No. ER17-933-000 (Mar. 30, 2017) (delegated letter order).

(LNG) terminal. Exelon purchases re-gasified LNG for Mystic Units 8 and 9 under a firm natural gas sales and purchase agreement with Engie Gas & LNG, LLC (Engie). In June 2016, Exelon entered into negotiations with Engie regarding an amendment to its fuel agreement that would, among other things, alter the incremental cost of fuel burned at Mystic Units 8 and 9 for the period from September 1, 2016, through November 30, 2016 (Shoulder Period Agreement).

4. Under section III.A.7 of the ISO-NE Tariff, the Internal Market Monitor (IMM) determines Reference Levels for the financial and physical parameters of supply offers. When a resource fails applicable market power screens, the parameters of the resource's supply offer will be set to its respective Reference Level. Under the ISO-NE Tariff, a resource may request consultation with the IMM in order to update the financial and physical parameters used to calculate Reference Levels. On August 25, 2016, Exelon requested that the IMM update its Reference Levels for Mystic Units 8 and 9 to reflect the new incremental cost of re-gasified LNG purchased under the Shoulder Period Agreement.

5. Additionally, under section III.A.15 of the ISO-NE Tariff, a market participant has the right to make a filing under section 205 of the FPA seeking additional cost recovery if, as a result of mitigation applied under Appendix A, it will not recover the fuel and variable operating and maintenance costs of a resource for all or part of one or more operating days. The Tariff requires that the section 205 filing be made within 60 days of the receipt of the first invoice containing credits or charges for the applicable operating day. The tariff specifies that the section 205 filing include:

- (i) the actual fuel and variable operating and maintenance costs for the Resource for the applicable Operating Days, with supporting data and calculations for those costs;
- (ii) an explanation of [] why the actual costs of operating the Resource exceeded the Reference Level costs . . . ;
- (iii) the [IMM's] written explanation provided pursuant to section III.A.15.3; and (iv) all requested regulatory costs in connection with the filing.^[4]

The Tariff requires that before a Market Participant makes the section 205 filing, it send to the IMM, for a pre-filing review, the information in subsections (i) and (ii) within 20 days of the referenced first invoice date. The IMM then has an additional 20 days to provide the Market Participant with its written explanation of the events that resulted in the request for additional cost recovery.

⁴ ISO-NE Tariff, § III.A.15.2 (47.0.0).

6. On October 31, 2016, Exelon submitted its request for additional cost recovery to the IMM for those days Mystic Units 8 and 9 were mitigated during October 1-24, 2016 (October 31 Submittal).⁵ At the IMM's request, Exelon supplemented the October 31 Submittal on November 1 and November 4, 2016 (November 4 Submittal). On November 23, 2016, the IMM issued a report addressing the October 31 Submittal (November 23 Report). In the November 23 Report, the IMM took the position that the October 31 Submittal did not contain fuel or other cost information and that the necessary data, supporting calculations, and explanation required by the Tariff were not received until the November 4 Submittal, which the IMM states is too late under the ISO-NE Tariff. Accordingly, the IMM believes that Exelon is only entitled to seek additional cost recovery for the periods of operation that were covered in the ISO-NE's invoices received on or after October 15, 2016—20 days prior to the November 4 Submittal—which excludes Exelon's request for additional recovery for the October 1, 3, and 4, 2016 operating days. Exelon made three subsequent requests to the IMM for additional cost recovery for mitigated operating days during the period of October 25-November 4, November 5-21, and November 22-30, 2016.

II. Exelon's Filing

A. Request for Additional Cost Recovery

7. On February 3, 2017, Exelon filed with the Commission the instant request for additional cost recovery for all mitigated operating days during October through November 2016. Exelon explains that under-recovery occurred because the Reference Levels for Mystic Units 8 and 9 did not reflect the costs of purchasing re-gasified LNG under the Shoulder Period Agreement. While the IMM did not agree that Exelon should recover the full cost for natural gas paid to Engie under the Shoulder Period Agreement, Exelon states that the IMM did appear to agree that Exelon was under-recovering its costs and, therefore, the IMM "recommend[ed] additional cost recovery based on the use of Reference Levels that include [Exelon's] proposed fuel indices plus the IMM's market based adder rather than [Exelon's] contract-based adder."⁶ Exelon states that it accepts, for purposes of this filing, the IMM's positions regarding the calculation of additional fuel costs for the requested operating days.⁷

⁵ Exelon received the first charges for the mitigated period in ISO-NE's October 11, 2016 invoice.

⁶ Filing at 19 (citing November 23 Report at 3).

⁷ Exelon states that its decision to accept the IMM's position with respect to this and certain other adjustments for purposes of this filing should not be construed as conceding the validity of the IMM's positions or waiving the right to challenge its

8. Exelon disputes the IMM's finding in the November 23 Report that Exelon's October 31 Submittal was deficient.⁸ Exelon states that the October 31 Submittal set forth cost shortfalls "due to the difference between the Reference Levels in place and the incremental cost of fuel under [the] Shoulder Period Agreement," explaining that the amounts were calculated "by comparing [Mystic's] cost of generation (using [its] incremental cost of fuel under the Shoulder Period Agreement and unit parameters) against the payments [Exelon] received from ISO-NE."⁹ Exelon states that it reasonably assumed that the explanation and information provided in the October 31 Submittal would be sufficient. Moreover, Exelon argues that the additional information requested by the IMM, such as the fuel invoices by Engie for these days, was either unavailable to Exelon at the time or already in the IMM's possession. Referring to correspondence in which the IMM explained that a market participant's submittal to the IMM "should be identical in substance to the documentation that you intend to provide to the Commission in your Section 205 filing," Exelon argues that such an interpretation of what must be submitted to the IMM is unsupported under the Tariff and unreasonable considering that natural gas suppliers typically bill on a monthly basis.¹⁰

9. Exelon states, even assuming *arguendo* that the October 31 Submittal was deficient to an extent that its application was not complete until after making the November 4 Submittal, this would not preclude it from seeking additional cost recovery with respect to the October 1, 3, and 4, 2016 operating days.¹¹ Exelon argues that the IMM's position improperly conflates the consequences of missing the 20-day deadline in section III.A.15.3 for the pre-filing submission to the IMM with the consequences of missing the 60-day deadline in section III.A.15.1 for the section 205 filing with the Commission. Exelon asserts that there is nothing in section III.A.15 that supports the IMM's claim that a late submission to the IMM, alone, results in complete forfeiture of the right to seek additional cost recovery. Exelon argues that the only direct consequence of a late submission to the IMM is a delayed start to the 20-day period for the IMM's review, and, consequently, fewer days until the 60-day filing deadline where a market participant may evaluate and raise questions regarding the IMM's explanation.

positions in future proceedings, including future proceedings in which Exelon may seek additional cost recovery for Mystic Units 8 and 9. Filing at 17 n.51.

⁸ Filing at 10.

⁹ Filing at 10 (citing November 23 Report, Attachment C).

¹⁰ Filing at 11-12.

¹¹ Filing at 13-14.

10. Lastly, Exelon requests to recover \$56,930.80 in regulatory costs in connection with its filing. It states that it has conservatively estimated its regulatory costs based solely on fees and expenses of outside counsel incurred in connection with the submissions to the IMM and this proceeding. It also requests authorization to recover any reasonable regulatory costs it may incur in connection with this proceeding after the date of its filing, subject to submission of a compliance filing. Exelon states that such authorization is consistent with *Dominion*, where, according to Exelon, the recovery of regulatory costs was authorized “subject to [the applicant] submitting a compliance filing detailing the actual regulatory costs.”¹²

B. Request for Waiver

11. Because Exelon submitted its FPA section 205 filing more than 60 days after it received the earliest of the invoices at issue here, Exelon requests waiver of section III.A.15.1 of the ISO-NE Tariff, which requires that requests for additional cost recovery be submitted within 60 days of receipt of the first invoice containing credits or charges for the applicable operating days. Exelon states that ISO-NE has authorized Exelon to represent that it supports the requested waiver.¹³

12. Exelon states that good cause exists to grant the requested waiver.¹⁴ First, Exelon states that it has acted in good faith with respect to the requirement to submit this filing within 60 days of the receipt of the first invoice containing credits or charges for the applicable operating day. It explains that, prior to the 60th day, Exelon and ISO-NE agreed that it would be more efficient for Exelon to make a single additional cost recovery filing covering all applicable operating days during the October-November 2016 period, rather than what otherwise would have been four separate filings.

13. Second, Exelon argues that its requested waiver is limited in scope. Exelon states that it is only requesting waiver with respect to the applicable operating days during the October 1-November 21, 2016 period. Exelon explains that it is not requesting waiver with respect to the applicable operating days during the November 22-30, 2016 period as its filing was submitted within 60 days of the first invoice for that period. Exelon also notes that it is not requesting waiver of any of the substantive requirements applicable to additional cost recovery under section III.A.5 of the Tariff.

¹² Filing at 20 (citing *Dominion Energy Mktg., Inc.*, 143 FERC ¶ 61,233, at P 24 (2013) (*Dominion*)).

¹³ Filing at 1.

¹⁴ Filing at 21.

14. Third, Exelon argues that the requested waiver would resolve a concrete problem: namely, the fact that it would otherwise have been required to submit four separate section 205 filing requesting additional cost recovery. Exelon states that such filings would have been substantially duplicative of each other in that they would have presented the same issues.

15. Lastly, Exelon argues that the requested waiver will not result in any adverse consequences. It asserts that the requested waiver will not harm third parties, and will, in fact, benefit any third parties who might have an interest in this filing by allowing them to comment on a single filing rather than having to participate in four separate proceedings presenting the same issues. Exelon notes that it is the only party harmed by the delayed settlement that results from making this single application for additional cost recovery.

III. Notice of Filing and Responsive Pleadings

16. Notice of Exelon's filing was published in the *Federal Register*, 82 Fed. Reg. 10,573 (2017) with interventions and protests due on or before February 24, 2017. Direct Energy Business Marketing, LLC and the New England Power Pool Participants Committee submitted motions to intervene. The IMM submitted a limited protest.

17. On March 13, 2017, Exelon submitted an answer and motion to strike portions of the IMM's protest. New England Power Generation Association, Inc. (NEPGA) submitted a motion to intervene out-of-time and answer. On March 29, 2017, the IMM submitted an answer to respond to Exelon and NEPGA.

A. Comments and Protest

18. The IMM states that, although Exelon largely accepts the IMM's proposed additional cost recovery value for purposes of the instant request for cost recovery, Exelon refuses to concede that the IMM has properly construed the Tariff requirements that support this proposed value.¹⁵ The IMM states that Exelon provides no explanation or rationale beyond the IMM's November 23 Report, which is included in Exelon's FPA section 205 filing, to support the value Exelon has proposed; therefore, the IMM posits, the only justification provided in Exelon's filing for the proposed cost recovery value is the one provided by the IMM in the November 23 Report. Accordingly, the IMM argues that, in order for the Commission to accept Exelon's proposed cost recovery, the Commission must accept the IMM's Reference Level calculations and rationale justifying that value.

¹⁵ IMM Protest at 2.

19. Echoing its concerns in the November 23 Report, the IMM does not support Exelon's request for additional cost recovery for the October 1, 3, and 4, 2016 operating days.¹⁶ The IMM explains that the October 31 Submittal did not contain fuel or other cost information, but rather only a summary of the amount of additional cost recovery Exelon was requesting, with no supporting data or explanation of how Exelon arrived at the requested amount. The IMM asserts that Exelon's lack of a clear explanation in its submission required the IMM to make a number of assumptions, calculations, and corrections to make sense of Exelon's requested amount. For example, the IMM states that Exelon initially requested additional cost recovery for days and periods of time when Mystic Units 8 and 9 were not mitigated, which is clearly not permitted under the Tariff. The IMM asserts that, while Exelon arguably never satisfied the requirements in section III.A.15 to request additional cost recovery for any of the days during the Shoulder Period Agreement given the deficiencies in its submittals, Exelon clearly did not do so for the first three days in question given that no supporting documentation whatsoever arrived until the November 4 Submittal. The IMM indicates that the Tariff contains a 20-day deadline by which the IMM must receive a request for additional cost recovery after a market participant receives its first invoice. Therefore, the IMM argues that, because the IMM received Exelon's last supplement to the October 31 Submittal on November 4, 2016—more than 20 days after the relevant invoice for the October 1, 3, and 4, 2016 operating days—Exelon should be prohibited from receiving additional cost recovery for these days.

20. In the event that the Commission grants Exelon's request for additional cost recovery for the October 1, 3, and 4, 2016, operating days, the IMM provides additional information to correct what it believes are errors in Exelon's calculations for these days.¹⁷ This information includes, among other things, corrections to the fuel burn value used for Mystic Unit 9 on October 3, 2016, and corrections to the number of hours Mystic Units 8 and 9 were mitigated in the real-time energy market during these operating days. Accordingly, the IMM asserts that the proper additional cost recovery value for these operating days is \$353,035, rather than \$293,353, as requested by Exelon.

B. Answers

21. Exelon and NEPGA argue that the IMM's comments regarding whether the IMM properly construed the Tariff with respect to the calculation of Mystic Units 8 and 9's Reference Level are beyond the scope of this proceeding and therefore should be struck from the protest.¹⁸ With the exception of whether Exelon is eligible in the first place for

¹⁶ IMM Protest at 18.

¹⁷ IMM Protest at 20.

¹⁸ Exelon Answer at 2-3; NEPGA Answer at 6-8.

additional cost recovery for the October 1, 3, and 4, 2016 operating days, Exelon states that it has voluntarily elected to not challenge the IMM's determination regarding the amount of additional costs that it may recover. Exelon argues that the bulk of the IMM's arguments are devoted to addressing the IMM's interpretation of the Tariff with respect to costs that Exelon has expressly not sought to recover.

22. NEPGA asserts that the IMM essentially takes issue with Exelon's reservation of rights to argue in a future proceeding that its costs incurred under its LNG contract are properly recoverable under the Tariff.¹⁹ NEPGA argues that there is nothing extraordinary about a party reserving its rights, and nothing would justify granting declaratory relief on an issue that is beyond the scope of this proceeding.²⁰

23. Exelon and NEPGA request that, to the extent that the Commission determines that it is appropriate to address the IMM's request regarding the proper interpretation of the Tariff with respect to Reference Levels in this proceeding, the Commission provide notice and an opportunity to intervene for others who could be impacted.

24. In its answer, the IMM argues that section III.A.15 determines the scope of Exelon's section 205 filing and that, pursuant to that section of the Tariff, Exelon was required to raise the issue of the correct calculation of the Reference Levels. The IMM explains that, under section III.A.15.2, Exelon was required to include an explanation of "why the actual costs of operating the Resource exceeded the Reference Level costs," along with the November 23 Report.²¹ The IMM states that these materials, along with Exelon's transmittal letter, expressly raise the issue of whether the Reference Levels (and therefore the resulting costs to be recovered) should be based on Exelon's fuel contract or market-based price.²² Furthermore, the IMM states that the Commission cannot rely simply on the fact that Exelon is willing to accept the amount of additional cost recovery that the IMM determined to be justified. The IMM argues that the Commission is obligated to articulate the basis for any finding that Exelon's filing meets the section 205 standard and the conditions set forth in section III.A.15 that permit Exelon's filing.

¹⁹ NEPGA Answer at 6.

²⁰ NEPGA Answer at 6.

²¹ IMM Answer at 7.

²² IMM Answer at 6.

IV. Discussion

A. Procedural Issues

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), we will grant NEPGA's unopposed motion to intervene out-of-time and accept its comments, given its interest, the early stage of this proceeding, and the absence of undue prejudice or delay.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2017), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that has assisted us in our decision-making process. Nevertheless, we deny Exelon's motion to strike portions of the IMM's protest.²³

B. Substantive Issues

1. Request for Waiver

28. As an initial matter, we grant Exelon's request for waiver, which is uncontested, to allow it to submit its request for cost recovery here, inclusive of invoices received more than 60 days prior to making this section 205 filing. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.²⁴

29. We find that the foregoing conditions have been satisfied here. First, we find that Exelon has acted in good faith, as it consulted with ISO-NE prior to the 60th day and both parties agreed that it would be more efficient to submit a single request for

²³ See *Boston Edison Co.*, 61 FERC ¶ 61,026, at 61,147 n.114 (1988) ("Motions to strike are not favored, and allegedly objectionable material will not be struck unless the matters sought to be omitted have no possible relationship to the controversy, may confuse the issue, or otherwise prejudice a party.").

²⁴ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 14 (2016); *Calpine Energy Servs., Inc.*, 154 FERC ¶ 61,082, at P 12 (2016); *New York Power Auth.*, 152 FERC ¶ 61,058, at P 22 (2015).

additional cost recovery rather than four separate filings. Second, the request for waiver is limited in scope as Exelon requests a one-time waiver of the 60-day filing requirement in section III.A.15.1 with respect to the applicable operating days during the October 1-November 21, 2016 period. Third, we find that allowing Exelon to submit a single request for additional cost recovery solves a concrete problem in that Exelon would otherwise be required to submit, and commenters to comment on, four substantially duplicative filings. Finally, we find that granting the request for waiver will not have undesirable consequences.²⁵

2. Request for Additional Cost Recovery

30. We grant Exelon's request for additional fuel cost recovery for all mitigated days from October through November 2016, including the October 1, 3, and 4, 2016, operating days, in an amount totaling \$1,554,854, as calculated by the IMM. We also grant Exelon's request to recover reasonable regulatory costs incurred in connection with this filing, subject to Exelon submitting a compliance filing detailing the actual regulatory costs within 60 days.²⁶

31. We disagree with the IMM's position that Exelon's alleged failure to timely submit information to the IMM for operating days October 1, 3 and 4, 2016 precludes Exelon from seeking additional cost recovery for those days. Although the Tariff requires a submission to the IMM within 20 days of receiving the invoice from ISO-NE for the relevant operating days, we do not find that failure to meet that deadline alone necessarily operates as a procedural bar to submitting a FPA section 205 filing for additional cost recovery or renders such a filing unjust and unreasonable. We note that the IMM may, as it has done here, protest any FPA section 205 filing for cost recovery, and arguments concerning missed deadlines may be considered but are not conclusive. When weighing the equities of cost recovery under the circumstances before us here, we find it just and reasonable to consider Exelon's request for additional cost recovery for the entire period of October through November 2016. Exelon's initial submission to the IMM was made within 20 days of the first invoice for the mitigated period, and, while the IMM required additional information, the IMM does not dispute Exelon's statements that some of that information, such as the fuel invoices by Engie for these days, was unavailable to Exelon at the time.

²⁵ In making this finding, we note that no party has argued that granting waiver will have undesirable consequences.

²⁶ Exelon states that any post-filing costs will be limited to fees and expenses of outside counsel and an outside consultant (if necessary) incurred in connection with this proceeding. Filing at 20.

32. Having found that Exelon is not prohibited from seeking cost recovery for the entire period at issue, we next find that the amount of costs that Exelon seeks to recover, as adjusted by the IMM, is just and reasonable. Exelon states that it has accepted the IMM's general methodology with respect to the additional cost recovery sought in the instant proceeding, and, with respect to the Reference Levels that the IMM applied when assessing Mystic Units 8 and 9, we note that this issue is not contested in the instant proceeding. We thus find that the record here sufficiently supports granting Exelon's cost recovery in the amount of \$1,554,854.

The Commission orders:

(A) Exelon's request for waiver is hereby granted, as discussed in the body of this order.

(B) Exelon is hereby granted additional cost recovery in the amount of \$1,554,854, plus reasonable regulatory costs incurred in connection with this filing, subject to a compliance filing within 60 days detailing the actual regulatory costs, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.