MEMORANDUM

TO: NEPOOL Principal Committee Members and Alternates

FROM: NEPOOL Counsel

DATE: June 25, 2018

RE: Summary of Recent Pleadings in the Mystic Retention-Related FERC Proceedings -- Exelon COS Agreement (ER18-1639); NEPGA Complaint (EL18-154); and ISO-NE Waiver Request (ER18-1509).[1]

We briefly summarize below additional pleadings filed over the last few days (June 13-22) in the various proceedings related to the out-of-market continued operation of Mystic 8 & 9 for the commitment periods covered by the 13th and 14th capacity auctions. For your convenience, you can click on the names of each of the filing parties as shown in blue below to be linked directly to the pleading being summarized, as posted in the FERC's eLibrary.

I. Exelon COS Agreement (ER18-1639)

Constellation Mystic Power, LLC ("Mystic")

Mystic's answer to the comments and protests filed in ER18-1639 ("Mystic Answer") does not dispute the need for settlement and hearing procedures as suggested in the comments of certain intervenors.[2] Mystic requests; however, that the FERC set the case for settlement and hearing procedures as soon as possible and that the issues to be addressed in settlement and hearings be properly narrowed.[3] The Answer is separated into two sections: (1) issues whose summary disposition is most likely to be critical to prospects for timely settlement; and (2) additional issues that are strong candidates for time-saving summary disposition.

In the first section, Mystic argues that: (1) Mystic is entitled to recover its cost-of-service for the contract term (and specifically that it is appropriate for Mystic to recover, on a pass-through basis, the fuel supply costs associated with its affiliate fuel supply agreement ("FSA") during the contract term and that issues of the length of the contract term and whether it is appropriate to include capital expenditures in the cost-of-service are to be resolved in the Waiver Proceeding); (2) any effect that the COS Agreement may have on the market, including issues related to cost

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[1] In the ***ISO-NE Waiver Request*** proceeding ***(ER18-1509)***, ISO-NE requested waiver of its Tariff to the extent necessary (i) to retain Mystic 8 & 9 for fuel security and (ii) to extend certain FCM deadlines for that retention. In the ***Exelon COS Agreement*** proceeding ***(ER18-1639)***, Exelon seeks FERC approval of an agreement to provide cost-of-service compensation for the continued operation of the Mystic 8 & 9 for the 2022-23 and 2023-24 Capacity Commitment Periods ("CCPs 13 and 14") (the "COS Agreement"); the ***NEPGA Complaint (EL18-154)*** asks the FERC, should it grant ISO-NE's Waiver Request, to require market changes in time for FCA13 that " accounts for the capacity of fuel security resources in a way that prevents price suppression," suggesting Mystic 8 & 9 capacity be treated in the auctions like a Sponsored Resource under New England's Competitive Auctions with Sponsored Policy Resources ("CASPR") design.

[2] Mystic Answer at 1.

[3] *Id.* 1-3.

allocation, the future design of the ISO-NE markets, and fuel security mechanisms are beyond the scope of this proceeding; and (3) the terms of Mystic's proposed COS Agreement that do not change the pro forma cost-of-service agreement in the Tariff are just and reasonable because they have already been found to be so.[4]

In the second section, the Mystic Answer argues that certain issues are capable of being decided now by the FERC and do not require fact-finding in settlement or hearing processes.[5] First, the Mystic Answer asserts that questions regarding the treatment of Everett are "without merit."[6] Mystic specifically responds to arguments made by ENECOS and NESCOE related to affiliate abuse, NRG's arguments related to the FSA between Mystic and Constellation LNG, and ENECOS' arguments related to vertical market threats.[7] Second, the Mystic Answer asserts that the following cost-of-service issues do not raise issues of material fact and should be resolved on legal and policy grounds: (1) the rate of return; (2) recovery of Critical Infrastructure Protection Reliability Standard costs; (3) the use of one-eighth operations and maintenance expenses to establish cash working capital; and (4) Mystic's proposal not to require the use of the Uniform System of Accounts to obtain cost-of-service rates in this proceeding.[8] Finally, the Mystic Answer argues that the non-conforming terms of the COS Agreement are just and reasonable.[9] The Mystic Answer emphasizes that the COS Agreement was negotiated with ISO-NE in its role as independent markets and tariff administrator and opposes the proposed changes suggested in the comments of NextEra and NESCOE.[10]

Mystic renews its requests from its Initial filing and also requests that the FERC set this case for hearing and settlement procedures consistent with the scope outlined above.

II. NEPGA Complaint (EL18-154)

NEPGA

NEPGA's Answer in its Complaint docket emphasizes several of its original claims. NEPGA again argues strongly that the FERC must take action to protect FCA13.[11] NEPGA states that FCA13 is the only auction still in dispute and, relying on ISO-NE's assertion that "it will 'work with stakeholders with the goal of developing a sound proposal to address [price suppression and displacement], and will target implementation for FCA 14'" and asserts that the only remaining question before the FERC is whether the FPA requires action in time for FCA13.[12]

NEPGA concludes that the FERC must take action in FCA13 in order to, "protect the integrity of wholesale markets and prevent the participation of resources held for fuel security and receiving

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[4] *Id*. 3-12.
[5] *Id*. 12-33.
[6] *Id*. at 12.
[7] *Id*. at 13.
[8] *Id*. at 21-29.
[9] *Id*. at 29.
[10] *Id.* at 32-33.
[11] NEPGA Answer in NEPGA Complaint Docket at 2.
[12] *Id.* at 2, *citing* ISO-NE Answer at 24.

out-of-market payments from suppressing prices below just and reasonable levels."[13] NEPGA states that its showing that price suppression and displacement in FCA13 will exacerbate fuel security concerns have not been refuted and cites to comments that acknowledge the growing risks associated with the premature retirement of fuel secure resources.[14] NEPGA also relies on the CASPR Order and the FERC's focus on price formation in wholesale markets to conclude that the FERC should "exhibit leadership in this proceeding by directing ISO-NE to implement a solution that allows ISO-NE to retain the Mystic Units in a manner that does not upend FCA 13."[15]

Next, NEPGA argues that the FERC should reject arguments that the *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc., 150 FERC ¶ 61,214 (2015) (reh'g pending) ("IPPNY")* precedent is relevant and distinguishes the case noting: (1) unlike the units in *IPPNY*, the Mystic Units are not being held to address local transmission reliability needs; (2) in contrast to *IPPNY*, fuel security was never intended to be reflected in the capacity market; and (3) *IPPNY* relates to NYISO's short-term market for capacity rather than New England market.[16]

NEPGA then augments its arguments on price suppression and displacement.[17] NEPGA refers to the testimony of Dr. Sotkiewicz and provides supplemental testimony to address ISO-NE's claim related to the potential for economic displacement of resources.[18] NEPGA suggests that those opposing its Complaint hypothesize about unintended consequences while "minimizing obvious and significant price suppression and displacement in the much more important Forward Capacity Auction."[19] NEPGA concludes that its remedy, even if imperfect, is a better option and will protect FCA13.[20]

NEPGA again requests that the FERC direct ISO-NE to adopt NEPGA's proposed solution for FCA13, whereby "the Mystic Units would be offered into the FCA at their actual costs in order to preserve competitive outcomes; to the extent the units failed to clear the Forward Capacity Auction, the units would then be offered into the existing Annual Reconfiguration Auctions ('ARAs') as price takers and awarded a capacity supply obligation."[21]

Finally, NEPGA argues that procedural arguments against its Complaint are without merit.[22] Responding to NEPOOL's Limited Comments, NEPGA argues there is no merit to claims that "NEPGA's proposed relief cannot be granted because it has not been vetted in the NEPOOL stakeholder process . . . [as] ISO-NE already bypassed the stakeholder process in proposing its tariff waivers . . .."[23] NEPGA continues that "it would be unreasonable to now use the already-bypassed stakeholder process as an excuse to fail to take action to protect FCA13 and suggests

[13] *Id*. at 3.
[14] *Id.* at 3-4.
[15] *Id*. at 4.
[16] *Id*. at 4-7.
[17] *Id.* at 8.
[18] *Id*. at 8-9.
[19] *Id*. at 11.
[20] *Id*. at 13.
[21] *Id*. at 10.
[22] *Id*. at 14.
[23] *Id.*

that an alternative would be to deny the waiver and let stakeholders debate fuel security and price suppression together."[24] NEPGA concludes that regardless, "the stakeholder process is not so important that it trumps just and reasonable rates in FCA13. The Federal Power Act requires just and reasonable and not unduly discriminatory rates, not a stakeholder process."[25]

NEPGA again requests that the FERC issue an order no later than July 2, 2018 granting its Complaint and directing ISO-NE to implement NEPGA's proposed solution to ensure just and reasonable rates in FCA13.[26]

FirstEnergy Solutions Corp. ("FirstEnergy")[27]

Despite having filed requests for emergency relief in various FERC dockets in the past year, FirstEnergy submitted a Renewed Request for Emergency Action in the Grid Resiliency docket (AD18-7), as well as in the NEPGA Complaint docket (EL18-154). While FirstEnergy notes its apparent support of the ISO-NE's efforts to address the region's challenges, FirstEnergy describes solutions such as RMR agreements and the ISO-NE's Waiver Request as "merely Band Aids and not permanent fixes to the present threats posed by generation retirements."[28] FirstEnergy argues that attempts to address the fuel security problem on a piecemeal, regional, basis with tools like RMR agreements and individual tariff waiver requests are insufficient and states, "[r]ather, the record demonstrates that the electric grid's resilience crisis is a *national* problem requiring *national* leadership and a holistic solution."[29]

To that end, FirstEnergy urges the FERC to take immediate direct action to address the closures of nuclear and coal-fired generators and the associated loss of fuel diversity and resilience. FirstEnergy then renews its request for emergency relief as previously requested in the AD18-7 docket aimed at preserving nuclear and coal-fired generation and notes "this is the same relief requested by the ISO-NE but applied at a level sufficient to protect the resilience of the Nation's electric grid."[30]

III. ISO-NE Waiver Request Proceeding (ER18-1509)

NEPGA

NEPGA's Answer to Pleading and Motion responds to the ISO-NE's Answer in support of its Waiver Request. NEPGA asserts two main arguments in its Answer.[31] First, NEPGA argues that ISO-NE's Waiver request, if approved, would actually amend a distinct section of the Tariff.[32] Here, NEPGA distinguishes between reliability and fuel security and asserts that ISO-

[24] *Id.*
[25] *Id.*
[26] *Id.* at 17.
[27] Note that FirstEnergy submitted identical pleadings in both EL18-154 and ER18-1639.
[28] FirstEnergy Request at 2.
[29] *Id.* at 10 (emphasis theirs)
[30] *Id.* at 13.
[31] NEPGA Answer to ISO-NE at 1.
[32] *Id.* at 3.

NE is impermissibly broadening the definition of reliability to include fuel security.[33] NEPGA continues, arguing that such broadening could set a negative precedent and allow for the Tariff to further expand to include terms like "resilience," recently the subject of the DOE NOPR.[34]

Second, NEPGA argues that re-pricing the Mystic Units as price-takers will have undesirable consequences.[35] NEPGA's Answer is specifically concerned with potential price suppression beginning in FCA13.[36]

NEPGA submits that the FERC must condition approval of the Waiver Request on the relief NEPGA requests in its Complaint in Docket No. EL18-154.[37] NEPGA requests that the FERC find that ISO-NE does not presently have the authority to re-price the Mystic Units as price-takers in FCAs 13 and 14 and that approval of the Waiver Request does not convey that requirement or authority to ISO-NE.

Maine Public Utilities Commission ("MPUC")

In its Motion for Leave to Answer and Answer, the MPUC argues that ISO-NE's request to defer cost allocation determinations to "Chapter 2" stakeholder discussions is "neither appropriate nor consistent with the tariff" and addresses ISO-NE's additional information regarding causes of ISO-NE's fuel security concerns.[38] MPUC argues that cost allocation is necessarily an issue that must be resolved as part of the Waiver Request because the Request includes the waiver of a provision that would otherwise allocate the Mystic costs locally.[39]

The MPUC argues that ISO-NE's answer confirms that fuel security concerns have not been caused by the entire region, referencing specifically "the environmental restriction limiting the availability of dual fuel or oil fueled resources . . . promulgated by the Massachusetts Department of Environmental Protection" and the decision of the Massachusetts Supreme Court that struck down the electric distribution company gas pipeline funding proposal.[40]

MPUC requests that the FERC deny the ISO-NE's Waiver Request and, as necessary, direct ISO-NE to undertake the transmission operability analysis required under the Tariff.[41]

Eversource

Eversource responds in its June 13 answer ("Eversource Answer") to the May 25, 2018 Comments filed by David Patton, the External Market Monitor ("EMM") for ISO-NE, in support of the ISO-NE Waiver Request.[42] Eversource agrees with the position that New England has a

[33] *Id*. at 4.
[34] *Id*.
[35] *Id*.
[36] *Id*. at 6.
[37] *Id*.
[38] MPUC Answer at 2.
[39] *Id*. at 4.
[40] *Id*. at 5.
[41] *Id*.
[42] Eversource Answer at 1-3.

serious fuel security risk and highlights the EMM's stated concerns over the ability of the stakeholder process to address this issue and the need for FERC leadership in resolving it.[43]

Eversource disagrees; however, that "procurement of a prompt seasonal product alone is the answer to resolving the dire fuel security risks that exist in New England caused by insufficient natural gas fuel delivery infrastructure."[44] Eversource argues that New England relies more heavily on natural gas-fired generation and advocates a long-term solution, namely a new, natural gas pipeline.[45] Eversource reasons that "[e]xisting pipeline capacity needed to deliver natural gas supplies to those natural gas-fired generators is already fully subscribed by gas distribution companies, who have paid for the gas pipeline system."[46] As such, gas-fired generators depend on interruptible capacity to meet their obligations under the FCM and are compensated for providing electric generation capacity, "even though they are in essence taking advantage of spare pipeline capacity to satisfy their fuel supply needs."[47] Eversource concludes that a short-term seasonal price signal will not alter the existing lack of incentive for gas-fired generators to make a long-term investment in new gas pipeline infrastructure.[48]

Eversource requests the FERC consider mechanisms that incentivize a long-term solution, namely new natural gas pipeline infrastructure, to address the critical and time sensitive issues raised in the ISO's Waiver Request.[49]

Cavus Energy LLC ("Cavus")

Cavus, a natural gas-focused infrastructure development company, criticizes the Waiver Request and its proposed solution as flawed and without merit.[50] Much of the Answer focuses on ISO-NE's determination that Distrigas is dependent on Mystic. Cavus argues that ISO-NE does not demonstrate a compelling need for out-of-market action based on errors in ISO-NE's assumptions.[51] Here, Cavus asserts that: (1) a "Mystic only" retirement does not reduce gas deliverability; (2) retirement of Mystic is no threat to Distrigas; (3) the current market for Distrigas supports its cost structure; and (4) any Mystic retirement could improve the region's fuel security.[52]

Cavus also argues that out-of-market action would be an ineffective remedy with understated consequences.[53] Specifically, Cavus expresses concern that: (1) the waiver request will likely reduce fuel security; (2) retaining Mystic as a pre-emptive means to prevent loss of Distrigas is unwarranted and unduly discriminatory; (3) ISO-NE incorrectly argues inter-dependence, *i.e.*,

43 *Id.*
44 *Id*. at 4.
45 *Id*. at 4-5.
46 *Id.*
47 *Id*. at 4.
48 *Id*.
49 *Id*. at 5.
50 Cavus Answer at 3.
51 *Id.* at 3-4.
52 *Id.* at 4-10.
53 *Id.* at 10.

that "'Distrigas is fully integrated with the generator, and each depends upon the other . . ;'"[54] and (4) cost-of-service for Mystic is neither a least cost solution nor a matter of last resort .[55]

Cavus requests that the FERC "reject ISO-NE Waiver request and urge ISO-NE to continue in pursuit of well-functioning, unbiased, market solutions that promote fuel security and grid resiliency in the region."[56]

Massachusetts Attorney General ("Mass AG")

The Mass AG responds to ISO-NE's arguments that ISO-NE properly relied on a waiver petition rather than a Section 205 filing. The Mass AG argues that the waiver standard has a lesser level of scrutiny than a formal Section 205 filing that is preceded by the NEPOOL stakeholder process and states, "ISO-NE's attempt to shoehorn the substantive issues in this case into a procedural waiver request rather than filing a Section 205 proceeding denies the FERC and stakeholders the benefit of the time-tested New England stakeholder process and the Section 205 adjudicatory process."[57]

The Mass AG also rejects ISO-NE's characterization of its waiver petition as merely a "trigger" for when a cost-of-service agreement may be used. Rather, the Mass AG alleges that ISO-NE is trying to create a right where one does not currently exist. The Mass AG states, "ISO-NE is seeking a waiver of almost all of the Tariff's Forward Capacity Market retirement requirements and existing retirement deadlines, and to remove the Tariff's existing limits on Exelon's ability to recover costs under a cost-of-service agreement. Such a request cannot reasonably be characterized as limited or simply as the 'trigger' for when a cost-of-service agreement may be used, and cannot be granted by a waiver."[58]

NextEra Energy Resources, LLC and New Hampshire Transmission, LLC ("NextEra")

NextEra's Answer argues that, instead of the ISO-NE's Waiver Request, the FERC should insist on changes pursuant to the standards of Section 205 of the FPA, and that such a filing address the resulting price suppression.[59] Specifically, NextEra states that, "[i]n arguing against any need for the FERC to address FCA price suppression, ISO-NE fails to justify the significant change in practice it is proposing—treating a generating facility whose purpose is to meet real-time energy demand during winter months in the same manner as a generating facility whose purpose is to meet the Installed Capacity Requirement when there is a local resource adequacy or local transmission security constraint."[60] NextEra distinguishes the FERC's decision in *IPPNY*, where the FERC "focused on the modeling of transmission constraints . . . [and] reasoned that had transmission been properly modelled in the Installed Capacity ("ICAP") market, the out-of-market units needed for local transmission reliability would have cleared."[61] NextEra also

[54] *Id.* at 14 *citing* ISO-NE Answer at 26-27.
[55] *Id.* at 10-16.
[56] *Id.* at 17.
[57] Mass AG Answer at 4.
[58] *Id*. at 5.
[59] *Id.* at 3.
[60] *Id.*
[61] *Id*. at 4.

distinguishes the NYISO ICAP market from FCM and, like NEPGA, contrasts the short-term ICAP market with the FCM three-year forward market.[62] Next Era argues that ISO-NE does not meet its burden to demonstrate that FCA prices will be just and reasonable if it were to treat Mystic as a price taker.[63] NextEra also states that ISO-NE's Answer does not sufficiently rebut NextEra's arguments in its original Comments.[64]

While NextEra accepts ISO-NE's explanation that "the Tariff does not currently permit a resource that is retained for reliability reasons to re-enter the FCM as an existing resource," NextEra views ISO-NE's statement as, "a commitment to [the FERC] that, with the exception of a future Tariff amendment, ISO-NE will not assert that the Tariff allows Mystic 8 & 9 to do anything other than to permanently retire after the [COS] Agreement is terminated (or, pursuant to the Tariff, to re-qualify as a New Generating Capacity Resource)."[65]

NextEra asks the FERC to reject ISO-NE's waiver and institute a proceeding under FPA section 206 to ensure that rates resulting from the retention of Mystic 8 & 9 under an RMR agreement are just and reasonable and not unduly preferential or discriminatory.[66]

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[62] *Id*.
[63] *Id*. at 5.
[64] *Id*. at 6.
[65] *Id. citing* ISO Answer at 22.
[66] *Id*. at 7.