

Executive Summary

Mystic Retirement FERC Proceedings

(August 17, 2018)

This is the first of several planned periodic reports providing a high level summary of ongoing FERC proceedings related to the potential retirement of Constellation Mystic's 8 and 9 Units (Mystic 8 & 9). Those proceedings more specifically are: (1) ISO New England's (ISO-NE) Tariff Waiver Request in Docket No. ER18-1509, the subsequent order (*Waiver Order*) that denied the Waiver Request and instituted a new investigation in Docket No. EL18-182 and required further filings by ISO-NE required (referred to as the Waiver Proceeding); and (2) the Constellation Mystic Cost-of-Service Agreement (COS Agreement) filing in Docket No. ER18-1639 and the subsequent order that conditionally accepted the COS Agreement, subject to potential adjustments and refunds (Mystic Proceeding). In Section IV of this report, we provide a status update on the NEPOOL stakeholder process related to fuel security issues.

NEPOOL is an intervening party in both the Mystic Proceeding and the Waiver Proceeding and continues to monitor both proceedings. If you have any questions concerning the proceedings, please contact Joe Fagan (202-218-3901; jfagan@daypitney.com), Jamie Blackburn (202-218-3905; jblackburn@daypitney.com), or Sunita Paknikar (202-218-3904; spaknikar@daypitney.com).

I. Background

The Waiver Proceeding stems from FERC's response to ISO-NE's May 1 Waiver Request, where ISO-NE asked the FERC to waive Tariff provisions as needed to allow ISO-NE to contract to retain the continued operation of Mystic 8 & 9 for fuel security purposes. ISO-NE explained that Mystic 8 & 9 submitted plans to retire as of June 1, 2022. ISO-NE asserted that, if Mystic 8 & 9 retired, the region would have fuel security concerns for the Capacity Commitment Periods associated with Forward Capacity Auctions (FCA) 13 and 14, which span from June 1, 2022 to May 31, 2024. The FERC rejected the Waiver Request in its **July 2** order (*Waiver Order*) which we [summarized](#) for you previously. FERC found that the Tariff may be unjust and unreasonable and directed ISO-NE either to submit interim Tariff revisions by **August 31** and more permanent revisions by **July 1, 2019**, or, alternatively, to show cause why the Tariff remains just and reasonable and that one or both of the filings is not necessary.¹

The Mystic Proceeding is being held pursuant to the FERC's **July 13** order (*the Mystic Order*),² which we also [summarized](#) for you previously. In that order, the FERC conditionally accepted the Constellation COS Agreement for the continued operation of Mystic 8 & 9 from June 1, 2022 through May 31, 2024, but suspended its effectiveness and set it for hearing, subject to refund and the outcome of the Waiver Proceeding.³

¹ *Waiver Order* at P 2.

² *Mystic Order* at P 2.

³ 164 FERC ¶61,022, n. 4 (noting that the Mystic Proceeding is subject to the outcome of the ongoing Tariff Proceeding "because the tariff revisions that ISO-NE may submit in that proceeding in

II. Status of the Hearings in the Mystic Proceeding (ER18-1639)

The FERC, in the Mystic Proceeding, required that hearings be held and the evidentiary record be submitted to the Commission by **October 12**. A Presiding Judge (Judge Sterner) was appointed and held a prehearing conference on **July 27**, at which he confirmed that discovery should begin immediately and must be completed by **September 24**. Judge Sterner approved a non-disclosure agreement that all parties must sign in order to receive confidential information in discovery and established a specific, time-sensitive procedure for objecting and responding to discovery. He went on to establish the following fast-track procedural schedule:

- **Jul 30** - Mystic Supplemental Direct Testimony (which has been filed)
- **Aug 16** - ISO-NE Answering Testimony (which has been filed)
- **Aug 23** - Intervenor and FERC Trial Staff Answering Testimony
- **Sep 14** - Intervenor (including ISO-NE) and FERC Trial Staff Cross-Answering Testimony
- **Sep 13** - Mystic Rebuttal Testimony
- **Sep 27** - Live Hearings begin

Per the FERC's order, the issues that will be addressed in the hearing include the justness and reasonableness of the following elements of the COS Agreement: (1) the amount of Constellation's reported capital expenditures (including the design of any appropriate "true up" mechanism); (2) the proposed Fuel Supply Charge; (3) the margin on third-party sales to be retained by Mystic; and (4) the amount and rate treatment of the proposed capital expenditures, O&M expenses, and administrative and general expenses for the Mystic Generating Station and the Distrigas Facility.

Anticipating the chance that parties would ask ISO-NE for information classified as "Confidential," ISO-NE counsel (with input from NEPOOL counsel) circulated a [notice](#) to satisfy the requirement of the ISO-NE's Information Policy that warns Participants of the accelerated procedures that ISO-NE will follow to provide Participants some opportunity to try and protect their "Confidential Information" if they wish. If Confidential Information is to be turned over in the proceeding, it would be pursuant to the non-disclosure agreement in the case.

Discovery remains active and ongoing. At this time, there have been over 50 separate sets of discovery requests, each with multiple questions, seeking information variously from Constellation, ISO-NE and ENGIE/Distrigas. So far, there has only been one public discovery dispute. Eastern New England Consumer-Owned Systems (ENECOS) sought information related to the Mystic 8 & 9 Retirement De-List Bids and other data related to the its offers in FCA13. Constellation and ISO-NE opposed that request. Following oral argument on **August 9**, the Presiding Judge issued an **August 13** [order](#) denying ENECOS' motion due to the sensitivity of the requested information.⁴

response to the [order denying ISO-NE waiver request] are likely to be relevant to the Commission's further action in this proceeding, following the hearing . . ."

⁴ The parties worked out among themselves a separate dispute over discovery of cost information relating to the Everett Marine Terminal.

Early in the proceeding, parties attempted to narrow the issues through potential stipulations. The highly compressed litigation schedule, however, may limit the ability of parties to streamline the proceeding through stipulation(s).

On **July 30**, per the procedural schedule above, Constellation submitted Supplemental Direct Testimonies of William B. Berg, Michael M. Schnitzer, and Alan C. Heintz. Mr. Berg introduced the testimony of Mr. Schnitzer and described changes to the significance of his prior testimony in light of the *Mystic Order*. Mr. Schnitzer provided additional details about the Mystic COS and related agreements. Mr. Heintz testified about a proposed true-up mechanisms for recovery of Mystic costs and provides information about the proposed rate base for Mystic 8 & 9 and the LNG facility. The ISO-NE Answering testimony was filed on **August 16** and included testimony from Bob Ethier, who had negotiated the COS Agreement with Mystic, that provided his explanation and justification of provisions of that Agreement. It also included the testimony of Richard Levitan, who testified about Mystic 8 & 9's role as Distrigas' largest customer and the implications to Distrigas if Mystic 8 & 9 retired.

III. Rehearings and Motions for Clarification

Mystic Proceeding: As of the close of business on **August 16**, four parties ([the New Hampshire Public Utilities Commission \(NHPUC\)](#), [ENECOS](#), [NESCOE](#), and [the Massachusetts Attorney General \(MA AG\)](#)) have sought rehearing of the Mystic Order. While NESCOE's rehearing request urged the Commission to relax established procedural deadlines in Order, the other parties raised legal issues that will likely not be resolved until after the evidentiary hearings are concluded in early October. The NHPUC seeks rehearing of the FERC's ruling permitting recovery of the full Fuel Supply Charge for the Distrigas Facility. ENECOS' Request for Rehearing argues: (1) that Constellation's COS Agreement should have been rejected as a "substantive nullity;" (2) if not a nullity, the COS Agreement should have been rejected as deficient; and (3) that the FERC erred when it failed to follow precedent to prevent "togglng" between cost-based and market-based rates. Finally, the MA AG requested clarification that the *Mystic Order* does not require the inclusion of all of Constellation's proposed capital expenditures in its COS rate and requests rehearing on the FERC's determination that the FERC has the authority to allow Constellation to recover any proposed costs relating to the operation of the Everett Distrigas LNG facility. The MA AG also signaled support for NESCOE's request that the FERC reconsider the accelerated procedural schedule.

Waiver Proceeding: Requests for Rehearing of the *Waiver Order* were required to be filed on or before **August 2**. The requests for rehearing are all summarized in the [August 6, 2018 Litigation Report](#) (pp. 10-11). Since then, there have been a number of pleadings responding in opposition to the request by gas distribution companies that the FERC clarify that the *Waiver Order* was to assure the addition of new gas transportation infrastructure potentially to be paid by electric customers.

IV. NEPOOL Stakeholder Process

In response to the *Waiver Order*, ISO-NE has proposed for stakeholder input and vote(s) Tariff changes that it intends to file by **August 31** as well as changes to Planning Procedure No. 10 (Planning Procedure to Support the Forward Capacity Market). Those proposed changes, along

with numerous alternative proposals, are being considered by the [Reliability](#) and [Markets](#) Committees at meetings scheduled for **August 22**, and by the [Participants Committee](#) at a meeting scheduled for **August 24**. Following the ISO's **August 31** filing, the region will then turn its attention to efforts on developing market-based measures to address fuel security in New England, which it must conclude by the end of **June 2019**.