UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Constellation Mystic Power, LLC	Docket No. ER18-1639-___

MOTION OF MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE, NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC., VERMONT PUBLIC POWER SUPPLY AUTHORITY, EASTERN NEW ENGLAND CONSUMER-OWNED SYSTEMS, AND ENERGY NEW ENGLAND, LLC FOR DISCLOSURE OF AUDIT INFORMATION

Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure,[1] Massachusetts Municipal Wholesale Electric Company (MMWEC), Connecticut Municipal Electric Energy Cooperative (CMEEC), New Hampshire Electric Cooperative, Inc. (NHEC), and Vermont Public Power Supply Authority (VPPSA), the Eastern New England Consumer-Owned Systems (ENECOS),[2] and Energy New England, LLC (ENE) (collectively, Public Systems) request that the Commission direct ISO New England Inc. (ISO-NE) to release additional information concerning its audit of performance under the fuel security cost-of-service agreement among ISO-NE, Constellation Mystic Power, LLC

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[1] 18 C.F.R. § 385.212.

[2] The ENECOS are 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, and Wellesley Municipal Light Plant.

(Mystic), and Constellation Energy Generation, LLC,[3] including but not limited to redacted copies of any reports, studies, or other analyses produced by or for ISO-NE in connection with the audit.

SUMMARY

Under the Mystic Agreement, Mystic passes through to ISO-NE, and thus to New England ratepayers, the costs that Mystic incurs under agreements with various affiliates, including the Fuel Supply Agreement (FSA) between Mystic and Constellation LNG, LLC (CLNG), owner of the Everett Marine Terminal (Everett or EMT), net of the generators' market revenue and a fraction of Everett revenues. As explained below, the net costs passed through the Agreement so far have been astronomical: more than $436 million over the first ten months of the two-year term. Further, most of those costs have resulted from CLNG buying—and then selling at a loss, burning uneconomically, or otherwise disposing of—fuel that Mystic did not need.

Under the Commission's orders in this proceeding, both regulators and customers depend on ISO-NE's audits of Mystic and its affiliates' contract performance to ensure that service is being provided at the lowest reasonable cost. But contrary to its commitments earlier in this proceeding, ISO-NE has released almost no information concerning the audits or the bases for their conclusions that Mystic's performance is consistent with its

[3] See Constellation Mystic Power, LLC, FERC FPA Electric Tariff, Cost of Service Agreement, Rate Schedule FERC No. 1 (8.0.0) (Mystic Agreement). The Agreement was approved pursuant to earlier Commission orders issued in this proceeding. *See Constellation Mystic Power*, *LLC*, 165 FERC ¶ 61,267 (2018) (December 2018 Order), *on reh'g*, 172 FERC ¶ 61,044 (2020) (July 2020 Rehearing Order), *on compliance*, 172 FERC ¶ 61,045 (2020) (July 2020 Compliance Order), *on reh'g*, 173 FERC ¶ 61,261 (2020) (December 2020 Rehearing Order), *vacated and remanded in part sub nom. Constellation Mystic Power*, *LLC v. FERC*, 45 F.4th 1028 (D.C. Cir. 2022).

obligations under the Agreement. Neither the Commission, the States, nor the customers who pay the bills have had any opportunity to assess the practices and decisions (of Mystic affiliates) that produced these enormous charges.

For the reasons stated here, Public Systems ask that the Commission direct Mystic and ISO-NE to release, within 30 days from any order on this motion, additional data concerning: (a) the fuel charges (including fuel inventory management charges) that have been imposed by Mystic's affiliate and passed through to New England ratepayers, and (b) the fuel supply audits undertaken by (or on behalf of) ISO-NE pursuant to its commitments in this proceeding. This information should help ratepayers assess the causes of the monthly charges for fuel and related expenses, including the cost of buying and then disposing of fuel the region did not need, and the steps taken to ensure that they are consistent with the Mystic Agreement's least-cost obligation. Public Systems further request that the Commission require that, going forward, ISO-NE and Mystic supplement these data on a quarterly basis.

Requiring disclosure should help to enable New England ratepayers to take appropriate action to protect themselves against unwarranted charges (if any), including by: (1) seeking disallowance of costs (in the upcoming true-ups required under the Agreement or otherwise) that are inconsistent with Agreement-authorized collections; (2) seeking an order directing ISO-NE to enforce the Agreement through enhanced auditing; or (3) filing a section 206[4] complaint seeking modification of the Mystic Agreement—perhaps to add an independent auditing requirement, add other procedural protections or data disclosure

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[4] Federal Power Act § 206, 16 U.S.C. § 824e.

requirements, impose limitations on the categories of Everett costs that Mystic can pass through, or seek termination of the Agreement. Robert Ethier, ISO's Vice President, System Planning, testified during hearings on the Agreement that the "parties who are paying for this agreement" would be the ones to "bring the claims for damages" if they believed "[Constellation] was not operating in a least-cost manner," Tr. 1065:25–1066:4. But, as Mr. Ethier acknowledged, customers will have no meaningful ability to protect themselves absent information disclosure. Public Systems urge that the Commission act to ensure that the requisite data are disclosed.

BACKGROUND

The concern that forms the basis for this motion is not new, but the need for action has grown exponentially. MMWEC and NHEC pointed out to the Commission in a joint filing last December that the charges imposed under the Agreement had become much larger and more volatile than anticipated.[5] By way of example, monthly "supplemental capacity payments" to Mystic had ballooned from $13.8 million in June 2022 to more than $48 million in July, largely because of Everett inventory management costs. *Id.* Since then, these costs have *skyrocketed*, making the earlier, substantial charges seem modest. As detailed below, ISO-NE has passed through more than $436 million in supplemental capacity payments in just ten months, including nearly $120 million for January 2023 and $104

[5] Answer of Massachusetts Municipal Wholesale Electric Company and New Hampshire Cooperative, Inc. to Emergency Motion of Constellation Mystic Power, LLC, *et al*., No. ER18-1639-019 (Dec. 7, 2022), eLibrary No. 20221207-5114 (MMWEC/NHEC Answer). In that filing, MMWEC and NHEC "urge[d]" that the Commission "not impose additional—and wholly unwarranted—burdens on the region's already sufficiently overburdened ratepayers." *Id.* at 5.

million for February 2023 alone.[6] These one-time costs—mostly to buy and then dispose of unneeded gas—are not funding infrastructure that will benefit future ratepayers; they are pure deadweight losses.

When the Commission accepted the Mystic Agreement, it rejected the concerns voiced by many parties that Constellation's fuel procurement and sales practices should be evaluated by independent auditors. The Commission sided instead with ISO, allowing it to oversee those activities, audit the charges, and make relevant information about Constellation's actions available to stakeholders.[7] While in the ten months since the Mystic Agreement went into effect ISO-NE has audited Everett's fuel management practices and charges, the only document concerning the audit that the ISO has released is an uninformative, three-page summary of the conclusions of an ISO-retained consultant.[8] This summary document falls far short of the data that ISO-NE said in 2018 it would make available and is too cursory either to explain why the charges have become so astronomical or to instill confidence in the ISO's oversight.

Given the magnitude of the charges passed through so far and how little information ISO-NE and Mystic have made public to justify them, we respectfully request that the Commission act to require disclosure of information necessary to ensure that ISO is doing an adequate job of supervising Mystic's fuel management practices, and to enable

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[6] *See infra* p. 6.

[7] December 2018 Order P 194.

[8] ISO-NE, *Mystic Cost of Service Agreement (COSA) Quarterly Audit Summary (June 2022 – August 2022)* (posted Mar. 3, 2023) (Summary), https://www.iso-ne.com/static-assets/documents/2023/03/cosa_audit_summary_q1_q2_2022_2023.pdf.

ratepayers to challenge the imposition by Mystic of costs that are inconsistent with its obligations and authorization under the Agreement.

JUSTIFICATION FOR REQUESTED RELIEF

I. Mystic fuel costs, including costs to manage the inventory in Everett's tanks, have been stratospheric.

The Mystic Agreement obligates ISO-NE (and, by extension, New England ratepayers) to pay Constellation a monthly supplemental capacity payment.[9] Each monthly payment is calculated based on (1) one twelfth of the annual fixed revenue requirement for Mystic 8 & 9 and 91% of the Everett fixed revenue requirement,[10] *plus* (2) variable charges like fuel supply or tank congestion charges, *less* (3) the revenue Mystic receives from sales of capacity, energy, and ancillary services and any profits that Everett makes on Daily Gas Sales—amounts that vary from month to month.[11] In theory, Mystic also must credit a

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[9] Mystic Agreement sched. 3.

[10] According to Constellation's most recent information filing, the monthly fixed revenue requirement for Mystic 8 & 9, excluding capital expenditures (CapEx) incurred during the Agreement, was $9,741,614 in 2022. *Constellation Mystic Power, LLC*, 2022 Informational Filing, attach. B, Mystic 8 & 9 sched. A at 1 (Sept. 15, 2022), eLibrary No. 20220915-5354. The corresponding Everett amount was $4,077,713, *id.*, attach. B, Everett sched. A at 1, of which 91%, or $3,710,719, is allocated to Mystic. The total monthly fixed cost in 2022 was therefore about $13,452,333, offset by capacity, energy, or ancillary service net revenue. The September 15, 2022 information estimated total monthly fixed costs including CapEx of $15,307,180 (Mystic) and $4,540,769 (91% of Everett). A subsequent capital structure settlement reduced the monthly fixed O&M component of Everett costs to $4,223,686. *See* ISO New England Inc., *Mystic Cost of Service Agreement Scenario Analysis* at 1 (Nov. 10, 2022) (ISO-NE Mystic Scenario Analysis), https://www.iso-ne.com/static-assets/documents/2022/11/mystic-cost-of-service-agreement-scenario-analysis-11102022.pdf. The ISO-NE Mystic Scenario Analysis uses a monthly fixed revenue requirement for Mystic of $12,635,091. *Id.* at 2.

[11] As a result, the supplemental capacity payments can be expected to vary to some extent based on, among other things, the extent to which Mystic operates in merit and the magnitude of its inframarginal revenue each month. But as explained below, the increases driven by Everett tank management activities swamp other month-to-month variation.

sliding-scale percentage of the margins earned on Everett's forward gas sales to third parties.[12] But Mystic recently confirmed that it has made no such forward sales.[13]

The monthly charges can increase—sometimes enormously—when Mystic passes through to its ratepayers the costs that Everett incurs to manage the inventory of liquefied natural gas (LNG) in its tanks. Everett contracts ahead of time for scheduled LNG deliveries. If the storage tanks are not empty when a cargo approaches, Everett's owner must either divert the tanker or make room in the tanks by selling vapor or self-scheduling Mystic to burn gas uneconomically. Everett charges these costs to Mystic under the Fuel Supply Agreement (FSA).[14] Because the resulting costs are paid by wholesale electric ratepayers in whole or in part,[15] the Mystic Agreement requires Constellation to choose the least-cost option.[16]

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[12] *Constellation Mystic Power*, *LLC*, 182 FERC ¶ 61,200, PP 31, 38 (2023).

[13] Constellation Mystic Power, LLC's Limited Request for Rehearing, and in the Alternative, Clarification of Order on Remand at 25 n.87, No. ER18-1639-024 (Apr. 27, 2023), eLibrary No. 20230427-5443 (Mystic Remand Order Rehearing).

[14] Under the FSA, Mystic pays: (1) the contract price for gas delivered to Mystic; (2) a "Fixed O & M/Return on Investment" charge that includes an allocation of 91% of Everett's fixed costs; (3) a pass-through of Everett's variable operating costs; (4) an administrative services fee; (5) credit and collateral costs; (6) pipeline transportation agreement costs; (7) net fees associated with the diversion of a scheduled LNG delivery; and (8) credits or debits of profits or losses on Daily Gas Sales. *See* Constellation Mystic Power, LLC, Compliance Filing (eTariff Code 80), attach. C (Clean Fuel Supply Agreement) (Dec. 20, 2021), eLibrary No. 20211220-5218.

[15] The Mystic Agreement and FSA pass through "Diversion Costs" and profits or losses on "Daily Gas Sales." FSA at 3. Losses incurred by self-scheduling Mystic to manage Everett's inventory are deducted from any credits that otherwise result from Mystic's inframarginal revenue on other sales. *See* Mystic Agreement § 4.3.3.

[16] Section 3.5 of the Mystic Agreement allows Constellation to self-schedule Mystic for fuel management purposes but requires Everett to instead "sell fuel to third parties or reject a fuel shipment" if Constellation "reasonably believes that action will reduce overall costs to ratepayers."

The charges passed through the Agreement so far have been staggering. Through the Agreement's first nine months (June 2022 through February 2023), supplemental capacity payments totaled more than **$436 million**, including nearly $120 million for January 2023 and $104 million for February 2023 alone. As we explain below, this is more than *double* the fixed costs to operate both Everett and the two Mystic Units over the same nine-month period. The monthly charges are listed in the table immediately below.

Figure 1

1.1 Mystic Cost of Service Payments

The following table shows the monthly Supplemental Capacity Payments associated with the Mystic Cost of Service settlement.

Month	Supplemental Capacity Payment	Real-Time Load Obligation MWh	Operational Conditions
Jun-22*	$13,005,074.74	9,782,401.91	Predominately offline
Jul-22*	$46,103,707.69	12,410,366.74	Tank congestion management
Aug-22*	$2,557,010.86	12,407,714.72	In-merit operation
Sep-22*	$11,871,728.52	9,312,881.74	Predominately offline
Oct-22*	$12,197,974.22	8,771,010.34	Predominately offline
Nov-22*	$53,481,678.24	9,154,107.20	Tank congestion management
Dec-22	$26,824,880.10	10,459,349.43	Tank congestion management
Jan-23	$119,929,231.45	10,392,320.51	Tank congestion management
Feb-23	$103,883,699.03	9,419,123.65	Tank congestion management
Mar-23**	$46,569,363.90	9,594,214.66	Tank congestion management

*Data Reconciliation Process (DRP) completed for the month.
** March initial settlement not final until the April monthly bill is released.

See ISO-NE, *Mystic Cost of Service Preliminary Report* at 1 (posted Apr. 24, 2023), https://www.iso-ne.com/static-assets/documents/2023/04/mystic_cos_prelim_03_2023.pdf (Preliminary Report).

As these data make clear, most of the charges imposed under the Mystic Agreement thus far have resulted not from Constellation's fixed costs to operate Mystic and Everett but, instead, from Constellation's LNG procurement and tank management decisions. Over the Agreement's first ten months, the combination of (1) the fixed revenue requirement for

Mystic 8 & 9 and (2) 91% of Everett's fixed costs totaled roughly $181 million.[17] But net revenue credits—reflecting the difference between Mystic's revenue (e.g., from its capacity, energy, and ancillary service sales) and its variable costs, plus any positive margins credited to Mystic under the FSA— offset some of those costs. If the credits were $60 million over that period,[18] then the fixed costs *net* of credits would be $121 million. And the $315 million difference between that amount and the total supplemental capacity payments would be attributable *almost entirely to the cost of managing Everett's inventory by diverting cargos or making room in its tanks*. It thus appears that Everett tank management

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[17] $181 million is the sum of the requirements for seven months of 2022 (7 * [$15,307,180 + (91% * $4,989,856)]) and three months of 2023 (3 * [$9,773,049 + (91% * $4,703,212)]). *See* 2022 Informational Filing, attach. B, Mystic 8 & 9 sched. A at 1 (Mystic) and Everett sched. A at 1. These fixed revenue requirement amounts include CapEx that Constellation expected to incur and to expense during the Agreement's term. Constellation recently agreed in settlement to rate base rather than expense much of the relevant CapEx. Constellation Mystic Power, LLC, Settlement Agreement to Resolve Formal Challenges to 2021 Informational Filing (sub-docket -015), and Request for Action by September 1, 2023, No. ER18-1639-021 (Mar. 15, 2023), eLibrary Nos. 20230315-5137 (Public) and 20230315-5138 (Privileged). Doing so would reduce the monthly fixed revenue requirement amounts by several million dollars per month.

[18] ISO-NE published a worksheet enabling stakeholders to estimate Mystic's portion of the costs passed through the Mystic Agreement—that is, costs other than those passed through the FSA. *See* ISO-NE, *User Guide: Estimation Worksheet for Mystic Cost of Service* (Nov. 2022), https://www.iso-ne.com/static-assets/documents/2020/07/user-guide-for-estimation-worksheet.pdf. The worksheet states that during the 2022-23 capacity commitment period Mystic will receive $5,369,400 per month in Forward Capacity Market (FCM) revenue, putting aside performance bonuses or penalties. ISO-NE, *Mystic Cost of Service Estimation Worksheet* (Nov. 2022), https://www.iso-ne.com/static-assets/documents/2020/07/mystic-cost-of-service-estimation-worksheet.xlsx. Thus, FCM revenue alone should account for roughly $54 million in credits over the Agreement's first ten months.

charges are on pace to exceed $375 million annually and $750 million over the two-year term,[19] on top of other costs passed through the Mystic Agreement.

For context, we observe that these annualized Everett tank management charges are multiples of the annual costs forecasted for the *entire* Inventoried Energy Program (IEP) that ISO-NE proposed in 2019[20] combined with the *entire* revised Winter Reliability Program it considered adopting for this past winter.[21] And while the ISO-NE recently filed to increase the IEP payment rates (and, thus, the program costs), the annualized Everett charges still exceed by nearly $100 million the revised IEP's "Estimated Upper Bound Program Cost."[22]

Viewed from a different perspective, the $120 million supplemental capacity payment to Mystic for January 2023 was more than a quarter of the value of the entire New

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[19] Ten months of supplemental capacity payments ($436M) – ten months of fixed costs and CapEx ($181M) + ten months of FCM and other revenue credits ($60M assumed) = $315M variable fuel-related charges through March 2023. $315M / 10 months * 12 months = $378M annualized. Even if one were to assume no revenue credits (counter-factually), the variable fuel-related charges would exceed $300M. [($436M - $181M) / 10 * 12 = $306M / year].

[20] *See ISO New England Inc.*, 171 FERC ¶ 61,235, P 17 (estimating program costs "between $102 and $148 million per year"), *reh'g denied*, 172 FERC ¶ 62,095 (2020), *review granted in part and denied in part sub nom. Belmont Mun. Light Dep't v. FERC*, 38 F.4th 173 (D.C. Cir. 2022).

[21] *See* Chris Geissler, Stephen George, & Craig Martin, ISO-NE, *Winter 2022/23 Analysis: Assessment and Recommendations* at 22 (July 14, 2022) (estimating program cost of $170 million), https://www.iso-ne.com/static-assets/documents/2022/07/a09_mc_2022_07_12-14_winter_2022_2023_presentation.pptx.

[22] *See* Prepared Testimony of Dr. Todd Schatzki on behalf of ISO New England Inc. at 24-25, No. ER23-1588-000 (Apr. 7, 2023), eLibrary No. 20230407-5030.

England wholesale energy market that month.[23] In effect, the Mystic Agreement produced a surcharge of $11.54/MWh on every megawatt hour of wholesale electricity sold in ISO-NE markets in January 2023, driven largely by Everett tank management.[24]

The costs are even more shocking in terms of dollars per megawatt-hour of Mystic's output. For the fourth quarter of 2022 (October–December), Mystic's supplemental capacity payments totaled roughly $92.5 million.[25] During that same period, Mystic sold 438,236 MWh of electricity.[26] The supplemental payments translate to more than $211/MWh of Mystic's output during that period—nearly three times the average day-ahead LMP.[27] And

[23] *See* Memorandum from New England Power Pool to Participants Committee Members And Alternates at 47 (Feb. 15, 2023) (Agenda item #1, "ISO COO Report" section), https://www.iso-ne.com/static-assets/documents/2023/02/npc-2023-03-02-initial.pdf.

[24] ISO-NE, *Monthly Market Operations Report for February 2023*, at 59 (Mar. 16, 2023) ($119,929,231 supplemental capacity payment divided by 10,392,321 MWh), https://www.iso-ne.com/static-assets/documents/2023/03/2023_02_mnthly_market_rpt.pdf. By way of comparison, day ahead locational marginal prices at the New England Hub averaged $49.14/MWh in January. ISO-NE, *Monthly Market Operations Report for January 2023*, at 5 (Feb. 16, 2023), https://www.iso-ne.com/static-assets/documents/2023/02/2023_01_mnthly_market_rpt.pdf.

[25] *Monthly Market Operations Report for February 2023* at 59.

[26] FERC Electric Quarterly Report for Constellation Mystic Power, LLC, Report Period: Q4, Oct-Dec 2022 (generated Mar. 30, 2023).

[27] *See* ISO-NE, *Monthly Market Operations Reports for October 2022*, at 5 (Nov. 17, 2022) ($52.97/MWh), https://www.iso-ne.com/static-assets/documents/2022/11/2022_10_mnthly_market_rpt.pdf; ISO-NE, *Monthly Market Operations Reports for November 2022*, at 5 (Dec. 14, 2022) ($61.72/MWh), https://www.iso-ne.com/static-assets/documents/2022/12/2022_11_mnthly_market_rpt.pdf; and ISO-NE, *Monthly Market Operations Reports for December 2022*, at 5 (Jan. 20, 2023) ($115.50/MWh), https://www.iso-ne.com/static-assets/documents/2023/01/2022_12_mnthly_market_rpt.pdf.

during the first quarter of 2023, payments climbed to $339/MWh of Mystic's output[28]—roughly *six times* the average day-ahead LMP during that period.[29]

While the Agreement's costs are quantifiable, its benefits are much less clear. During the first ten months of the Agreement's term, Mystic operated in merit just one month, was predominately offline for three months, and operated mostly for tank congestion management—burning gas uneconomically—during the other six months. Preliminary Report at 1. Indeed, when the region on Christmas Eve experienced its first capacity scarcity condition in years, driving real-time prices to more than $2,200/MWh,[30] Mystic apparently remained offline.[31]

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[28] During the first quarter of 2023, supplemental capacity payments to Mystic totaled $270,382,294. Preliminary Report at 1. Over the same period, Mystic sold 798,441 MWh of energy. FERC Electric Quarterly Report for Constellation Mystic Power, LLC, Report Period: Q1, Jan-Mar 2023 (generated May 8, 2023). The quotient is $338.64/MWh of Mystic output in the first quarter.

[29] *See* ISO-NE, *Monthly Market Operations Reports for January 2023*, at 5 (Feb. 16, 2023), https://www.iso-ne.com/static-assets/documents/2023/02/2023_01_mnthly_market_rpt.pdf (January 2023 average day-ahead LMP was $49.14); ISO-NE, *Monthly Market Operations Reports for February 2023*, at 5 (Mar. 16, 2023), https://www.iso-ne.com/static-assets/documents/2023/03/2023_02_mnthly_market_rpt.pdf (February 2023 $69.35/MWh); ISO-NE, *Monthly Market Operations Reports for March 2023*, at 5 (Apr. 14, 2023), https://www.iso-ne.com/static-assets/documents/2023/04/2023_03_mnthly_market_rpt.pdf (March 2023 $35.02/MWh).

[30] ISO Newswire, *ISO-NE maintains system reliability through generator outages, loss of imports on Christmas Eve* (Jan. 4, 2023), https://isonewswire.com/2023/01/04/iso-ne-maintains-system-reliability-through-generator-outages-loss-of-imports-on-christmas-eve/.

[31] Marissa Tansino, *ISO New England imposes $39 million in penalties for lack of reserves on Christmas Eve* (last updated Jan. 10, 2023), https://www.wmur.com/amp/article/iso-new-england-penalties-lack-reserves-new-hampshire-123/42453032; ISO Newswire, *Update on Christmas Eve capacity deficiency* (Jan. 12, 2023), https://isonewswire.com/2023/01/12/update-on-christmas-eve-capacity-deficiency/.

II. Load-Serving Entities depend on ISO-NE and FERC to ensure that the Everett costs passed through the Mystic Agreement are just, reasonable, and consistent with the contract.

FERC has jurisdiction over the Mystic Agreement's pass-through of Everett costs and revenues, *Constellation Mystic Power*, *LLC*, 45 F.4th at 1048-49, 1057, and any practices or contracts that directly affect the amounts to be passed through, *id*.; *FERC v. Elec. Power Supply Ass*'*n*, 577 U.S. 260, 277 (2016). Public Systems and other New England load-serving entities depend on the Commission to ensure that the costs imposed on them are just and reasonable.[32]

In the 2018 litigation concerning the Mystic Agreement, many consumer-side parties argued that the Mystic-Everett affiliate relationship (Constellation owns both Mystic and Everett) and the pass-through to captive ratepayers of an overwhelming share of Everett's costs created an urgent need for rigorous independent oversight of Everett's fuel procurement and sales. *See generally* December 18 Order PP 186-191 (summarizing party positions). Connecticut Parties,[33] for example, explained that the pass-through of costs to captive ratepayers erased any economic incentives to keep fuel costs low and eliminated

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[32] *Public Utility Dist. No. 1 v. FERC*, 471 F.3d 1053, 1058 (9th Cir. 2006) ("A major purpose of the whole [Federal Power] Act is to protect power consumers against excessive prices.") (quoting *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952)), *aff'd sub nom. Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1017 (9th Cir. 2004) (describing "protecting consumers" as the FPA's "'primary purpose'"); and *Atl. Ref. Co. v. Pub. Serv. Comm*'*n*, 360 U.S. 378, 388 (1959) ("The [Natural Gas] Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.").

[33] The Connecticut Parties are: Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, and Connecticut Office of Consumer Counsel.

the need for Everett to sell gas in the market to cover its costs.[34] They explained that imposing winter performance requirements while guaranteeing Everett cost recovery could induce Constellation to procure excessive LNG. *See* Connecticut Parties' Initial Brief at 30-31. Under the Mystic Agreement, Constellation bears the risk of failing to procure enough gas to meet winter requirements but little or no risk for procuring too much gas or paying too much for it. Constellation simply charges ratepayers for the costs of the gas it bought and any losses or other expenses it incurs to dispose of the gas it does not need. As the ISO's lead negotiator acknowledged, with a cost-of-service guarantee there is "very limited downside risk to [Constellation] of flooding the market with LNG." Tr. 992:23–993:9 (Ethier).

ISO-NE negotiated several contract provisions intended to protect against that outcome, though it acknowledged that the provisions were "less direct and more requiring of oversight than the profit motive which drives a merchant generator." Ex. CT-083. The Mystic Agreement requires Constellation to:

- "[E]xercise Good Utility Practice with respect to the fuel supply arrangements" for Mystic 8 & 9, Mystic Agreement § 3.9;
- Meet with ISO-NE before "September 1 of each year . . . to discuss the . . . fuel supply plans (i.e., the number of cargoes scheduled to supply both Mystic and third-party sales) for the Winter months (December through March)," *id.;*

[34] *See*, *e.g.*, Initial Brief of the Connecticut Public Utilities Regulatory Authority, the Connecticut Department of Energy and Environmental Protection, and the Connecticut Office of Consumer Counsel at 22-23 & n.30, 26, No. ER18-1639-000 (Nov. 2, 2018), eLibrary No. 20181102-5243 (Connecticut Parties' Initial Brief) (quoting ISO testimony that Exelon was "not interested in third-party sales" (Tr. 1096:25-1097:3 (Ethier)) which "didn't necessarily fit with their corporate goals" (Tr. 1110:4-13 (Ethier)) and that sharing the margins on third-party sales yielded an "attenuated incentive" to make those sales (Tr. 1041:20-22 (Ethier); Ex. CT-069)).

- "[P]rovide timely notice" of any change to the fuel supply plan, "such as through the addition or subtraction of a scheduled LNG cargo," *id.*;
- Reject or dispose of excess LNG by the lowest-cost-to-ratepayers means, Mystic Agreement § 3.5;[35]
- "[P]rovide ISO with a daily report regarding (i) storage tank inventory, (ii) next scheduled cargo (expected amount in MMBtu), and (iii) aggregate sen-dout of (a) third party sales of both vapor (by pipeline) and (b) LNG for that day," Mystic Agreement § 3.8;
- Provide ISO-NE with other information that ISO-NE reasonably requests, "including storage tank volumes, scheduled LNG cargoes, and outages of the LNG Facility," *id.*;
- Allow ISO-NE to examine the books and records "necessary to audit and verify the accuracy of all reports, statements, invoices, charges, or computations" under the Agreement, Mystic Agreement § 6.2;
- "[E]xercise reasonable efforts to secure the ability to provide ISO, subject to a non-disclosure agreement, copies of any contracts" for the supply of fuel to Everett or fuel sales to third parties from Everett during the term, *id.*;
- Provide copies upon the ISO's request "of (i) any affiliate fuel supply agreements involving the LNG Terminal in effect during the Term, (ii) a record of all third-party sales that are reflected in (a) the Daily Gas Sales Costs that are credited or debited under Part 2 of Schedule 3 and (b) the Third-Party Sales Credit for Demand Charges under Part 2 of Schedule 3, and (iii) documentation of the margin earned on any third-party sales of LNG re-gasified through the LNG Facility for purposes of verifying the crediting of such margin against the cost of the Resources' fuel supply from" CLNG, *id.*; and
- Perform audits of Monthly Reports and Periodic Cost Reports, as well as a final audit at the end of the Agreement's term of all expenses incurred under it, *id.*

And ISO-NE left no doubt as to the scope or purpose of the audit rights, explaining that they were intended to "ensure that Mystic will operate in accordance with the terms of the

[35] "[R]ather than self-scheduling for fuel management purposes, the Owner's affiliate shall sell fuel to third parties or reject a fuel shipment if Owner and/or Lead Market Participant reasonably believes that action will reduce overall costs to ratepayers." *Id.*

agreement, including making 'least-cost' decisions where appropriate" and "[t]o address ISO-NE's concerns that Exelon may over-procure LNG without market risk."[36]

Nonetheless, parties remained concerned that in practice no entity would be positioned to oversee Constellation adequately. They argued that, while ISO-NE had contract rights to obtain the necessary information, it lacked strong incentives to engage in rigorous oversight because it does not pay the resulting bills and simply passes costs through to ratepayers. Connecticut Parties' Initial Brief at 50. Conversely, they argued, consumers would have ample incentives to conduct oversight but would lack the information with which to do so unless Mystic and the ISO provided it. *Id.*

Connecticut Parties highlighted that the trial testimony of Dr. Robert Ethier, ISO-NE's Vice President of System Planning and the ISO's chief negotiator of the Mystic Agreement, seemed to confirm these worries. He testified that the "parties who are paying for this agreement" would be the ones to "bring the claims for damages" if they believed "[Constellation] was not operating in a least-cost manner," Tr. 1065:25–1066:4. But he acknowledged they could do so only if they "became aware" of Constellation's breach. *Id.* at 1066:3. Only if affected parties "[have] the information" will they "[have] recourse to also take action." *Id.* at 1069:10-11. And he admitted that ratepayers could not enforce the Agreement without access to the information that Mystic must make available to the ISO under the Agreement. *See* Ex. CT-084 (acknowledging that "access to the data [ISO] is authorized to examine under Section 6.2" is "necessary" to "evaluate whether Mystic's fuel

[36] Initial Brief of ISO New England Inc. at 38, No. ER18-1639-000 (Nov. 2, 2018), eLibrary No. 20181102-5229 (ISO Initial Brief).

supply costs 'were least-cost and consistent with Good Utility Practice'" and that he was unaware of any public data sources that could substitute for Section 6.2 information).

To address this, Connecticut Parties asked the Commission to condition its acceptance of the agreement on commitments that the parties provide data necessary to assess whether Constellation complied with the Agreement. Connecticut Parties' Initial Brief at 32, 36, 40-41. And they urged the Commission to require tailored management audits to assess whether Constellation's operations under the Agreement are consistent with the conduct of sellers in competitive markets, meet ISO-NE's reliability needs, and minimize ratepayer costs. *Id.* at 37, 43-50.

ISO-NE opposed the independent management audits as unnecessary because the ISO "will have and [will] exercise extensive and sufficient oversight over Mystic and [Everett] during the Mystic Agreement term."[37] ISO-NE said it would conduct "routine and frequent audits" on a "broad range of matters related to the Agreement," including "LNG procurement and forward contracting and whether the fuel supply costs incurred by Mystic were prudently incurred and correctly accounted for." December 2018 Order P 192. Moreover, ISO-NE committed to make the resulting information available to stakeholders to the maximum extent permitted by its Information Policy. *See* ISO-NE Initial Brief at 40 n.116; December 2018 Order P 194 ("Consistent with its Information Policy, ISO-NE will allow redacted versions of its reports to be publicly available and allow less redacted versions to

[37] Reply Brief of ISO New England Inc. at 10, No. ER18-1639-000 (Nov. 16, 2018), eLibrary No. 20181116-5254 (ISO Reply Brief). Mystic, for its part, opposed independent auditing on grounds that it increased the risk that costs might be disallowed—thereby adding to other parties' doubts about the efficacy of the provisions Mystic and ISO-NE negotiated. *See* December 2018 Order P 185.

be available to state commissions and other administrative non-participant bodies.").[38] *See also* Tr. 1060:17-20 (Ethier) ("We have some experience with this in the sense that we get audited regularly and versions of that report go public, so maybe there's a model -- and also NEPOOL audits us on a periodic basis, and that also might inform what we share.")

The Commission relied on those representations. *See* December 2018 Order P 193 (relying on audit commitment); *id.* PP 194, 196 (relying on commitments to make redacted audit reports public). It declined to require independent management audits because it found that the ISO-NE's promises to audit the prudence of Constellation's fuel practices and to make the resulting information available to stakeholders "provides a sufficient safe-guard to ratepayers and should provide entities with the information necessary to initiate and meet their burden of proof in a [Federal Power Act] section 206 proceeding." July 2020 Rehearing Order P 90.

III. ISO-NE's audit Summary is inadequate to show that it conducted the necessary oversight and Constellation abided by the Mystic Agreement's terms.

At the October 2022 NEPOOL Markets Committee meeting, ISO-NE announced that it had engaged Levitan & Associates (Levitan) to audit Constellation's fuel supply activities and charges.[39] Despite the audit's critical importance to ratepayers who both

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[38] ISO also suggested that Constellation could be required to provide state regulators with monthly reports on fuel management practices and gas burns. ISO Reply Brief at 11.

[39] *See* Minutes of the NEPOOL Markets Committee Meeting, October 12-13, 2022, at 10 (Nov. 10, 2022) ("Ms. Arnold reviewed the auditing and review provisions and explained that there are processes for two external auditors to review the agreement, one being a financial audit and the other a fuel supply audit. She noted that the ISO has already contracted with Levitan to perform the fuel supply audit . . . ."), https://www.iso-ne.com/static-assets/documents/2022/11/a00_mc_2022_11_08-10_minutes_mc_oct_12-13.docx; Greg Stoltzfus & Cheryl Arnold, ISO-NE, *Mystic Cost of Service Agreement: Update on Settlement Results and Audit Status* at 24 (rev. 2,

shoulder the Agreement's enormous fuel charges and pay for the audit, ISO-NE has not posted or otherwise disclosed:

- Its request for proposals to conduct the fuel supply audit;
- Information about when, how, or how widely it distributed the request for proposals;
- The identities or even the number of entities who responded to the request for proposals;
- The basis on which ISO-NE selected Levitan to conduct the audits;
- The basis on which ISO-NE determined that Levitan—which has testified repeatedly about the importance of retaining Everett and the need for Mystic to fund Everett's operations—is sufficiently impartial to conduct the fuel supply audit; or
- The resulting fuel supply audit contract, or other documents detailing the audit scope and procedures.

Nor has ISO-NE provided "redacted versions of [the audit] reports," as contemplated by the Commission. December 2018 Order P 194.

Instead, ISO-NE released on March 3, 2023, a sparse, three-page Summary of the Levitan audit process and its conclusion that Constellation's fuel charges for the first two quarters of the Agreement (June 2022 through November 2022) were reasonable.[40] The Summary states that the audit scope includes Levitan's

> (1) . . . review of available information furnished by CNLG to support the fixed costs, [variable operating & maintenance costs], and commodity sales to Mystic in the Monthly Fuel Invoice; (2) analysis of CLNG's third party sales, including spot sales and sales under Peaking Option Contracts with LDCs; and (3) review of CLNG's decisions with respect to managing the LNG tank volumes at the EMT, including self-scheduling Mystic,

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posted Oct. 12, 2022) ("Following an RFP process, the ISO selected Levitan and Associates to perform the fuel supply audit").

[40] Summary, note 8.

> selling additional volumes into the market, and/or diversions or cancellations of LNG cargoes.

Id. at 1.

According to the Summary, Levitan "reviewed spreadsheet calculations and requested supporting documentation of the line items identified in Mystic's Monthly Fuel Invoice." *Id.* It states that Levitan "verified the calculation of the Weighted Average Cost of Gas (WACOG), which is the stipulated fuel price in the [Mystic Agreement]," and "reviewed CNLG's sales of vapor to ensure that (1) spot sales were competitive with published market prices, and (2) sales prices invoiced under Peaking Options Contracts were consistent with the pricing terms in the executed contracts." *Id.* The summary also implies that Levitan reviews documentation between CLNG and its LNG supplier regarding options to divert or cancel LNG cargoes. *Id.* In support of its review, Levitan developed "in concert with Constellation . . . an agreed-upon set of supporting documents that CLNG provides with each monthly FSA invoice." *Id.* Mystic, in a recent rehearing request, added that so far it has "responded to 16 sets of data requests from Levitan" and participated in "many hours of teleconferences with the auditor and ISO-NE to answer questions about any and all charges that flow through the Monthly Fuel Supply Cost."[41]

Yet, despite this seeming thoroughness, the audit as described leaves out important lines of inquiry. And with respect to the matters it covers, the published summary provides only bare conclusions that Constellation "made reasonable decisions" and charged ratepayers appropriately. Summary at 2. Indeed, the summary is so sparse that even Mystic was

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[41] Mystic Remand Order Rehearing at 3-4.

forced to describe it, with remarkable understatement, as "high-level in nature." Mystic Remand Order Rehearing at 29.

In fact, the summary provides no insight at all into Levitan's review of a key driver of the fuel-related charges passed through the Mystic Agreement: Constellation's LNG purchasing decisions and the terms of its LNG supply contracts. The importance of these arrangements is obvious; in fact, ISO-NE negotiated a right to review Constellation's fuel supply plans for each winter, including LNG purchases and expected sales,[42] and touted that review as an "important element" of its oversight of Constellation's implementation of the Agreement.[43] ISO-NE explained that the purpose of the review is to protect against Constellation either under-procuring fuel and being unable to meet the winter fuel security objection or "over-procuring LNG, at ratepayers' expense, and then selling excess LNG into New England at below cost." ISO Initial Brief at 31. ISO-NE said it expected Constellation to "'come forward with both the [LNG tanker delivery] schedule and [the] supporting analysis that justifies and rationalizes [its proposed] schedule.'" *Id.* at 31-32 (quoting Tr. at 1089:21-23 (Ethier)). ISO-NE then would review the proposed plan against the "baseline knowledge" gained during Constellation's "three years of operating [Everett] and

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[42] Mystic Agreement § 3.9 ("Owner and Lead Market Participant and/or their affiliates shall meet with ISO (i) prior to the commencement of the Term of this Agreement to discuss the fuel supply plan for the first twelve months of the Term, and (ii) prior to September 1 of each year of the Term to discuss the overall fuel supply plan (i.e., the number of cargos scheduled for both Mystic and third-party sales) for the Winter months of December through March. To the extent that the fuel supply plan is modified after the meeting with ISO (such as through the addition or subtraction of a scheduled LNG cargo), Owner or Lead Market Participant will provide timely notice of same to ISO.")

[43] ISO Initial Brief at 30; *see also* ISO Reply Brief at 10 (citing section 3.9 to support contention that ISO-NE "will have and exercise extensive and sufficient oversight over Mystic and Distrigas . . .").

Mystic on a merchant basis" before the Agreement's term. *Id.* at 31.[44] That benchmark would be important because Constellation, as a merchant, could be expected to operate in a manner that "minimizes the need to sell or burn LNG at a loss by scheduling just enough cargoes to meet their energy and capacity obligations." ISO Initial Brief at 31.

The summary does not indicate that the ISO has reviewed Constellation's fuel supply plan. It does not say when the initial required consultation took place, what it encompassed, or whether Levitan was involved. The summary does not address critical questions at the heart of whether Constellation acted prudently and in accord with Good Utility Practice and its contractual obligations to minimize costs to ratepayers. The unaddressed inquiries include:

- How much LNG did Constellation buy for delivery during the contract term and on what delivery schedule?
- When did Constellation make its purchases and at what price? Did Constellation lock in all purchases at the same time, or did it stagger its purchases to mitigate market price risk?
- What arrangements did Constellation negotiate concerning potential rejections or diversions of incoming cargoes? What alternatives might have been available to provide more flexibility or limit price risk?
- Did Constellation enter into any physical or financial hedges to manage the risks associated with its LNG procurement? Should it have done so?
- When did Constellation inform ISO-NE of its LNG procurement plans and what information did it provide to ISO-NE? At what points (if any) did Constellation update ISO-NE about any changes in those plans or to confirm that the prior plans remained reasonable?

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[44] *See also* December 2018 Order P 219 ("ISO-NE and the IMM have stated that they will monitor Everett and Mystic's behavior during the term of the Agreement and compare it to the period prior to Agreement.").

- Did ISO-NE form a judgment about whether Constellation's plans were reasonable? If so, what information did it consider material and what standard did it apply in reaching that conclusion?

ISO-NE presumably has the data necessary to answer these questions. To obtain approval of the Mystic agreement, ISO-NE emphasized its right to review the CLNG fuel supply plans. And Mystic says it provides ISO-NE and Levitan with all the underlying proprietary information used to calculate the Tank Congestion Charge values (Mystic Remand Order Rehearing at 29)—data that should answer at least some of the questions above. But the published audit summary addresses none of the questions, not even at a "high level" (*id.*). On its face, the audit summary addresses only Constellation's decisions about how to dispose of excess gas and its calculations of charges and credits.[45]

Yet even as to those issues, the summary provides almost no information about the matters supposedly under review. Take July 2022, for example. Mystic's supplemental capacity payment for that month exceeded $46 million[46]—more than triple the monthly fixed costs for Mystic and Everett (let alone the net cost after deducting inframarginal energy, ancillary service, and capacity revenue). Plainly, the vast majority of the supplemental capacity payment for that month consisted of losses or other costs associated with rejecting or disposing of excess gas. As explained above, Constellation has three ways to manage Everett's inventory—rejecting or diverting an incoming cargo, self-scheduling Mystic to burn gas at a loss, or selling gas to third parties—and is obligated to choose the means that

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[45] Access to the audit contract would shed light on whether Levitan's responsibilities are limited to these items.

[46] Preliminary Report at 1.

is least cost to ratepayers.[47] Any diligent evaluation of the fuel supply costs passed through the Mystic Agreement would have to examine the choice(s) Constellation made that produced the costs, the alternatives available at the relevant times, and potential options that could have been available with the exercise of reasonable forethought and prudent business practices.

The summary, however, addresses none of this. Reproduced below is the full summary supporting the imposition of the $46 million supplemental capacity payment for July 2022:

> **July 2022**
>
> Based on LAI's analysis of all options available to CLNG, LAI concluded that CLNG made reasonable decisions in managing tank inventory and regarding third party sales in July 2022. LAI discovered and CLNG acknowledged erroneous over and underbillings to Mystic in the Monthly Fuel Invoice that ultimately resulted in net overbilling for the month, which were resolved through the July Resettlement.

Summary at 2. And unfortunately, that is no anomaly. The supplemental capacity payment for November 2022 was even greater—almost $53.5 million[48]—but the audit summary was just as sparse:

> **November 2022**
>
> Based on LAI's analysis of all options available to CLNG, LAI concluded that CLNG made reasonable decisions in managing tank inventory and regarding third party sales in November 2022.
>
> LAI identified and CLNG acknowledged one potential instance where there could be an adjustment regarding Daily Gas Sales once the WACOG was determined for that month. However, once the WACOG process that is used

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[47] Mystic Agreement § 3.5.

[48] Preliminary Report at 1.

> to calculate the Daily Gas Sales numbers was finalized, no adjustment was needed.

Summary at 3 (footnote omitted).

Public Systems submit that such barebones, conclusory assertions are inadequate. The summaries do not identify the specific practices and decisions that drove the tremendous fuel-related costs passed through the Mystic Agreement, much less demonstrate that they were prudent and consistent with Constellation's contract obligation to minimize ratepayer costs. To reach a conclusion on that issue, one would need to know at least:

- Whether Constellation's fuel supply plan and incoming cargo schedule was reasonable when made;
- If Constellation incurred costs to divert a cargo or dispose of excess gas in a particular month, when did it identify the need to take such steps and should it have identified the need earlier?
- How did Constellation forecast the costs of the available fuel-management options? For example, what market price forecasts did Constellation use to assess the cost of self-scheduling Mystic to burn gas uneconomically or selling vapor to third parties? Were the forecasts reasonable?
- What step did Constellation choose and was that option the least expensive to ratepayers? And in making that assessment, did Constellation account for all relevant considerations? For example, when evaluating the cost to ratepayers, did it consider the offsetting reduction of locational marginal prices that would result from self-scheduling Mystic to burn gas uneconomically?
- Did Constellation use all commercially reasonable steps to minimize the potential costs of each fuel-management alternative? Did it hedge its fuel supply risk? Did it attempt to negotiate more flexible LNG purchase arrangements? What steps did it take to identify potential third-party gas buyers and to maximize the profits or minimize the losses on such sales?

Throughout this long-running proceeding, ISO-NE resisted calls for additional auditing of Mystic by assuring ratepayers and the Commission that it would engage in extensive oversight[49] and would make the resulting information available to stakeholders.[50] If the quarterly audit reports are to amount to more than an exhortation to "trust us," they must include a level of detail sufficient to enable a reasonable stakeholder either to confirm that Constellation acted consistent with its contract obligations or to challenge the charges that have been imposed. And the need for that information is even more acute now that the Commission has ruled on remand that interested parties may review and challenge Everett tank management charges during the upcoming true-up. *See Constellation Mystic Power, LLC*, 182 FERC ¶ 61,200, PP 57-58, 62 (2023), *reh'g pending*. The information provided to date falls short.

IV. The Commission should direct Mystic and ISO-NE to provide additional information.

The sheer magnitude of the fuel costs passed through the Fuel Supply Agreement between Mystic and its affiliates, the absence of prior review by the Commission, the States, or other representatives of the customers who pay the bills, and ISO-NE's commitments to make audit results public so that customers can assess Constellation's compliance with the Mystic Agreement, all necessitate the release of the information underlying the audit results. Accordingly, the Commission should require Mystic and ISO-NE to answer the questions set forth in this pleading and provide copies of the following documents, subject to reasonable confidentiality protections as described below:

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[49] ISO Reply Brief at 10.

[50] ISO Initial Brief at 40 n.116 ("Similar to [the] concept floated for Exelon's final supply plans, and consistent with the ISO Information Policy, redacted versions of the reports could be made available, with state commissions and other administrative, non-participant bodies may be able to view less redacted versions."); December 2018 Order at P 194 (same).

- All documents presented by Constellation to justify its fuel supply plan (including any modifications);
- All documents used by ISO-NE to evaluate the reasonableness of Constellation's fuel supply plan (including any modifications);
- Any analysis or evaluation prepared by ISO-NE of Constellation's fuel supply plan;
- Each monthly invoice or comparable document detailing on a line-item basis all costs, expenses, charges, and credits applied under the Mystic Agreement for the months covered by the audit summary;
- Each monthly invoice or comparable document detailing on a line-item basis all costs, expenses, charges, and credits applied under the Fuel Supply Agreement for the months covered by the audit summary;
- Any report or other document communicating the results of Levitan's monthly audits, including any workpapers or calculations supporting the conclusion that Constellation disposed of excess LNG by least-cost means;
- To the extent not specified in any such report or other document, a list of the documents that Levitan reviewed in conducting each monthly audit; and
- To the extent not otherwise provided, information responsive to the bulleted questions set forth earlier in this pleading, including but not limited to:
    - A copy of the request for proposals leading to Levitan's selection;
    - A copy of any contract between ISO-NE and Levitan concerning the audit; and
    - Narrative discussion of the consultations that took place concerning Constellation's fuel supply plan, any documents the ISO or its consultants reviewed, any conclusions the ISO or its consultant formed, and the bases for those conclusions.

We are aware that Mystic requested rehearing of the Commission's remand order, seeking to shield much of this information from disclosure and challenge during the upcoming true-up on grounds that it is competitively sensitive and that its releasing would violate the ISO-NE Information Policy. *See* Mystic Remand Order Rehearing at 4, 20-21. But for the reasons we explain below, any legitimate confidentiality concerns could be addressed by a protective order and tiered-access system and should not shield from scrutiny the hundreds of millions of dollars that Mystic and its affiliates are charging ratepayers.[51]

To begin, we note that not all commercial or confidential information is "Confidential Information" under the Information Policy. Rather, "Confidential Information" is the subset of "commercial or financial information[] *the disclosure of which would harm the Furnishing Governance Participant or prejudice the position of that Governance Participant in the New England electricity markets*." *See* ISO-NE Tariff, Att. D, § 2.1(a) (emphasis added). Here, the relevant Governance Participant—Mystic—will retire at the end of the Mystic Agreement term and will operate for the rest of its economic life under full cost-of-service rates. Because Mystic no longer depends (and never will depend) on market sales for cost recovery, the disclosure of its fuel costs will not harm Mystic or prejudice its position in the New England electricity markets.

While Everett may sell gas or LNG to third parties after Mystic retires, the ISO-NE Information Policy does not extend to protecting that non-jurisdictional interest.[52] Even if

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[51] *See* Mystic Agreement § 11.10.2 ("Notwithstanding anything in this Agreement to the contrary, if during the course of an investigation or otherwise, the Commission requests that a Party (the "responding Party") provide to it information that has been designated by the other Party to be treated as confidential under this Agreement, the responding Party shall provide the requested information to the Commission or its staff within the time provided for in the request for information. . . ."); ISO-NE Information Policy section 1 ("The Information Policy is expressly intended *both*: (1) to protect against the disclosure of Confidential Information that could facilitate anticompetitive conduct prohibited by the antitrust laws *and* (2) *to distribute information* to the extent and in a manner consistent with preserving the competitiveness and efficiency of the New England electric markets and the reliability of the bulk power system.") (emphasis added) ISO-NE Tariff, Att. D, § 1.

[52] CLNG is not a Governance Participant, and its sales of gas or LNG are not "in the New England electricity markets."

it did, Mystic has not shown that disclosure of historical data about Everett's past purchases and sales would jeopardize its current or future position in the LNG and gas markets.

In any case, to the extent there may be any legitimate concern about the unrestricted release of the information sought here—no matter whether the concern pertains to effects on Mystic, Everett, or the market writ large, and no matter whether it falls inside or outside the Information Policy's scope—it can be addressed with a protective order and tiered-access system. The Information Policy itself contemplates such mechanisms,[53] as did the ISO's testimony and pleadings and the Commission's orders in this proceeding.[54] And the Commission commonly uses protective orders to harmonize the twin goals of protecting markets and market participants while enabling ratepayer access to information needed to challenge charges under cost-of-service rates.[55]

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[53] The Information Policy permits disclosure of Confidential Information to Dispute Representatives (as defined in the ISO-NE Billing Policy) and Authorized Persons (as defined in the Information Policy) who have signed non-disclosure agreements. *See* Information Policy §§ 2.2, 3.3. It also allows disclosure of asset-specific information to contract counterparties and entitlement holders, subject to standards of conduct and similar limitations. *Id.* § 3.0(d) and (e). It would be reasonable to treat as entitlement holders for this purpose the ratepayers who must pay 100% of Mystic's and 91% of Everett's full cost of service. And finally, the Information Policy contemplates disclosure to other entities in other situations when disclosure is "required by order of a court or regulatory agency of competent jurisdiction," *id.* § 2.2, which would include an order of this Commission directing disclosure subject to a protective order.

[54] *See* Tr. 1058:22 – 1060:20 and 1091:5 – 1092:7 (Ethier); ISO-NE Initial Br. at 33 n. 98; *id.* at 40 n. 116 (discussing potential tiered access); December 2018 Order P 194 ("Consistent with its Information Policy, ISO-NE will allow redacted versions of its reports to be publicly available and allow less redacted versions to be available to state commissions and other administrative non-participant bodies."); July 2020 Rehearing Order P 90 ("[T]his process . . . should provide entities with the information necessary to initiate and meet their burden of proof in a FPA section 206 proceeding.").

[55] *E.g.*, *Sithe New Bos.*, *LLC*, 100 FERC ¶ 61,106, P 22 (2002) (rejecting request for disclosure of confidential information to all NEPOOL Participants but providing for disclosure subject to protective order); *Mojave Pipeline Co.*, 38 FERC ¶ 61,249, at 61,842

Indeed, the protective order adopted in this proceeding includes its own tiered access system, allowing participants to label as "Highly Confidential Privileged Material" those materials that are of "such a commercially sensitive nature" that they pose a "higher risk of competitive injury if disclosed" and justify a "heightened level of confidential protection."[56] The protective order contemplates that such material may include "(1) information regarding contract negotiations for gas transportation, sales or marketing services; and (2) strategic business or financial plans." *Id.* Such "Highly Confidential Privileged Material" is available only to those "Reviewing Representatives"[57] who are ***not*** "Competitive Duty Personnel."[58] Mystic has not shown that tiered disclosures under such a

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(1987) ("Since in most instances a protective order can protect against harmful disclosure, a party claiming that confidential material should be withheld entirely will be expected to show that a protective order will not adequately safeguard its interests and that this concern outweighs the need for the material to develop the record."); *W. Deptford Energy*, *LLC*, 134 FERC ¶ 61,189, P 27 (2011) ("WDE has not shown . . . why the Commission's normal procedure of requiring such information to be disclosed to parties pursuant to a Protective Agreement that requires disclosure only to certain individuals who sign the agreement is not an appropriate balancing of those competing concerns.")

[56] Order of Chief Judge Adopting Protective Order at 4, No. ER18-1639-000 (May 31, 2018), eLibrary No. 20180531-3149.

[57] "Reviewing Representative" includes a person who has signed a Non-Disclosure Certificate and is: (i) designated Commission Trial Staff; (ii) an attorney who has made an appearance in the proceeding; (iii) attorneys, paralegals, and other employees associated for purposes of the case with such an attorney; (iv) an expert or employee of an expert retained for the proceeding; (v) employees or other representatives of Participants appearing in the proceeding with significant responsibility for the docket; or (vi) any other person designated as a Reviewing Representative by the Chief Judge or the Commission. *Id.* at 4-5.

[58] "Competitive Duty Personnel" are individuals "whose scope of employment or engagement includes direct involvement in or direct supervisory responsibility over the sale of electric energy or ancillary services, the sale of natural gas or LNG, marketing, sale, transportation, storage, or other services in competition with the producing Participant." *Id.* at 5. "Competitive Duty Personnel" does not include employees of the Commission, any state utilities commission which is a Participant, or in-house or outside counsel. *Id.* Non-competitive-duty representatives may not pass on "Highly Confidential Privileged

protective order—providing unredacted materials to non-competitive-duty reviewing representatives and redacted materials to others—would harm its competitive position or the New England electricity markets. On the other hand, the failure to provide for some form of disclosure of this information will leave market participants with no independent ability to assess whether Mystic has lived up to its contractual obligations.

V. CONCLUSION

As shown above, Mystic and ISO-NE already have passed through to ratepayers more than $436 million in supplemental capacity payments for the first ten months of the Mystic Agreement's term—most of which appears to reflect the cost of rejecting or disposing of excess LNG procured by Constellation. The Commission should require Mystic and ISO-NE to release more robust and useful information about the bases for those charges and the ISO's audit of them, as they promised the Commission and stakeholders they would do when they sought to persuade the Commission to accept the Agreement.

We end where we began. As explained at the outset, the ISO correctly observed during hearings on the Agreement that the "parties who are paying for this agreement" would be the ones to "bring the claims for damages" if they believed "[Constellation] was not operating in a least-cost manner," Tr. 1065:25–1066:4. The Commission should require the disclosure of data sufficient to allow New England ratepayers—"who are paying for this agreement"—an opportunity to protect themselves against unwarranted charges.

Information" to Competitive Duty Personnel or otherwise use the material to give a Participant or competitive of a Participant a commercial advantage in energy marketing or consulting. *Id.*

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May 19, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing motion to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated on this 19th day of May, 2023.

/s/ Amber L. Martin Stone
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