UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS AND PARTIAL PROTEST OF THE MASSACHUSETTS ATTORNEY GENERAL

The Attorney General of the Commonwealth of Massachusetts ("Massachusetts Attorney General") submits these Comments and Partial Protest pursuant to Rules 211 and 212 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure[1] and the May 16, 2018 Combined Notice of Filings #1.[2] The Massachusetts Attorney General moved to intervene in this docket on May 29, 2018.

On May 16, 2018 Constellation Mystic Power, LLC ("Mystic") requested Commission approval of an executed Cost-of-Service Agreement between itself, its corporate parent Exelon Generation Company, LLC ("ExGen"), and ISO New England, Inc. ("ISO-NE") ("Cost-of-Service Agreement"). The Cost-of-Service Agreement would provide full cost-of-service compensation to Mystic for two natural gas-fired generating units ("Mystic 8 & 9") for the period of June 1, 2022 to May 31, 2024. The Cost-of-Service Agreement also includes the costs associated with the Everett Marine Terminal LNG import facility ("Everett"). As addressed in a related docket, ISO-NE has requested Commission approval to retain Mystic 8 & 9 for "fuel

[1] 18 C.F.R. §§ 385.211, 385.212 respectively.

[2] 83 FR 23664 (May 22, 2018).

security" purposes,[3] and Mystic has asserted that it will retire Mystic 8 & 9 absent the Cost-of-Service Agreement.

As the Commonwealth's Ratepayer Advocate, the Massachusetts Attorney General is responsible for advocating for a reliable and safe power system at the lowest possible cost for all ratepayers. To this end, the Massachusetts Attorney General has supported, and will continue to support, the regional discussion regarding electric reliability and has actively participated in discussions about national and regional grid resiliency[4] and regional fuel security issues.[5] The Massachusetts Attorney General intends to continue this participation on behalf of Massachusetts ratepayers.

Throughout these discussions, the Massachusetts Attorney General has emphasized that any actions we undertake must be (a) proceeded by, and based on, a careful and transparent review, (b) fair for ratepayers and other stakeholders, and (c) in accordance with law. Here, based on Mystic's filing alone, the Commission does not have the information it needs to carefully evaluate the relevant issues and ensure that the proposal results in just and reasonable rates.

Conversely, as filed, the Cost-of-Service Agreement would result in unjust and unreasonable rates for several reasons. First, it fails to take into account two other on-going Commission dockets, the ISO-NE waiver request in ER18-1509, and the ExGen wavier request

---

3 ISO New England, Inc., Petition for Wavier of Tariff Provisions, Docket No. ER18-1509.

4 *See e.g.* State Commenters in *Grid Resiliency Pricing Rule*, 82 Fed. Reg. 194 (October 10, 2017); Comments of the Attorneys General of Massachusetts, Rhode Island, and Vermont in *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶61,012 (2018).

5 *See* Joint Requesters' Comments to ISO-NE on the OFSA (February 15, 2018*), available at* https://www.isone.com/event-details?eventId=135336

in RP18-806. To reach a just and reasonable result, these filings must be considered jointly with Mystic's request here. Second, Mystic's requested rate of return, based on a return on equity ("ROE") of 10.26%, is too high and inconsistent with Commission precedent. Third, Mystic fails to justify its proposed $181.6 million in capital expenditures, composed of $99.4 million in capital expenses included in gross plant and $82.2 million to be incurred during the term of the Cost-of-Service Agreement. Finally, Mystic has not provided sufficient information to determine whether the cost of service rate is properly calculated. For example, the parties must engage in discovery to determine (a) whether the $1,021,103,969 of identified Electric Plant in Service for Mystic 8 & 9 is as inflated as it appears to be; and (b) how the $60 million of identified Electric Plant in Service for the Everett facility constitutes a "two year slice" of the costs of the facility. Similarly, Mystic's inclusion of Everett facility costs as part of Mystic's cost-of-service raises legal and factual concerns that must be further investigated.

These concerns and the "unique" nature of this proceeding[6] coupled with the issues and concerns raised in the associated waiver petitions in Dockets ER18-1509 and RP18-806, warrant setting this proceeding for settlement judge procedures to allow parties to conduct the discovery and negotiations necessary to better understand and resolve concerns raised by the proposed Cost-of-Service Agreement.[7]

---

[6] The proposed Cost-of-Service Agreement poses a number of issues of first impression. As Mystic witness William Berg states in his testimony, "there has never been a cost-of-service case involving [the] unique combination of assets" presented in this proceeding. Exhibit MYS-001 at 9:5-7.

[7] The Massachusetts Attorney General further outlines these concerns below, but acknowledges that given the complex nature of this filing and its interrelation with at least two other ongoing dockets there are likely additional concerns that will come to light during the process. The Massachusetts Attorney General reserves the right to raise other concerns and issues as they are identified.

I. COMMUNICATIONS

Pleadings and other communications regarding this proceeding should be addressed to the following persons on behalf of the Massachusetts Attorney General:

Christina H. Belew
Sarah Bresolin Silver
Assistant Attorneys General
Massachusetts Attorney General Office of Ratepayer Advocacy
One Ashburton Place
Boston, MA 02108-1598
(617) 963-2380
christina.belew@state.ma.us
sarah.bresolin@state.ma.us

Ashley M. Bond
Duncan & Allen
1730 Rhode Island Avenue, N.W.
Suite 700
Washington, D.C. 20036
(202) 289-8400
amb@duncanallen.com

II. COMMENTS AND PARTIAL PROTEST

A. The Cost-of-Service Agreement Must be Evaluated in the Context of the Requests Contained in the Waiver Proceedings in Docket Nos. ER18-1509 and RP18-806

Mystic alleges "this is a relatively narrow proceeding" and seeks to exclude several issues as beyond the scope of this proceeding, including issues raised in related, pending Commission proceedings.[8] Contrary to Mystic's unilateral pronouncement regarding scope, the Commission should consider this proceeding holistically with the other pending related dockets.[9] These dockets are inextricably linked and a decision in one is likely to have a direct impact on the others.

---

[8] Transmittal Letter at 7. The Massachusetts Attorney General also notes that there appears to be conflict between Mystic and ISO-NE on whether or not a determination of the "[e]ffects that cost of service payments to Mystic may have on the market" is within the scope of this proceeding. At a minimum, it appears there is a genuine issue of material fact regarding whether resolution of that question is within the scope of this proceeding that needs to be resolved. *Id.* at n. 24.

[9] *See generally* Docket No. ER18-1509, Comments of the Massachusetts Attorney General at 12.

In the associated ISO-NE waiver petition (Dockets ER18-1509), ISO-NE proposes to retain Mystic 8 & 9 for reasons other than transmission reliability — the legally permissible basis under the Tariff for waiver — conceding that Mystic 8 & 9 are not needed for transmission reliability. Instead, ISO-NE seeks to retain Mystic 8 & 9 and the Everett facility on the grounds of "fuel security," a term neither defined nor recognized in the Tariff. In the waiver proceeding, the Commission must determine whether ISO-NE has the authority under the existing Tariff to retain a unit for "fuel security." Resolution of this legal Tariff interpretation issue will necessarily impact the outcome of this cost-of-service proceeding.

Mystic also asserts that whether it is appropriate to include recovery for future capital expenditures in the Cost of Service Agreement is beyond the scope of this proceeding because it is being addressed in the ER18-1509 ISO-NE Waiver Proceeding.[10] This is inaccurate. In the Waiver Proceeding, ISO-NE requests waiver of Section III.13.2.5.2.5.2 of the Tariff, which requires that capital expenditures be addressed in a Section 205 filing separate from the general cost-of-service filing.[11] ISO-NE is explicit that it is "*not* requesting waiver of the standard that Section III.13.2.5.2.5.2 requires a supplier to meet to qualify for recovery of its capital expenditures."[12] As a result, nothing in the Waiver Proceeding will address the substantive issue of whether the requested capital expenditures are reasonable or if Mystic has met the Tariff standard. This issue remains to be decided in this case.

Tariff Section III.13.2.5.2.5.2 relative to transmission reliability requires that capital expenditure filings must explain "why the capital expenditure is necessary in order to meet the

---

[10] Transmittal Letter at 5.

[11] ISO-NE Petition at 27.

[12] *Id.* at 28 (emphasis added).

reliability need identified by the ISO" and demonstrate "that the expenditure is reasonably determined to be the least-cost commercially reasonable option consistent with Good Utility Practice to meet the reliability need identified by the ISO."[13] This standard directly ties the reasonability of the capital expenditure to the reliability need identified by the ISO-NE, illustrating how interdependent this docket is with the Waiver Proceeding.

Similarly, in Docket No. RP18-806 ExGen seeks tariff waivers it deems necessary to accommodate its acquisition of the Everett facility. Certain parties have asserted that ExGen's proposed acquisition raises vertical market power concerns as it would result in ExGen owning both the interconnected generating resources and the strategic LNG supply facility. Mystic seeks to include the LNG facility costs in the Cost-of-Service Agreement in this proceeding, making the outcome of that issue relevant to the reasonability of the Cost-of-Service Agreement before the Commission here. The fact that Everett will be operated by an affiliate of Mystic also raises concerns about potential affiliate abuse that will need to be fully addressed and resolved to ensure a just and reasonable result.

Finally, a number of parties in the ER18-1509 Waiver Proceeding suggested that waiver of the one year cost of service term in the Tariff would be unnecessary if ISO-NE were ordered to institute a competitive solution like an RFP for 2023-2024, the second year of the proposed Cost-of-Service Agreement. Such a solution adopted in that docket would impact the two-year term proposed here.

These illustrations demonstrate that the three dockets in question should not be decided in isolation, and that the Commission should consider all requested waivers and related cost of

---

[13] Market Rule 1, Section III.13.2.5.2.5.2(b).

service provisions as a whole in order to determine the overall impact of the requests and the most just and reasonable solutions.

B. Mystic's Requested Rate of Return is Inconsistent with Commission Precedent and Would Result in Rates that are Unjust and Unreasonable

Mystic requests an overall rate of return of 8.46% based on a cost of debt of 4.76%, a ROE of 10.26% and a capital structure of 67.3% equity and 32.7% debt.[14] As discussed below, Mystic's ROE analysis fails to follow Commission precedent and is significantly too high. While Mystic requests an ROE placement in the upper half of the identified zone of reasonableness, the low risk profile associated with the Cost of Service Agreement warrants placement within the lower half of the zone. ExGen's capital structure is equity heavy and imputing it to Mystic leads to unjust and unreasonable results. Further, since the discounted cash flow ("DCF") analysis Mystic puts forward in this proceeding is based on a proxy group of utilities matching ExGen parent Exelon Corporation's ("Exelon") risk profile, it is more appropriate to impute Exelon's capital structure to Mystic. Similarly, Exelon's cost of debt should be used.[15]

1. The Requested 10.26 Percent Return on Equity is Too High and is Therefore Unjust and Unreasonable

Mystic requests approval of a 10.26 % ROE for both Mystic 8 & 9 and Everett, which represents the midpoint of the upper half of its expert Dr. Olson's identified DCF proxy group.[16] Dr. Olson's analysis and recommendation are contrived to skew toward a high ROE and stray

---

[14] Transmittal Letter at 11.

[15] The Massachusetts Attorney General lacks sufficient information to calculate the appropriate Exelon cost of debt consistent with the methodology included in Dr. Olson's MYS-011 at 4.

[16] Exhibit MYS-010 at 4:7-13.

from Commission precedent in several fundamental ways that render the requested 10.26% ROE unjust and unreasonable.

First, when setting the ROE for a single utility, Commission precedent is to use the median of the resulting zone of reasonableness.[17] As the Commission has explained, the median "gives 'consideration to more of the companies in the proxy group, rather than only those at the top and the bottom'"[18] like the midpoint does. Dr. Olson's analysis uses the midpoint without any discussion or attempt to explain this material deviation which results in an ROE recommendation that is higher than if he had used the median. For example, the midpoint of Dr. Olson's full DCF range is 9.46 while the median is 9.08.[19]

Second, Dr. Olson provides two justifications for placing the DCF in the upper half of the zone, but neither survives scrutiny. Dr. Olson first asserts an upper midpoint is necessary because current capital market conditions are anomalous.[20] The notion that anomalous capital market conditions support an above the median placement originated in Opinion No. 531 where the Commission, after consideration of the evidence specific to that proceeding, including the submission of several alternative methodologies for calculating an ROE, selected the midpoint of the upper half of the zone.[21] However, the United States Court of Appeals for the District of

---

17 *Southern California Edison Co. v. FERC*, 717 F.3d 177, 181-82 (D.C. Cir. 2013); *Southern California Edison Co.*, 131 FERC ¶61,020, at PP 84-95 (2010).

18 *Southern California Edison Co.*, 131 FERC ¶61,020, at P 85, quoting *Transcontinental Pipe Line Corp.*, 84 FERC ¶61,084, 61,427 (1998).

19 *See* Exhibit MYS-011 at 3. There is no justification for placing Mystic's ROE in the upper half of the zone, but Dr. Olson's 10.26% midpoint of the upper half is notably higher than the 9.94% median of that same range.

20 MYS-010 18:23-19:1.

21 *Martha Coakley, Mass. Atty. Gen., et al. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶61,234 (2014). Because Opinion No. 531 sought to identify an ROE for a diverse group of

Columbia Circuit vacated and remanded Opinion No. 531 on the precise ground that the Commission had failed to justify this ROE placement.[22] The Commission has held that the vacatur of Opinion No. 531 also impacts Opinion No. 551, which Dr. Olson relies on to support his recommendation for placing the ROE in the upper half of the zone.[23] Even if on remand the Commission were able to rehabilitate Opinion No. 531's holding, Mystic bears the burden of establishing the existence of anomalous capital market conditions and putting forward the alternative methodologies that support a finding that the central tendency of the DCF is unjust and unreasonable. Dr. Olson's testimony includes *no* alternative methodologies and only passing discussion of the circumstances that allegedly cause current capital market conditions to be so anomalous as to impact the reliability of the DCF.

Dr. Olson next asserts that Mystic faces risks greater than the other members of the proxy group.[24] The Commission does consider the risk profile of the target entity as it compares to the members of the proxy group itself. However, the Commission presumes an entity to be of average risk and has held that "unless [an entity] makes a very persuasive case in support of the need for an adjustment and the level of the adjustment proposed, the Commission will set the

---

utilities, the midpoint was the Commission approved measure, unlike in this proceeding where Commission precedent requires the use of the median.

22 *Emera Maine v. FERC*, 854 F.3d 9 at 27 (D.C. Cir. 2017).

23 Exhibit MYS-010 at 18:7-19:1. ISO *New England*, 161 FERC ¶61,031 at P 28 (2017) ("we recognize that, as a result of the Court's vacatur, those opinions [531] cannot serve as precedent in other proceedings. That effect is significant. For example, in 2016, the Commission issued Opinion No. 551… In making its determinations in that proceeding, the Commission relied extensively on its conclusions in Opinion No. 531. Rehearing of Opinion No. 551 is now pending before the Commission. As a result of *Emera Maine*, the Commission will not be able to rely on Opinion No. 531 as precedent in addressing those rehearing requests.")

24 MYS-010 19:1-5.

[entity's] return at the median of the range of reasonable returns."[25] Mystic bears the burden of establishing that it faces risks sufficiently greater than the proxy group members and has failed to provide the information or analysis necessary to support this determination. This will be difficult for Mystic to do given the fact that the ROE at issue will apply to a two year Cost-of-Service Agreement which greatly reduces financial risk and suggests an ROE placement in the lower half of the zone. As a result, Dr. Olson has failed to support selecting an ROE above the Commission's precedential preference for the median.

Dr. Olson's DCF analysis raises additional concerns, but given the information included with the filing, it is difficult to determine the materiality of these concerns. Specifically:

- Dr. Olson applied a "revenue screen" to remove from his proxy group all utilities with revenues of less than $2 billion.[26] This is not a routinely applied screen, and seems especially inappropriate given that the ROE at issue will be applied to Mystic. As a result, the proxy group members Dr. Olson has eliminated are likely more comparable to Mystic than the larger utilities that survived Dr. Olson's screen.

- Dr. Olson includes Dominion Resources in his proxy group despite its recent acquisition of SCANA and Commission precedent to remove from a proxy group any utility involved in merger activity. Dr. Olson asserts the acquisition "did not have a material impact on its share price" but provides no analysis or support for this statement.[27]

---

25 *Portland Natural Gas Transmission System*, 142 FERC ¶61,197 at P 382 (2013) (Commission presumes a pipeline to be of average risk "absent highly unusual circumstances that indicate an anomalously high or low risk as compared to other pipelines. Thus, unless a pipeline makes a very persuasive case in support of the need for an adjustment and the level of the adjustment proposed, the Commission will set the pipeline's return at the median of the range of reasonable returns"). *See also Southern California Edison Co.*, 92 FERC ¶61,070, 61,266 (2000) (setting ROE in upper half after consideration of "significant body of evidence presented in this case"); *Consumers Energy Co.*, 85 FERC ¶61,100, 61,363 (1998) (setting ROE in upper half after hearing and in reliance on Trial Staff's detailed conclusion that Consumers is riskier than the proxy group).

26 Exhibit MYS-010 at 13:16-19.

27 Exhibit MYS-010 at 14:4-7.

- Dr. Olson applies a yield adjustment factor to his proxy group members by increasing the dividend for each by one-half the growth rate for that proxy group member.[28] Dr. Olson provides no Commission support for this adjustment.

For the reasons discussed above, Mystic's requested 10.26% ROE is significantly inflated, is unsupported by Commission precedent, and would produce rates that are unjust and unreasonable.

2. Imputing Exelon Generating Co.'s Capital Structure to Mystic is Inappropriate and Harms Ratepayers

While it prefers to use actual capital structures, Commission precedent permits imputing a capital structure to entities like Mystic who do not issue their own debt or have their own credit rating.[29] When imputing a capital structure, the Commission examines whether the parent's capital structure "is anomalous relative to the capital structures of the publicly-traded proxy companies used in the DCF analysis" and whether use of the capital structure will produce a just and reasonable rate.[30]

Here Mystic proposes to impute ExGen's 67.28% equity and 32.72% debt capital structure on the basis that a 67.28% equity structure "falls within the range approved by the Commission in prior cases."[31] Mystic supports this position by citing a single case where the

---

28 Exhibit MYS-010 at 16:18-23.

29 *Transcontinental Gas Pipe Line Corp.*, Opinion No. 414, 80 FERC ¶61,157 at 61,667 (1997).

30 *Enbridge Pipelines (KPC)*, 100 FERC ¶61,260, at P 173 (2002) ("The Commission's policy is to use the actual capital structure of the entity that does the financing for the regulated pipeline as long as it results in just and reasonable rates."); *Trailblazer Pipeline Co.*, 106 FERC ¶63,005 at P 68 (2004) (Holding Commission policy permits use of corporate parent's capital structure provided the use does not create anomalous results in reliance on witness testimony which imputed the ultimate parent's capital structure to the pipeline).

31 Transmittal Letter at 12. The Massachusetts Attorney General notes that this capital structure differs from the one identified in Exelon's most recent 10-K, which identifies a 64% equity, 36% debt capital structure for ExGen. Exelon 10-K for Fiscal Year Ending December 31, 2017 at 205. Available at: https://www.sec.gov/Archives/edgar/data/8192/000162828018001324/exc-20171231x10k.htm

Commission permitted a gas pipeline to use its actual capital structure of 68.86% over requests to impose a hypothetical capital structure.[32] Mystic's argument misstates how the Commission evaluates capital structures under Opinion No. 414 and its progeny. Opinion No. 414-A establishes that the Commission will use an entity's actual capital structure so long as it is reasonable when "compared to equity ratios approved by the Commission in other proceedings *and* when compared to those of the proxy companies."[33]

It is important to remember that the question here is not whether Mystic's *actual* capital structure should be used as is the question in the majority of the cases Mystic cites in its Transmittal Letter. Mystic has no capital structure. Nor is the question whether a hypothetical capital structure should be applied. While a corporate parent's capital structure can be imputed to Mystic, ExGen's is not the only capital structure that should be under consideration. Exelon, the ultimate parent, has a capital structure of 47% equity and 52% debt.[34] For the reasons discussed below, Exelon's capital structure is the more appropriate structure to impute to Mystic.

ExGen's capital structure is equity heavy at 67.28% and the higher the equity percentage the higher the resulting rates to consumers. The Commission views its "obligation to protect ratepayers from excessive rates" as including "those that could result from manipulation of a regulated subsidiary's capital structure"[35] to be more equity heavy. As a result, the fact that

---

32 *Pacific Gas Transmission Co.*, 62 FERC ¶61,260, 61,778-9 (1993).

33 *Transcontinental Gas Pipe Line Co.*, Opinion No. 414-A, 84 FERC ¶61,804, 61,413 (1998) (emphasis added).

34 Exelon 10-K for Fiscal Year Ending December 31, 2017 at 205. Available at: https://www.sec.gov/Archives/edgar/data/8192/000162828018001324/exc-20171231x10k.htm

35 *Transcontinental Gas Pipe Line Co.*, Opinion No. 414, 80 FERC ¶61,804, 61,157 at 61,655 (1998).

ExGen's 67.28% equity structure just squeaks under the artificially high 68.86% threshold Mystic managed to find in one case is insufficient to justify its use.

Under Opinion No. 414-A the Commission must also consider whether the capital structure "is anomalous when compared to the equity ratios of the proxy companies used for the DCF analysis."[36] Mystic makes no attempt to investigate how ExGen's capital structure compares to those included in Dr. Olson's DCF proxy group. Further, Dr. Olson's DCF proxy group is composed of "companies with comparable risk to [Exelon], the ultimate parent."[37] As a result, Mystic has failed to substantiate its position that ExGen's capital structure is reasonable to impute to Mystic. Instead, Exelon's more balanced capital structure should be used.

C. The Cost-of-Service Agreement Fails to Justify the Inclusion of its Proposed Capital Expenditures, Which Appear to be Inflated.

Mystic's cost-of-service identifies and includes approximately $181.6 million in capital expenditures. Mystic's cost-of service reflects two categories of capital expenditures: those to be incurred between 2018 and the start of the Cost-of-Service Agreement in mid-2022, and those incurred during the term of the Agreement. Between 2018 and the start of the Cost-of-Service Agreement, Mystic asserts Mystic 8 & 9 will require approximately $66.3 million in capital expenditures[38] and the Everett facility will require approximately $33.1 million,[39] for a total of $99.4 million. This figure represents approximately four years' worth of future capital expenditures which are reflected in Mr.

---

36 *Enbridge Pipelines (KPC)*, 100 FERC ¶61,260 at P 185.

37 MYS-010 at 8:16-18.

38 Exhibit MYS-005 at 4 (Combined total for "Total Mystic 8 & 9 Capital" for years 2018-2021).

39 *Id*. at 6 (Combined total for "Everett Marine Terminal Total" for years 2018-2021).

Heintz's cost-of-service with no mechanism to address issues like prudence reviews or challenges.

During the proposed two year term of the Cost-of-Service Agreement, Mystic asserts Mystic 8 & 9 will require a further approximately $64.2 million in capital expenditures.[40] The Everett facility will allegedly require an additional approximately $18 million in capital expenditures,[41] bringing the total capital expenditure during the two year term of the Agreement to approximately $82.2 million. As discussed below, Mystic may only recover these expenditures if it satisfies the requirements of Market Rule 1, Section III.13.2.5.2.5.2, which hinges on the capital expenditures being required to address the reliability need identified by the ISO. Given that ISO-NE is not retaining Mystic for reliability reasons, it does not seem possible that Mystic can meet this standard. Moreover, Mystic has failed to provide sufficient information in Exhibit MYS-005 to satisfy the Tariff standard.

1. Mystic Fails to Justify the $99.4 Million of Capital Expenditures Included in Gross Plant

The cost-of-service includes approximately $99.4 million of capital expenditures that Mystic asserts will occur from 2018 until June of 2022, in other words, *before* the effective date of the Cost-of-Service Agreement.[42] The $99.4 million is composed of $66.3 million in capital expenditures related to Mystic 8 & 9[43] and $33.1 million related to the Everett facility.[44] Mr.

---

40 *Id*. at 5 (Combined total for "Total Mystic 8 & 9 Capital" for years 2022-2024).

41 *Id.* at 7 (Combined total for "Everett Marine Terminal Total" for years 2022-2024).

42 Transmittal Letter at 10.

43 Exhibit MYS-005 at 4 (Combined total for "Total Mystic 8 & 9 Capital" for years 2018-2021).

44 *Id*. at 6 (Combined total for "Everett Marine Terminal Total" for years 2018-2021).

Heintz calculated rate base in his cost-of-service study utilizing gross plant less accumulated depreciation, and increased his gross plant to reflect the inclusion of these capital expenditures.[45] These numbers present two concerns. First, they seem artificially high. Given that the identified Electric Plant in Service for Everett is $60 million,[46] it is difficult to understand how $33.1 million of capital expenditures will be required over the course of approximately four and a half years. The parties and the Commission require more information to understand and evaluate these claimed capital costs.

Second, these figures represent approximately four and a half years' worth of future expected capital expenditures which, as those years tick past, may not actually be spent. Additionally, none of these expenditures have been subject to any prudence reviews or challenges. To protect ratepayers, the Cost-of-Service Agreement must include a mechanism to ensure that only those capital expenditures deemed prudent and actually incurred between 2018 and May of 2022 are included in the gross plant used to calculate the cost-of-service rates.

2. Mystic Has Failed to Satisfy the Section III.13.2.5.2.5.2 Standard for Including Capital Expenditures During the Term of the Cost-of-Service Agreement

The cost of service includes $82.18 million of capital expenditures Mystic asserts are "necessary to reliably operate the units over the two-year reliability term" of the Cost-of-Service Agreement.[47] This figure is composed of $64.2 million in capital expenditures related to Mystic 8 & 9 and $18 million related to Everett. Market Rule 1, Section III.13.2.5.2.5.2 requires that

---

45 Transmittal Letter at 10.

46 Exhibit MYS-008 at 13, Schedule K

47 Transmittal Letter at 16.

Mystic show why each requested capital expenditure is "necessary in order to meet the reliability need identified by the ISO" and bear the burden of establishing each expenditure "is reasonably determined to be the least-cost commercially reasonable option consistent with Good Utility Practice to meet the reliability need identified by the ISO." Mystic relies on Mr. Berg's testimony and Exhibit MYS-005 to satisfy this burden.

As noted above, the Commission's decision as to whether under the current Tariff ISO-NE can retain Mystic for reasons *other than reliability*, will necessarily impact the question whether Mystic has satisfied Section III.13.2.5.2.5.2's standard for including capital expenditures. But even if the Commission determines that the Tariff allows for the waiver request, Exhibit MYS-005 fails to provide the information necessary to satisfy the standard include in Section III.13.2.5.2.5.2 of the Tariff.

For example, it is unclear how Mystic 8 & 9 can require $64.2 million in capital expenditures during the two year term of the Cost-of Service Agreement which is virtually the same amount as the $66.4 million in expenditures it anticipates for the nearly five years prior. An examination of MYS-005 raises more questions than it answers. In the year 2022 Mystic asserts that Mystic 8 & 9 will require a whopping $53.8 million in capital expenditures.[48] This is more than double the amount of any other year of capital expenditure and requires more explanation. Included in this figure is $12 million to "Move/Replace the Auxiliary steam boiler to directly provide starting steam to Mystic 8 & 9 in the absence of Mystic 7."[49] This inclusion is concerning because the terms of a 2006 settlement agreement in a previous Cost-of-Service Agreement docket required the "procurement and installation as early as possible in 2007 of an

---

48 Exhibit MYS-005 at 5 ("Total Mystic 8 & 9 Capital for year 2022).

49 *Id.* ("Detail" for Mystic 8 & 9 Common Projects, Boiler Move Costs).

auxiliary boiler…capable of providing steam to start up Mystic 8 & Mystic 9 so that neither unit will rely exclusively on Mystic 7 for start up steam."[50] Mystic provides no testimony or other explanation for why, over a decade later, Mystic 8 & 9 apparently continue to rely on Mystic 7 despite the terms of the 2006 Settlement Agreement in Docket No. ER06-427. In fact, Mystic contains *no* explanation or discussion of the boiler move anywhere in its filing other than the single reference in MYS-005. Mystic owes the Commission and parties a full explanation and must be held to its burden of proof on this issue

Two more issues require additional investigation. First, Mystic acknowledges "[n]either the ISO-NE Tariff nor the form of cost-of-service agreement specifies how or over what length of time a retirement de-list bid generator should recover capital expenditures."[51] Resolving this issue is necessary to ensure a just and reasonable result. As a result, this is an issue that should be more fully considered before any approval is made. Second, Mystic states it is willing, should this proceeding proceed to settlement discussions, to include a "'clawback" process to refund certain capital expenditures incurred during the reliability term if the units remain in service past the termination date."[52] The Massachusetts Attorney General requests that such a clawback process be included in any resolution of this proceeding.

D. Additional Information is Required to Evaluate Whether the Cost-of-Service is Appropriately Calculated

---

50 *Mystic Development, LLC*, 118 FERC ¶61,144 (2007) (Letter Order accepting Uncontested Settlement Agreement); Docket No. ER06-427-003, Settlement Agreement, Uncontested Settlement, Request for Expedited Approval and Conditional Motion for Interim Rate Relief (December 28, 2006) at 7 "Auxiliary Boiler."

51 *Id*. at n. 99.

52 Transmittal Letter at 16.

Mystic has not provided sufficient information to resolve several additional concerns and questions relating to whether the cost-of-service is appropriately calculated.

1. The Identified Electric Plant in Service for Mystic 8 & 9 is Unsupported

The Massachusetts Attorney General is concerned that the $1,021,103,969 of identified Electric Plant in Service for Mystic 8 & 9 is not supported and is likely significantly inflated.[53] Resolving these concerns will require an examination of these units' ownership history, which as relevant to this discussion can be summarized as follows. In January of 2011, Constellation Energy Group, Inc. paid $1.1 billion to acquire five assets from Boston Generating LLC as part of Boston Generating LLC's Chapter 11 bankruptcy proceeding.[54] The five assets were Mystic 7 (574 MW), Mystic 8 & 9 (1,508 MW), Fore River (787 MW) and Mystic Jet (9 MW).[55] Exelon acquired Constellation Energy Group in 2012 and in 2014 sold the Fore River unit to Calpine Corporation for $530 million.[56] Given this history, it is unclear how Mystic can claim over $1 billion of Electric Plant in Service for Mystic 8 & 9 when these assets were just two of five originally purchased for $1.1 billion, and after Exelon sold Fore River for $530 million. Further, if, as Exhibit MYS-005 suggests, Mystic 7 will be sold, the value of that transaction could be relevant to the question of the appropriate value for Mystic 8 & 9.

---

53 Exhibit MYS-008, Schedule A page 1.

54 *See* Constellation Energy Group, Inc. Form 10-K for Fiscal year Ending December 31, 2011 at 158. Available at: https://www.sec.gov/Archives/edgar/data/9466/000104746912001863/a2207433z10-k.htm

55 *Id.*

56 *See* Calpine Corp. Form 10-K for Fiscal Year Ending December 31, 2014 at 47. Available at: https://www.sec.gov/Archives/edgar/data/916457/000091645715000010/cpn_10kx12312014.htm

Mr. Heintz testifies that the electric plant in service cost is derived from Exelon's books, records, and 2017 financials,[57] but the filing provides insufficient information to understand how Mystic 8 & 9 are reflected on Exelon's books, and whether those books are kept in accordance with the Commission's Uniform System of Accounts. This becomes especially relevant as Mystic, which has been granted exempt wholesale generator status,[58] moves from market based rates to the cost-of-service rates requested here.[59]

2. Mystic Has Not Justified Inclusion of the Everett Facility in its Cost-of-Service

The Massachusetts Attorney General is unaware of any other cost-of-service filing where the Commission has permitted the inclusion of an entire LNG terminal in cost-of-service rates. Thus, it is not at all clear that applicable law or Commission precedent permits Mystic's request to include Everett facility costs as part of its cost-of-service rate. Even assuming inclusion of such a structure were to be permitted, the "unique" nature of this request raises a series of concerns that need to be addressed.

First, Mystic asserts that "the Everett charge is simply a two year slice of the costs of that facility."[60] Mystic then identifies $60 million as Electric Plant in Service for the Everett facility.[61] The filing does not explain how this $60 million figure is calculated making it

---

57 Exhibit MYS-006 at 5:3-5.

58 Transmittal Letter at 6; *Sithe Mystic Development, LLC*, 93 FERC ¶62,208 (2000).

59 *PacifiCorp.*, 124 FERC ¶ 61,046 at PP28-31 (2008) (applying Commission original cost rules to merchant generator transitioning to cost of service rates).

60 Transmittal Letter at 17.

61 MYS-008 at Schedule K page 1.

impossible to determine at this stage whether or not it is an accurate "two year slice" of the facility.

Second, Mystic proposes to credit the monthly fuel supply cost with 50% of the margin on any forward third-party LNG sales out of Everett.[62] Under the proposal, the remaining 50% margin on forward third-party sales will be used as an "incentive" to encourage Constellation LNG, an affiliate, "to make economic third-party sales."[63] Mystic asserts this structure is being proposed at the behest of ISO-NE, which is concerned about "Mystic's willingness to sell LNG to the gas utilities and other utilities that also depend on Everett for fuel supply."[64] The need to "incent" Constellation LNG to make economic sales seems to be the consequence of Mystic's proposal to include the Everett facilities cost in the cost-of-service rate being proposed. Absent such an arrangement it is hard to see why Constellation LNG would need such a strong incentive to make "economic" sales. Given that the cost-of-service is already structured to cover the costs of the Everett facility, it is unclear why ratepayers should be expected to shoulder those costs *in addition* to the puzzling request to forego 50% of the margin on every forward sale. This "incentive" is even more concerning given that it goes to Constellation LNG, an affiliate of Mystic, which raises affiliate abuse concerns.

To the extent that the Commission is willing to permit the inclusion of the Everett facility costs in the cost-of-service rate, Mystic has failed to support the reasonability of the use of 50% margin to accomplish that goal. As a result, the inclusion of 50% margin incentive is unjust and unreasonable and should not be allowed.

---

62 Transmittal Letter at 20.

63 *Id.*

64 *Id.*

Finally, the Massachusetts Attorney General requires additional information in order evaluate and resolve the following concerns:

- How will profits from the energy market be addressed? Since all of Mystic's fixed costs will be covered it is necessary to ensure these profits are clawed back.
- It is unclear based on what has been filed whether Everett's capital, operating and maintenance costs will be allocated between the two Mystic units and offsite fuel sales.
- The Massachusetts Attorney General has been unable to confirm that Accumulated Deferred Income Tax ("ADIT") has been updated to reflect the current federal corporate income tax of 21% and that excess ADIT will be credited to rate base and amortized consistent with Commission requirements.
- What is the extent to which Section 3.4.1.6 of the Cost-of-Service Agreement permits cost recovery of noncompliance with state and federal emissions standards?

CONCLUSION

For the reasons discussed above, the Massachusetts Attorney General requests that the Commission set this proceeding for settlement judge proceedings to permit parties to engage in the discovery and negotiations necessary to evaluate the reasonability of the Cost-of-Service Agreement.

Respectfully Submitted,

/s/Ashley M. Bond

Ashley M. Bond
Duncan & Allen
1730 Rhode Island Avenue, N.W.
Suite 700
Washington, D.C. 20036
Phone: 202.289.8400
amb@duncanallen.com

Counsel for the Massachusetts Attorney General

MAURA HEALEY
MASSACHUSETTS ATTORNEY GENERAL

/s/ Christina H. Belew
Christina H. Belew
Sarah Bresolin Silver
Assistant Attorneys General
Massachusetts Attorney General Office of the Ratepayer Advocacy
One Ashburton Place
Boston, MA 02108-1598
Phone: 617.963.2380
christina.belew@state.ma.us
sarah.bresolin@state.ma.us

Dated June 6, 2018.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing pleading has this day been served by means authorized under Rule 2010(f) of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.2010(f)) on each person who appears on the Official Service List compiled by the Secretary in this proceeding.

/s/ Ashley M. Bond
Ashley M. Bond
Duncan & Allen

Dated June 6, 2018.

Document Content(s)