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 her comments and partial protest to Constellation Mystic Power, LLC's ("Mystic") March 1, 2019 Compliance Filing ("Compliance Filing") pursuant to Rules 211 and 212 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure and the Commission's March 1, 2019 Combined Notice of Filings #1.[1] Mystic submits it Compliance Filing in accordance with the requirements of the Commission's December 20, 2018 Order Accepting Agreement, Subject to Condition, and Directing Briefs ("Order").[2] As discussed below, Mystic's Compliance Filing fails to comply with the requirements of the Order and with Commission precedent by failing to include: (1) a 2004 transaction in its original cost analysis; and (2) Everett facility costs in its clawback mechanism. For these reasons the Commission should require Mystic to make an additional compliance filing correcting these errors and omissions.

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[1] 18 CFR §§ 385.211, 385.212, respectively.

[2] *Constellation Mystic Power, LLC*, 165 FERC ¶61,267 (2018).

A. Mystic's Failure to Subject its 2004 Transfer of Mystic 8 & 9 to the Original Cost Test Violates the Commission's Explicit Requirement

The Order reaffirmed the Commission's "longstanding policy" that Mystic's recovery for Mystic 8 & 9 is limited to the lesser of depreciated original cost or purchase price, and held that Mystic's failure to incorporate prior purchases or sales of Mystic 8 & 9 into its analysis violated the original cost test.[3] The Order directed Mystic "to reflect the impact of an original cost test for each time the Mystic 8 & 9 units *changed ownership* since the units were first devoted to public service, which we find to be in April and June of 2003."[4] Despite these explicit instructions, the Mystic Compliance Filing fails to apply the original cost test to a 2004 transfer of Mystic 8 & 9 from an Exelon subsidiary to EBG Holdings. While the transmittal letter is entirely silent on the issue, Mr. Heintz argues that this 2004 transfer is "not relevant" to the Order's requirements because it was "not a sale, a purchase, or at arm's-length."[5] Mr. Heintz's statement is incorrect as a matter of law, fact, and policy. Mystic bears the burden of supporting its recalculated gross plant. By failing to include the 2004 change in ownership Mystic has not only failed to carry its burden but has defied the Commission's explicit directive.

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[3] Order at P 63 ("It is longstanding Commission policy that, in a cost-of-service ratemaking context, a utility may only earn a return on (and recovery of) the lesser of the net original cost of plant or, when plant assets change hands in arms-length transactions, the purchase price of the plant ('original cost test'))".

[4] *Id.* at P 64 (emphasis added).

[5] Attachment C at 10:3-19.

The record illustrates that the 2004 transaction occurred after an Exelon subsidiary failed to meet the June 2003 deadlines contained in its $1.25 billion credit facility with its lenders. The lenders agreed to at least two forbearance extensions during which time Exelon announced its intention to "transition out of ownership" of the assets, which included Mystic 8 & 9.[6] In the third quarter of 2003 Exelon announced the decision to take a $945 million (which translated to $573 million net of income taxes) impairment as a result of the decision to sell the assets.[7] Taking this impairment allowed Exelon to realize a $372 million reduction in its federal income tax liability and had the effect of removing Exelon's equity from the assets it was preparing to transfer to its lenders.[8] Negotiations with the lenders continued until they reached a settlement on February 23, 2004 which included Exelon transferring ownership of the assets to its lenders in lieu of the lenders pursuing their foreclosure remedies.[9] The transaction closed on May 24, 2004 with Exelon's subsidiary transferring ownership of Mystic 8 & 9 (along with other assets) to EBG Holdings.

Mr. Heintz's assertion that the 2004 transaction is not relevant to the original cost test is not persuasive. First, it is beyond dispute that ownership of

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6 Ex. ENC-0032 at 2; ENC-0034 at 36-37.

7 *Id.*

8 Ex. ENC-0030 at 33-34.

9 ENC-0032 at 3; *Exelon New England Holdings, LLC*, 107 FERC ¶61,148 at P 5 (2004); *Boston Generating LLC*, 108 FERC ¶ 62,122 (2004).

Mystic 8 & 9 changed as a result of the 2004 transaction, and it is ownership change that matters for purposes of the original cost test. The Order is clear on this point, holding: "We direct Mystic to reflect the impact of an original cost test *for each time* the Mystic 8 & 9 units *changed ownership* since the units were first devoted to public service, which we find to be in April and June of 2003."[10] Since ownership of Mystic 8 & 9 clearly changed from an Exelon subsidiary to EBG Holdings as a result of the 2004 transaction, the original cost test is applicable and must be applied.[11]

Second, Mr. Heintz's attempt to evade the original cost test by asserting that the 2004 transaction was not a "sale" cannot be reconciled with common sense or Exelon's public discussions of the transaction. Exelon's 2004 10-Q filing with the Securities Exchange Commission ("SEC") explicitly and repeatedly refers to the transaction as a "sale."[12] In fact, the section discussing the transaction is titled "Sale of Ownership Interest."[13] In that section, Exelon reports that:[14]

- "On May 25, 2004, Exelon and Generation completed the *sale*, transfer and assignment of ownership of their indirect wholly owned subsidiary Boston Generating, LLC (Boston Generating)…to a special purpose

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10 Order at P 64.

11 *Exelon New England Holdings, LLC*, 107 FERC ¶61,148 (2004).

12 Exelon Form 10-Q for the Quarter Ending June 30, 2004. Available at: https://www.sec.gov/Archives/edgar/data/22606/000095013704005924/c86837e10vq.htm (also in the record as Exhibit ENC-0036).

13 *Id.* at 27.

14 *Id.* (emphasis added).

entity owned by the lenders under Boston Generating's $1.25 billion credit facility";

- "The *sale* was pursuant to a settlement agreement reached with Boston Generating's lenders on February 23, 2004"; and
- "The Federal Energy Regulatory Commission (FERC) approved the *sale*…in May 2004."

Further, Mr. Heintz's assertion that this transaction was not a sale because the assets were "simply turned over to the creditor" "in exchange for forgiveness of the outstanding debt" is nonsensical.[15] Exelon's creditors were only willing to "forgive" the debt they were owed because Exelon agreed to sell them something of comparable value: a group of assets which included Mystic 8 & 9. The record indicates that Exelon took an impairment against the assets to ensure that the value of what they sold would match "the amount of outstanding debt" on the loan.[16] As a result, Mr. Heintz's position stands in contrast to the record evidence and Exelon's own description of the transaction.

Mr. Heintz's attempt to shield the 2004 transaction on the basis that it was not the result of an arm's-length transaction fares no better. The Commission has defined arm's-length transactions as those[17]

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15 Attachment C at 10:15-18.

16 *Id.* at 10:18.

17 *Seaway Crude Pipeline Co., LLC*, 154 FERC ¶61,070 at P 93 (2016); *citing Southwest Power Pool, Inc.*, 149 FERC ¶61,048 at P 96 (2014); Black's Law Dictionary 109 (6th ed. 1991) (defining arm's length transaction as "a transaction negotiated by unrelated parties, each acting in his or her own self interest. … A transaction in good faith in the ordinary course of business by parties with independent interests.")

> characterized as adversarial negotiations between parties that are each pursuing independent interests. The hallmark characteristic of arm's length bargaining is that it is negotiated rigorously, selfishly and with an adequate concern for price. If the negotiating parties have a common economic interest in the outcome of the negotiations, their bargaining is not at arm's length."

The record illustrates that the 2004 transaction is the result of extensive negotiations where each side selfishly sought a result most beneficial to its interests. Exelon negotiated multiple forbearance extensions and took an impairment to the value of the assets as part of negotiations that stretched out over months. These negotiations eventually resulted in a settlement agreement which is indicative of intense negotiations between sophisticated parties.[18] Mystic has provided no evidence whatsoever to support an argument that such complicated negotiations between sophisticated parties were not "negotiated rigorously, selfishly and with an adequate concern for price."[19] It defies reason to believe that Exelon and its lenders shared a "common economic interest" during foreclosure negotiations that would prevent this sale from being characterized as an arm's-length transaction under Commission precedent.

Finally, not including the 2004 transaction in the original cost analysis would defeat the intention of the original cost test. The original cost test was "adopted in response to widespread abuses in the electric utility industry" which resulted in "ratepayers pa[ying] higher rates for electric service but receiv[ing] no increase in

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[18] *Exelon New England Holdings, LLC*, 107 FERC ¶61,148 at PP 5-6 (2004).

[19] *Seaway Crude Pipeline Co., LLC*, 154 FERC ¶61,070 at P 93.

benefits."[20] "Without the original cost concept 'all that need be done to raise rates and obtain greater income would be to have one company buy utility properties from another at higher prices than depreciated original cost and in this very simple way increase the cost of service to consumer.'"[21] The Commission correctly held that the concerns that gave rise to the original cost principle apply with equal strength to facilities like Mystic who are seeking cost of service rates after being in the market, holding that "purchases of plant assets at amounts less than their net original cost should be permanently embedded in the net original cost of the plant assets regardless of the rate treatment afforded the plant assets at any given time."[22] Exelon sold Mystic 8 & 9 to EBG Holdings for a price, a price that allowed it to take an impairment against the value significant enough to reduce Exelon's tax liability by $372 million.[23] The fact that Exelon took such a significant impairment makes it seem likely that it sold the assets for less than the depreciated original cost. Mystic, another Exelon subsidiary, now asks the Commission to set rates for New England ratepayers which would ignore this transaction and allow Exelon to retain all the benefits associated with the 2004 transaction. Permitting Exelon to

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20 *PacifiCorp*, 124 FERC ¶ 61,046 at P 28 (2008).

21 *Seaway Crude Pipeline Co., LLC*, 154 FERC ¶61,070 at P 90, *quoting N. Natural Gas Co.,* 35 FERC ¶61,114 at 61,236 (1961).

22 Order at P 65.

23 Ex. ENC-0030 at 33-34. Mystic should not be allowed to cloud this issue by reference to P 71 of the Order which holds that Mystic is not required to take into consideration any previously recognized GAAP impairments. The 2004 transaction must be subjected to the original cost test because it represents a transaction where ownership of the units changed parties. That fact remains regardless of Mystic's 2003 impairment.

retain the tax reducing benefits of the transaction without including it in the original cost analysis in this proceeding would constitute an impermissible "double dip." The Commission should reject Mystic's proposed net plant values and require it to include the 2004 sale in its analysis.

B. Everett Should Be Included in the Clawback Provision

The Order directed Mystic to include a clawback provision consistent with the one included in the MISO Tariff.[24] This requirement reaffirms the Commission's finding that "a clawback mechanism is just and reasonable because it prevents both undesirable toggling and inequitable recovery from ratepayers."[25] The need for a clawback mechanism stems from the difference in how Mystic proposes to treat capital expenditures based on whether they occur before or during the Cost of Service Agreement. Capital expenditures that occur prior to the Cost of Service Agreement will be added to rate base and recovered over the remaining life of the plant.[26] Capital expenditures that occur during the Cost of Service Agreement will be expensed and be fully recovered in the year the project is completed.[27] As the Order recognized, the expenditures that are fully recovered during the Cost of Service Agreement "will benefit the resource for years after the contract ends"[28] and

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24 Order at P 208.

25 *Id.* at 210.

26 MYS-020 at 3:7-9; MYS-022 at 1-7; S-0014 at 11.

27 *Id.*

28 Oder at P 210.

a clawback provision is required to "reimburs[e]" ratepayers for these benefits[29] and "place Mystic on similar footing with other resources that would not have benefited from a cost-of-service agreement in the new market-based mechanism."[30]

Mystic's proposed clawback mechanism would apply only to the capital expenditures incurred by Mystic 8 & 9 and would not provide ratepayers with any reimbursement for the capital expenditures Everett expenses during the Cost of Service Agreement. This is a significant and improper omission. Mystic currently anticipates expensing $13.5 million in capital expenditures for Everett during the term of the Cost of Service Agreement.[31] These expenditures cover major projects such as recoating the LNG storage tanks, major maintenance of the jetty and dock structure, and improvements to site water removal mechanisms, to name just a few.[32] Clearly these projects, which will be fully expensed during the Cost of Service Agreement, will benefit Everett long after the Agreement terminates. And yet, under Mystic's proposed clawback mechanism, New England ratepayers will bear the cost associated with 91% of these projects without any opportunity for reimbursement. Similarly, should Everett reenter the market, ratepayers will have effectively subsidized Everett, leaving it in an economically superior position to its competitors. Such an outcome would be unjust, unreasonable, and would defeat the

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29 *Id.* at P 212.

30 *Id* at P 211.

31 Attachment C-1 at 72, Schedule D.

32 MYS-005 at 7.

purpose of a clawback mechanism, especially in light of the fact that ratepayers will cover 91% of Mystic's costs despite the record evidence that Mystic 8 & 9 can utilize no more than 39.16% of Everett's capacity. [33] Requiring ratepayer to recover 91% of an asset of which they can use only 39.16% while depriving them of the opportunity to be reimbursed for expensed capital expenditures is manifestly unjust and unreasonable.

Mystic fails to even acknowledge this issue in its Compliance Filing, which is inexplicable given the record evidence, which indicates that Mystic has previously *agreed* that Everett should be included in the clawback provision. Specifically, in response to a discovery request from the New England States Committee on Electricity ("NESCOE"), "Exelon confirm[ed] that it is willing to agree to a clawback process to refund certain capital expenditures if Everett continues in service after the Mystic Agreement terminates." [34] If, as Mystic recently contended for the first time in a procedurally prohibited Answer to parties' requests for rehearing,[35] its new position is that the Commission lacks the jurisdiction to require refunds from Everett, that argument is directly at odds with the Commission's extension of jurisdiction over Everett costs in this case and is internally inconsistent with

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33 Exhibit NES-028 at 26:22-27:2.

34 *See* NES-004 at 3.

35 Constellation Mystic Power LLC's Answer and Motion for Leave to Answer ("Mystic Answer") at 13-14 (Feb 6, 2019) (eLibrary Accession Number 20190206-5145).

Mystic's argument that the Commission has jurisdiction to award recovery of the costs of Everett. [36]

If, as the Commission asserts, its jurisdiction extends far enough to require New England ratepayers to shoulder 91% of Everett's costs, logic requires that it similarly extends far enough to require ratepayer reimbursement under these circumstances. Mystic has failed to provide any cogent argument to support its position that the Commission's jurisdiction can operate only to extract money from ratepayers, but not to protect them. Such a position cannot be reconciled with the Federal Power Act's primary aim of consumer protection.[37]

Mystic's assertion that there is no mechanism by which to accomplish refunds from Everett is also not persuasive. As NESCOE ably points out, Schedule 3A of the Mystic Agreement requires Mystic to make a true-up filing by April 1, 2015 to cover the expenses incurred between January 1, 2024 and the end of the Cost of

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[36] The Massachusetts Attorney General maintains her position that the Commission has overreached in its decision to exercise jurisdiction over Everett for purposes of including its costs in the Cost of Service Agreement. *See* Motion for Clarification and Request for Rehearing of the Massachusetts Attorney General at 8-16 (Aug. 13, 2018) (eLibrary Accession Number 2018813-5216); Massachusetts Attorney General's Motion for Rehearing at 2-14 (Jan. 22, 2019) (eLibrary Accession Number 20190122-5278).

[37] *Xcel Energy Svcs., Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016), *quoting Mun. Lt. Bds. of Reading and Wakefield v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). *Accord: Pennsylvania Pwr. Co. v. FPC*, 343 U.S. 414, 418 (1952) ("A major purpose of the [Federal Power] Act is to protect consumers against excessive prices"); *NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975) ("Of the Commission's primary task there is no doubt, however, and that is to guard the consumer from exploitation by non-competitive electric power companies"), *aff'd*, 425 U.S. 662 (1976).

Service Agreement on May 31, 2024.[38] As a result, the mechanism through which Mystic can implement the clawback's application to Everett is already in place.

Further, the fact that Mystic agrees Everett should be subject to formula rate protocols, including true-ups, undercuts its argument that the Commission lacks jurisdiction to require ratepayers to be reimbursed. Finally, the Commission has consistently found that it has jurisdiction to prohibit recovery of components of the Fuel Supply Charge that it finds to be unjust and unreasonable.[39] Should the Commission agree with Mystic's position that it lacks jurisdiction to include Everett in the clawback mechanism, it should reject as unjust and unreasonable Mystic's proposal to recover rates through the Fuel Supply Charge which reflect the expensing of Everett's capital expenditures during the Cost of Service Agreement.

CONCLUSION

For the reasons discussed above, the Commission should find Mystic's Compliance Filing deficient and require an additional filing to reflect: 1) the application of an original cost analysis to the 2004 sale of Mystic 8 & 9 from an Exelon subsidiary to EBG Holdings and 2) the inclusion of Everett in the required clawback mechanism.

Respectfully submitted,

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[38] NESCOE Answer at 5; MYS-0052 at 8 (Feb. 14, 2019) (eLibrary Accession Number 20190214-5096).

[39] Order at P 106; July 13 Order at P 37.

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Dated: March 22, 2019

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
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Dated March 22, 2019.