

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Mystic Development, LLC

Docket Nos. ER06-427-001  
ER06-427-002

ORDER GRANTING IN PART AND DENYING IN PART REHEARING AND  
CONDITIONALLY ACCEPTING COMPLIANCE FILING

(Issued August 23, 2006)

1. On December 29, 2005, Mystic Development, LLC (Mystic) filed an unexecuted Reliability Must Run Agreement (RMR Agreement) for the supply of electric energy at cost-based rates from its two combined-cycle, gas-fired generation facilities, known as the Mystic 8 and Mystic 9 units, or units, as requested by ISO New England, Inc. (ISO-NE), to provide reliability services in New England. Mystic requested that the Commission accept its proposed RMR Agreement and grant waiver of the Commission's 60-day prior notice requirement<sup>1</sup> to permit an effective date of January 1, 2006. In its February 24, 2006 Order,<sup>2</sup> the Commission conditionally accepted and suspended, for a nominal period, the RMR Agreement, made it effective, subject to refund, and established hearing and settlement judge procedures.

2. On March 27, 2006, Mystic filed a compliance filing to the February 24 Order, and several parties filed requests for rehearing of the February 24 Order as well as responsive pleadings. This order grants in part and denies in part the requests for rehearing and conditionally accepts the compliance filing.

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<sup>1</sup> 16 U.S.C. § 824d; 18 C.F.R. § 35.3 (2005).

<sup>2</sup> *Mystic Development, LLC*, 114 FERC ¶ 61,200 (2006) (February 24 Order).

## I. Background

### A. Mystic's Application

3. ISO-NE has authority, under Market Rule 1,<sup>3</sup> to negotiate power supply agreements for the purchase of electric energy at cost-based rates from generation facilities that ISO-NE identifies as being necessary to ensure reliability, but which are unable to recover operating costs under current market conditions.<sup>4</sup>

4. Mystic units 8 and 9 are located in Everett, Massachusetts, and have a combined winter capacity of 1,658 MW. Mystic unit 8 began commercial operation in April 2003, and Mystic unit 9 began commercial operation in June 2003. Both units are located within the Northeast Massachusetts/Boston load pocket. Mystic sells the output of each unit to Boston Generating, LLC (Boston Generating), which, in turn, sells the output to Sempra Energy Trading Corp. (Sempra) under a marketing agreement. Sempra markets the units' output through bilateral trades and into the ISO-NE spot electricity markets.<sup>5</sup>

5. In its application, Mystic contended that it had met the requisite criteria for RMR treatment and was thus entitled to cost-of-service rates. Mystic stated that ISO-NE has determined that Mystic units 8 and 9 are needed to maintain reliability in the Boston Import Area,<sup>6</sup> and argued that the Commission should accept ISO-NE's reliability determination. Mystic noted that it has long-term, firm gas supplies that are delivered at a liquefied natural gas (LNG) terminal located next to its facility, and thus is uniquely situated to meet ISO-NE's reliability needs.<sup>7</sup>

6. Mystic further stated that neither Mystic unit 8 nor Mystic unit 9 had been able to adequately recover its costs since a group of lenders acquired the units in 2004, and that a

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<sup>3</sup> Market Rule 1 permits ISO-NE to enter into contracts for the supply of power at cost-based rates when the generation facilities supplying power are needed for reliability in New England, and when the generation facility has demonstrated that it has not earned sufficient revenues in the market to keep the facility in operation. Market Rule 1 at III.A.6.2.

<sup>4</sup> *E.g., Milford Power Company, LLC*, 110 FERC ¶ 61,299 (*Milford I*), order on *reh'g*, 112 FERC ¶ 61,154 (2005) (*Milford II*).

<sup>5</sup> February 24 Order at P 3, *citing* Mystic Transmittal Letter at 5.

<sup>6</sup> Mystic Transmittal Letter at 7-8 and Exhibits D & E.

<sup>7</sup> February 24 Order at P 4, *citing* Mystic Transmittal Letter at 8.

detailed forecast indicated that those units would continue to under-recover their costs in the future.<sup>8</sup>

### **B. February 24 Order**

7. In the February 24 Order, the Commission agreed with ISO-NE that Mystic units 8 and 9 are needed for reliability, rejecting as unpersuasive intervenors' claims that a new and updated supporting study is necessary.<sup>9</sup> The Commission found that Mystic had adequately demonstrated that the units are not able to recover their Facility Costs<sup>10</sup> and that they qualify for an RMR Agreement.<sup>11</sup> The Commission further found that the proposed RMR Agreement raised issues of material fact that could not be resolved on the record before it. Accordingly, it set the rates, terms and conditions of the proposed RMR Agreement for hearing, to determine, among other things, the correct return on equity, a determination of the financial information necessary for a proper cost-of-service analysis, and the proper calculation of the cost of fuel and directed Mystic to file a compliance filing.<sup>12</sup> In the compliance filing, the Commission required Mystic to correct the Fuel Index Price<sup>13</sup> and modify section 3.1.2 of the proposed RMR Agreement to reflect the possible future sales of gas.<sup>14</sup>

### **C. Requests for Rehearing**

8. NSTAR Electric and Gas Corporation (NSTAR); Massachusetts Municipal Wholesale Electric Company, Reading Municipal Light Department, Wellesley Municipal Light Plant, and Concord Municipal Light Plant (collectively, Municipals); the

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<sup>8</sup> *Id.* at P 5, *citing* Mystic Transmittal Letter at 8-10. In 2004, a group of lenders acquired Boston Generating, the parent company of Mystic and its affiliated generation project companies, from a subsidiary of Exelon Corp. as part of a settlement in lieu of foreclosure due to Boston Generating's default under a credit agreement with the lenders. *Id.* at n.7.

<sup>9</sup> *Id.* at P 22.

<sup>10</sup> Facility Costs are defined as costs ordinarily necessary to keep a facility available. *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077 at P 35 (*Bridgeport I*), *order on reh'g*, 113 FERC ¶ 61,311 (2005) (*Bridgeport II*), *order rejecting reh'g*, 114 FERC ¶ 61,265 (2006) (*Bridgeport III*).

<sup>11</sup> *Id.* at P 32.

<sup>12</sup> *Id.* at P 50-52. The compliance filing will be addressed below.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at P 56.

Massachusetts Attorney General (Mass AG); and Mystic filed requests for rehearing of the February 24 Order. On April 11, 2006, Mystic filed an answer (April 11 answer) to NSTAR's, the Municipals', and the Mass AG's requests for rehearing. On April 11, 2006, NSTAR filed an answer to Mystic's request for rehearing. On April 17, 2006, the Mass AG filed an answer to Mystic's request for rehearing. On April 26, 2006, NSTAR and the Municipals filed answers to Mystic's answer to their requests for rehearing and Mystic filed an answer to the responses to its April 11 answer. On July 25, 2006, NSTAR filed a motion to lodge and a motion for expedited action. On July 27, 2006, NSTAR filed a motion for refund assurance. On August 4, 2006, Mystic filed an answer to NSTAR's motion to lodge and motion for refund assurance. On August 9, 2006, the Municipals filed an answer in support of NSTAR's motion to lodge. On August 11, 2006, Mystic filed an answer to the Municipals' answer to NSTAR's motion to lodge. On August 21, 2006, NSTAR filed an answer to Mystic's answers. In their requests for rehearing, the parties have raised a number of substantive issues, which we address below.

## **II. Discussion**

### **A. Procedural Matters**

#### **1. Answers and Motion to Lodge**

9. Rule 213(a)(2) prohibits an answer to a request for rehearing or to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept: (a) NSTAR's and Mass AG's answers to Mystic's request for rehearing; (b) Mystic's April 11 answer; (c) NSTAR's and the Municipals' answers to Mystic's April 11 answer; (d) Mystic's answer to the responses to its April 11 answer; (e) Mystic's answer to NSTAR's motion to lodge and motion for refund assurance; (f) the Municipals' answer to NSTAR's motion to lodge; (g) Mystic's answer to the Municipals' answer to NSTAR's motion to lodge, or (h) NSTAR's answer to Mystic's answers and will, therefore, reject them. We also deny NSTAR's motion to lodge as cumulative and unnecessary.

#### **2. Motion for Refund Assurance**

10. NSTAR asks the Commission to establish conditions, such as a bond, guarantee by a creditworthy entity, or escrow, to provide assurance that Mystic will pay refund obligations. NSTAR submits that Mystic's refund obligation could amount to a substantial portion of Mystic's assets. NSTAR contends that there is a substantial risk that Mystic would default on a refund obligation.<sup>15</sup>

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<sup>15</sup> Motion for Refund Assurance at 1-4, 9.

11. While the Commission is also concerned that Mystic pay any refund obligation that the Commission may order, we think that the motion is premature, and is more properly a matter for the presiding judge to consider in the hearing that we have ordered in this proceeding. We disagree with NSTAR's assertion that "an assessment of the underlying merits of the dispute leads inevitably to the conclusion that Mystic will owe substantial refunds."<sup>16</sup> The basis for the motion is that the rate base and common equity components of Mystic's cost of service are overstated.<sup>17</sup> These are matters that we have set for hearing and the presiding judge would be in a better position to judge the merits of the arguments on these issues. NSTAR is also concerned that Mystic may default on refund liability "by virtue of its merchant status."<sup>18</sup> But a company's status as a merchant generator does not lead to the conclusion that it will default on its obligations.

12. In support of its motion, NSTAR cites *Devon Power LLC*.<sup>19</sup> That case involved an emergency motion by certain generators for approval of cost of service rates without which the generators could not perform necessary and much-delayed maintenance. The applicant's financial situation was grave; there was serious concern that without the Commission's prompt action, the generators would not be able to perform through the 2003 peak summer season.<sup>20</sup> That is not the case here. While Mystic's refund obligation may, eventually, be substantial, NSTAR has not demonstrated that this is an emergency<sup>21</sup> or that Mystic would not be able to meet its financial obligations.<sup>22</sup> We think that this case is nearer to *Duke Energy Moss Landing*<sup>23</sup> where the Commission, while allowing intervenors to pursue their request for an escrow account at hearing, found their concerns about the financial viability of the generators to be "speculative and premature."<sup>24</sup> Accordingly, we will refer this matter to the presiding judge for consideration at the hearing in this proceeding.

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<sup>16</sup> *Id.* at 9.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 9.

<sup>19</sup> 102 FERC ¶ 61,314 (2003) (*Devon*).

<sup>20</sup> *Id.* at PP 1-2, 5-6.

<sup>21</sup> NSTAR cites certain cases that emerged from the California energy crises. We think that the analogy is overdrawn. NSTAR has not established that Mystic *has* a refund obligation, much less that it would default on a refund liability.

<sup>22</sup> See *Distrigas of Massachusetts*, 33 FERC ¶ 61,406 at 61,776 (1985).

<sup>23</sup> 86 FERC ¶ 61,187 (1999).

<sup>24</sup> *Id.* at 61,657.

## **B. Reliability Determination**

### **1. Requests for Rehearing**

13. Intervenors contend that the conditions on which ISO-NE based its reliability determination are outdated and insufficient for the Commission to make a reliability determination. Intervenors assert that the Commission should have recognized the reliability issue as constituting a disputed material fact warranting an evidentiary hearing. NSTAR and Mass AG contend that the Boston Edison Company's (BECO) 345 kV transmission project will add 900 MW of additional import capability to the Boston Import Area, which the Commission cannot ignore in upholding its obligation under section 205(a) of the Federal Power Act (FPA).<sup>25</sup> Therefore, they request that the Commission require ISO-NE to re-determine the need for Mystic 8 and/or 9 for system reliability purposes once BECO's 345 kV transmission project becomes operational.

14. Municipals contend that the Commission's finding that ISO-NE has already determined that planned system upgrades will not eliminate the reliability need for units 8 and 9 is unsupported. Municipals assert that ISO-NE has not claimed that both units will continue to be needed for reliability after transmission system upgrades, such as the BECO 345 kV transmission project, which were scheduled for completion in June 2006, are placed in service.<sup>26</sup> NSTAR states that the RMR Agreement should include a condition that would terminate the RMR rate if ISO-NE determines that neither unit is needed for system reliability purposes once BECO's 345 kV transmission project enters service, or would reduce the rate if ISO-NE determines that only one unit is needed for reliability once that project enters service.<sup>27</sup>

15. Municipals state that the February 24 Order was arbitrary and capricious in accepting an RMR Agreement to pay \$240 million per year for reliability services to units that ISO-NE previously described as being in violation of applicable reliability criteria (common mode failure). Municipals and NSTAR further contend that the Commission erred in summarily finding Mystic units 8 and 9 eligible for an RMR Agreement because the violation may be responsible for any shortfall in those units' revenues. They argue that there has been no conclusive showing that this violation had

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<sup>25</sup> Mass AG Request for Rehearing at 11; NSTAR Request for Rehearing at 3, 7, 15-25.

<sup>26</sup> Municipals Request for Rehearing at 14. The current in service projection is Summer of 2006. *NSTAR Project to Boost Long-Term Area Electrical Reliability available at <http://www.transmissionproject.net>*

<sup>27</sup> NSTAR Request for Rehearing at 7, 21-22, 24-25.

been resolved.<sup>28</sup> They assert that the February 24 Order erred in failing to recognize common mode failure issues and resulting output limits, and that this limitation should be reflected in the RMR Agreement rates.<sup>29</sup>

## 2. Commission Determination

16. As the Commission stated in *Bridgeport III*,<sup>30</sup> the ISO-NE's reliability determination is subject to the Commission's review under section 205 of the FPA.<sup>31</sup> In the February 24 Order, the Commission found that ISO-NE properly determined that the units are needed for reliability.<sup>32</sup> The Commission rejected intervenors' claims that a new and updated supporting study is necessary and agreed with ISO-NE that the system changes that the Municipals identified would not change ISO-NE's reliability determination.<sup>33</sup> The Commission therefore rejected the Municipals' request that Mystic seek a new reliability determination from ISO-NE.<sup>34</sup>

17. The Commission denies intervenors' requests for rehearing of the Commission's finding that ISO-NE properly determined that the units were needed for reliability. In its reliability determination, ISO-NE stated that the Mystic units were needed for reliability "at least until the planned transmission improvements into [Boston] are in service."<sup>35</sup> In its answer to protests, ISO-NE stated that future additions do not change the bulk power system *as it existed* in December 2004 or *as it existed* at the time that ISO-NE filed its answer (February 2, 2006).<sup>36</sup>

18. As noted above, in its reliability determination, ISO-NE stated that the Mystic units are needed for reliability at least until planned transmission improvements into Boston are in service. Since BECo's 345 kV transmission project is anticipated to commence service, we direct ISO-NE to update its reliability determination for the

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<sup>28</sup> Municipals Request for Rehearing at 45

<sup>29</sup> *Id.* at 45-46; NSTAR Request for Rehearing at 22-23.

<sup>30</sup> *Bridgeport Energy, LLC*, 114 FERC ¶ 61,265 at P 12 (2006) (*Bridgeport III*).

<sup>31</sup> 16 U.S.C. § 824d (2000).

<sup>32</sup> February 24 Order at P 22.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Mystic's December 29, 2005 application, Attachments C at 1 and D at 2: ISO-NE Reliability Need Determination (December 15, 2004), Summary of ISO-NE System Planning Reports, (December 7, 2004).

<sup>36</sup> ISO-NE's February 2, 2006 Answer to Protests at 6.

Mystic units within 30 days of the date that the BECo 345 kV transmission project commences service. If following its updated reliability determination, ISO-NE determines that the Mystic units are no longer needed for reliability, ISO-NE may terminate the RMR Agreement with Mystic on 120 days written notice as provided for in section 2.2.1 of the RMR Agreement.

**C. Facility Costs Test**

**1. Requests for Rehearing**

19. Intervenors argue that, if the Commission does not grant rehearing and summarily rejects Mystic's filing, it should grant rehearing for the purpose of including financial eligibility issues among the matters set for hearing in this case. NSTAR states that Mystic provides no basis for concluding that it is unable to recover its Facility Costs and failed to provide audited financial data for itself and Boston Generating. NSTAR further contends that there is no evidence that the business - contracted services item in Exhibit TTH-4 is eligible for inclusion in a Facility Costs study.<sup>37</sup> NSTAR further asserts that the February 24 Order fails to address the items that Mystic included in the Exhibit TTH-4 cost analysis: \$13.4 million in power purchase costs for the nine-month period ending September 30, 2005, which represent "Mark-to-Market" transactions,<sup>38</sup> and principal prepayments of \$10.9 million in 2004 and \$7.9 million for the partial year 2005. Additionally, intervenors state that the "other, net" costs are costs that Mystic admits that it did not pay. Intervenors assert that these costs may relate to hedging activity and thus have no place in Exhibit TTH-4.<sup>39</sup> Mass AG states that Mystic reports \$149.4 million of "Intercompany" revenues in 2004 and questions how Mystic allocated these revenues to the units. Further, Mass AG and NSTAR contend that the Commission defines Facility Costs to include fixed Operation and Maintenance (O&M), Administrative and General (A&G), taxes and certain debt service obligations and that Mystic can not designate variable O&M as a Facility Cost for this proceeding only.<sup>40</sup> Intervenors further contend that debt service costs are not properly considered as Facility Costs and that Mystic's 2006 cost predictions are irrelevant and fundamentally flawed.

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<sup>37</sup> NSTAR Request for Rehearing at 33.

<sup>38</sup> NSTAR claims that Mystic acknowledged that these transactions should have been excluded from the Facility Cost analysis. NSTAR Request for Rehearing at 34.

<sup>39</sup> Municipals Request for Rehearing at 22; NSTAR Request for Rehearing at 36.

<sup>40</sup> Mass AG Request for Rehearing at 4; NSTAR Request for Rehearing at 36.



## 2. Commission Determination

20. We will grant rehearing in part for the purpose of including certain financial eligibility issues among those set for hearing. In the February 24 Order, in *Bridgeport I*,<sup>41</sup> and in *Berkshire I*,<sup>42</sup> the Commission compared Facility Costs, such as fixed O&M, A&G, and taxes, to revenues earned in the energy and capacity markets in determining whether a proposed RMR Agreement is necessary for a generating facility to remain operational. In the February 24 Order, the Commission also included Mystic's debt service payments in the comparison, and concluded that Mystic demonstrated that the units were not able to recover their Facility Costs and that the units thus qualify for an RMR Agreement.<sup>43</sup>

21. However, based on the issues that the intervenors have raised on rehearing and upon further review, we find that the question of whether Mystic has historically recovered its Facility Costs raises issues of material fact that can not be resolved on the record before us, and are more appropriately addressed in the hearing that the Commission established in the February 24 Order. If it is determined that the proposed RMR Agreement is necessary for the units to remain operational to provide reliability services, then the hearing should consider the entire cost-of-service exclusive of the issues we address summarily below.

22. Intervenors note that in Exhibit TTH-4, Page 1, Mystic includes variable O&M costs in its operating expense data. They contend that inclusion of variable O&M costs in the Facility Costs Test departs from Commission precedent. We disagree. In prior RMR proceedings, the Commission has permitted recovery of both fixed costs and variable costs as essential costs for the services that the units continue to provide.<sup>44</sup>

23. Although the category of variable O&M costs generally may be included in the Facility Costs Test, in the instant filing Mystic does not identify or explain why its specific costs are appropriate and recurring expenses. For example, in Exhibit ACH-3,

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<sup>41</sup> *Bridgeport I*, 112 FERC ¶ 61,077 at P 36.

<sup>42</sup> *Berkshire Power Company, LLC*, 112 FERC ¶ 61,253 at P 25 (2005) (*Berkshire I*), order on reh'g, 114 FERC ¶ 61,099 (*Berkshire II*), order rejecting reh'g, 115 FERC ¶ 61,253 (2006) (*Berkshire III*).

<sup>43</sup> *Id.* The Commission noted that it must consider debt service costs, just as it considers any other fixed costs. *Id.*, citing *Berkshire II*, 114 FERC ¶ 61,099 at P 7.

<sup>44</sup> *E.g.*, *Consolidated Edison Energy Massachusetts, Inc.*, 112 FERC ¶ 61,263 at P 40 (2005) (*Con Ed*), reh'g pending (citing *PSEG Power Connecticut*, 110 FERC 61,020 at P 30 (*PSEG I*), order on reh'g, 110 FERC ¶ 61,441 (2005) (*PSEG II*)); *Milford I* 110 FERC ¶ 61,299 at P 70; *Bridgeport I*, 112 FERC ¶ 61,077 at P 46.

Schedule 5, it appears that Mystic allocates a Long-Term Service Agreement (LTSA) penalty expense as a variable O&M expense. The Commission ruled in *Bridgeport I* that “a one-time extraordinary maintenance expense...may not be relevant when determining whether a cost-of-service RMR contract is necessary for a facility to remain in service...”<sup>45</sup> Additionally, the Commission notes that Mystic has not explained the variable O&M expense that it included in its costs for 2005. Therefore, we will grant rehearing and set for hearing the issue of whether the specific costs Mystic has described as variable O&M expenses for 2004 and 2005 are properly classified and the allocation of variable O&M expenses between the RMR units and the non-RMR units.

24. Intervenors also claim that the Commission incorrectly included Mystic’s debt service payments as Facility Costs. Municipals contend that debt service costs are not relevant as Facility Costs in this case because Mystic’s parent company, Boston Generating, foreclosed on Mystic’s original owner’s loan and became the subsequent owner of the units, thereby eliminating debt service payments. We deny rehearing on this issue. We disagree with Municipals’ argument that the Commission added debt service payments as “an entirely new test for RMR Agreement eligibility...”<sup>46</sup> The Commission included debt service payments in the Facility Cost Test in *Berkshire I*.<sup>47</sup> Subsequently, the Commission ruled in *Berkshire II* that “if it [Berkshire] continues to operate at a loss for the debt-holders or for subsequent owners (and there is no reason to believe that either would necessarily be able to operate any more profitably than Berkshire), it would ultimately be shut down, adversely affecting reliability. In short, then, debt-service costs are just as much a cost to be considered in any analysis as other fixed costs.”<sup>48</sup>

25. Although, in general, debt service payments may be included as Facility Costs, the Commission will review each RMR agreement on a case-by-case basis to determine whether particular debt service payments should be considered as Facility Costs.<sup>49</sup>

26. Therefore, the Commission will grant rehearing and set for hearing whether the specific payments to Boston Generating are appropriately classified as debt service payments and whether debt is properly allocated among the Boston Generating Portfolio and the Mystic units.

27. As stated previously, the issue of whether the proposed RMR Agreement is necessary for Mystic to recover its Facility Costs is set for hearing. We note that on

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<sup>45</sup> *Bridgeport I*, 112 FERC ¶ 61,077 at P 38.

<sup>46</sup> Municipals Request for Rehearing at 27.

<sup>47</sup> *Berkshire I*, 112 FERC ¶ 61,253 at P 25.

<sup>48</sup> *Berkshire II*, 114 FERC ¶ 61,099 at P 7.

<sup>49</sup> *Id.* at P 9.

July 5, 2006, the presiding Administrative Law Judge issued a procedural schedule in Docket No. ER06-427-003. The presiding Administrative Law Judge has the discretion to take whatever action is appropriate to accommodate the additional issues that we are setting for hearing in this order. If the hearing ultimately determines that the RMR Agreement is necessary, then a just and reasonable cost-of-service rate must be established in this proceeding. While the hearing established in this order should consider the entire cost-of-service, the Commission will rule summarily on certain other aspects of the RMR Agreement, and provide additional guidance for the ordered hearing, as discussed below.

**D. Termination of RMR Agreement**

**1. Transition Payments Date**

**a. Requests for Rehearing**

28. Municipals and NSTAR assert that under the settlement agreement accepted on June 16, 2006 in Docket Nos. ER03-563-030, *et al.*, as of December 1, 2006, Mystic will begin to receive substantial transition payments.<sup>50</sup> The transition payments would be fixed at \$3.05 per kW-month (for 2006-2007) and would increase over the course of the transition period, culminating in a payment of \$4.10 per kW-month (for 2009-2010).<sup>51</sup> Intervenors assert that, as a result of these payments, Mystic will receive more than \$57 million per year in 2006-2007, and that this amount will exceed \$76 million per year in 2009-2010. Municipals ask that the Commission provide that the RMR Agreement will terminate as of December 1, 2006, unless Mystic demonstrates that such transition payments, coupled with other market revenues, remain below the level of the units' relevant Facility Costs.<sup>52</sup> Municipals suggest that the Commission require Mystic to make this showing within 30 days after the Commission approves the settlement agreement in Docket Nos. ER03-563-030, *et al.*<sup>53</sup> Municipals submit that this timetable will allow the Commission to determine, before December 1, 2006, whether the RMR Agreement should terminate on that date.<sup>54</sup> NSTAR requests that the Commission

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<sup>50</sup> *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (Order Accepting Settlement). Under the settlement agreement, a forward capacity market (FCM) will be implemented instead of the contested locational installed capacity (LICAP) mechanism originally proposed by ISO-NE.

<sup>51</sup> *Id.* at P 30.

<sup>52</sup> Municipals Request for Rehearing at 53.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 54.

require Mystic to retake the Facility Costs Test, incorporating transition payment revenues in that analysis.<sup>55</sup>

**b. Commission Determination**

29. The Commission addressed this issue in the Order Accepting Settlement in Docket Nos. ER03-563-030, *et al.* The Commission will not require the termination of existing RMR agreements before the full implementation of the FCM and will not require RMR holders to reapply for new RMR agreements. In the Order Accepting Settlement, the Commission stated that it:

has consistently accepted RMR agreements for a term that expires upon implementation of a locational capacity mechanism. FCM will not result in the purchase of capacity until the beginning of the first commitment period in June 2010. Therefore, the June 2010 termination date of RMR agreements is consistent with the express terms of the RMR agreements and the Commission's intent that those contracts terminate when a capacity market mechanism is fully implemented.<sup>56</sup>

30. But although we are not mandating early termination of existing RMR agreements, it is appropriate that prospective capacity revenues from transition payments be included in the Facility Costs Test.<sup>57</sup> As indicated above, we are setting for hearing the determination of whether the proposed RMR Agreement is necessary for Mystic to remain operational. In order to make this finding, the Commission compares on both an historic and prospective basis the Facility Costs, such as O&M, A&G, and taxes to revenues earned in the energy and capacity markets. Now that the Commission has approved the FCM Settlement, we grant rehearing for the purpose of including prospective transition payments in the Facility Costs Test that will be addressed in the hearing.

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<sup>55</sup> NSTAR Request for Rehearing at 14.

<sup>56</sup> Order Accepting Settlement, 115 FERC ¶ 61,340 at P 166 (citations omitted).

<sup>57</sup> The Commission also stated that the transition payments will be netted against RMR revenues, which will protect against over-recovery. *Id.*

## 2. Notice of Termination

### a. Request for Rehearing

31. Municipals assert that the February 24 Order departs from *New Boston*,<sup>58</sup> which allows an RMR Agreement to be terminated with 60 days' notice if ISO-NE determines that a unit is no longer needed for reliability purposes. Municipals claim that requiring 120 days' notice is "particularly troubling given that charges under the proposed RMR agreement for Mystic Units 8 and 9 are *eight times* more expensive than those under the New Boston agreement on an absolute basis, and nearly *twice* as expensive on a \$/kW-month basis."<sup>59</sup>

### b. Commission Determination

32. The Commission rejects Municipals' request for rehearing. Municipals have not met the burden of proof showing that shortening the notice period to 60 days is consistent with or superior to the *pro forma* 120 days. We found that the 120-day notice of termination period was just and reasonable when we approved the *pro forma* Form of Cost-of-Service Agreement under Market Rule 1.<sup>60</sup>

33. The Commission finds that the instant proceeding differs from *New Boston* and that a reduction of the notice period from the *pro forma* 120 days to 60 days is not warranted here. In *New Boston*, ISO-NE agreed to the shortened notice period because it had already determined that specific planned upgrades would eliminate the need of New Boston Unit 1 for reliability services.<sup>61</sup> In the instant proceeding, ISO-NE has not found that upgrades will make the units unneeded for reliability services. Therefore, *New Boston* is distinguishable.

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<sup>58</sup> *Exelon New Boston, LLC*, 106 FERC ¶ 61,191(2005) (*New Boston*).

<sup>59</sup> Municipals Request for Rehearing at 18 (emphasis in original, footnote omitted).

<sup>60</sup> Market Rule 1 was approved by the Commission in *New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287 (2002).

<sup>61</sup> *See*, ISO-NE January 20, 2004 Protest at 4 in Docket No. ER04-344-000.

## **E. Prior Notice Requirement**

### **1. Request for Rehearing**

34. Municipals contend that the Commission erred in granting Mystic waiver of the 60-day prior notice requirement.<sup>62</sup> Municipals state that Mystic is responsible for its own inability to file the proposed RMR Agreement earlier than December 29, 2005 and that Mystic's assertion that it filed the RMR Agreement as quickly as possible does not explain why it is essential that service under the RMR Agreement begin immediately, rather than 60 days from the date of filing.<sup>63</sup> Municipals contest the assumption that Mystic could not tolerate a 60-day delay and would rather shut down its units than continue in the market for two months before beginning to receive full cost-of-service rates.<sup>64</sup>

### **2. Commission Determination**

35. The Commission denies Municipals' request for rehearing. The Commission has granted waiver of the prior notice requirement where: (a) agreements are intended to permit operation by a generator that is needed to assure system reliability; (b) the applicant may only learn upon very short notice which units will be RMR units; and (c) the applicant might not be able to file 60 days before the commencement of service due to the short notice.<sup>65</sup> After the Commission rejected Mystic's proposed RMR Agreement in Docket No. ER05-1304, Mystic and ISO-NE did not complete their negotiations revising the instant proposed RMR Agreement until December 29, 2005. Under Market Rule 1, Mystic could not file the RMR Agreement until it had received the approval of ISO-NE and completed negotiations of the RMR Agreement. We find that Mystic filed the proposed RMR Agreement promptly upon the completion of negotiations. Our granting of waiver is consistent with waiver of the prior notice requirement in other RMR proceedings.<sup>66</sup>

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<sup>62</sup> 16 U.S.C. § 824d (2000); 18 C.F.R. § 35.3 (2005). February 24 Order, 114 FERC ¶ 61,200 at PP 65-72.

<sup>63</sup> Municipals Request for Rehearing at 62-63.

<sup>64</sup> *Id.*

<sup>65</sup> *Mirant Americas Energy Marketing, L.P.*, 105 FERC ¶ 61,359 at P 14-16 (2003); *Milford I*, 110 FERC ¶ 61,299 at P 25; *Berkshire I*, 112 FERC ¶ 61,253 at P 27.

<sup>66</sup> *Mirant Kendall, LLC and Mirant Americas Energy Marketing, L.P.*, 109 FERC ¶ 61,227 at P 15 (2004) (*Mirant I*), order on reh'g, 110 FERC ¶ 61,272 (2005); *PSEG II*, 110 FERC ¶ 61,441 at P 49; *Milford I*, 110 FERC ¶ 61,299 at P 25; *Berkshire I*, 112 FERC ¶ 61,253 at P 27; *Con Ed*, 112 FERC ¶ 61,263 at P 47; *Pittsfield Generating Company, L.P.*, 115 FERC ¶ 61,059 at P 76 (2006) (*Pittsfield*), reh'g pending.

**F. Suspension of Proposed RMR Rates****1. Request for Rehearing**

36. Municipals contend that the Commission erred in failing to suspend Mystic's proposed RMR rates for five months.<sup>67</sup> Municipals rely on *West Texas*,<sup>68</sup> which provides for a maximum suspension of rate increases. Municipals state that Mystic is a market-based rate seller, does not keep its books in accordance with the Uniform System of Accounts, does not have audited financial data, and does not have an approved cost-based rate on file against which to compare the proposed RMR rates. Municipals argue that these are compelling reasons to impose the maximum suspension permitted by law.

**2. Commission Determination**

37. The Commission rejects Municipals' request for rehearing. In several RMR orders, including *Mirant I*, *PSEG I*, *Milford I*, and *Bridgeport I*, we stated that *West Texas* was not applicable where the current rate on file for the RMR units is not a cost-of-service rate, but rather is a market-based rate.<sup>69</sup> Consistent with this precedent, because Mystic's current rate on file for these units is not a cost-of-service rate, but rather is a market-based rate, we find that *West Texas* does not apply here. The February 24 Order appropriately suspended the rates for a nominal period, subject to refund.<sup>70</sup>

**G. Fuel Index Price and Fuel Sales Revenues****1. Request for Rehearing**

38. Mystic requests that the Commission grant rehearing of the February 24 Order to allow Mystic to retain the benefit of its gas discount by allowing it to set the Fuel Index Price at the Algonquin City Gate price.<sup>71</sup> Mystic explains that its agreement with Distrigas of Massachusetts (Distrigas) provides Mystic with a firm supply of gas subject

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<sup>67</sup> Municipals Request for Rehearing at 60.

<sup>68</sup> *West Texas Utilities Co.*, 18 FERC ¶ 61,189 (1982) (*West Texas*).

<sup>69</sup> *Mirant I*, 109 FERC ¶ 61,227 at P 16; *PSEG I*, 110 FERC ¶ 61,020 at P 68; *Milford I*, 110 FERC ¶ 61,299 at P 23; *Bridgeport I*, 112 FERC ¶ at P 73.

<sup>70</sup> *E.g.*, *PSEG I*, 110 FERC ¶ 61,020 at P 69; *Milford I*, 110 FERC ¶ 61,299 at P 23; *Bridgeport I*, 112 FERC ¶ 61,077 at P 73; *Berkshire I*, 112 FERC ¶ 61,253 at P 21; *Con Ed*, 112 FERC ¶ 61,263 at P 50; *Pittsfield*, 115 FERC ¶ 61,059 at P 77.

<sup>71</sup> In the February 24 Order, the Commission ordered Mystic to include the \$0.20 discount/MMBTU in its Fuel Index Price, so Mystic's Stipulated Bids would incorporate the actual Algonquin City Gate price.

to a must-take obligation of 1,400,000 MMBtu per week. Mystic states that, in return for agreeing to this minimum take provision, it receives the gas at a \$0.20/MMBtu discount off the Algonquin City Gate price of gas. Mystic explains that it must pay as liquidated damages 25 percent of the Algonquin City Gate price for any of the 1,400,000 MMBtu of gas that it does not take each week.<sup>72</sup> Mystic also requests that the Commission clarify that, in the event that Mystic is allowed to sell (either by itself or through a third party) any gas that it does not take to meet its must-take provision, Mystic should credit back revenues to RMR rates only after it has fully recovered its gas costs, including any liquidated damages.<sup>73</sup>

## 2. Commission Determination

39. The Commission denies Mystic's request for rehearing on this issue. Mystic claims that it will "save" load approximately \$14.5 million<sup>74</sup> by maintaining its discount in exchange for bearing liquidated damages. The problem, however, is that Mystic's proposal does not pass this discount on to its customers. Indeed, it could be viewed that under Mystic's proposal, customers would pay a \$0.20 surcharge/MMBtu on Mystic's actual fuel costs. Instead of allowing Mystic to keep the benefits of the discount, the Commission directs Mystic to incorporate the discount into the Fuel Index Price so Mystic's Stipulated Bid price can decrease. This will benefit customers by allowing Mystic a greater chance to operate in-merit and increase its energy market revenue, which Mystic must credit against its Monthly Fixed Cost Charge. In addition, Mystic's customers should not be responsible for liquidated damages resulting from Mystic's business decision to enter into a contract with a must-take provision to receive a price discount. Mystic has the opportunity to self-schedule (and operate out-of-merit) to take as much gas as possible to attempt to avoid its liquidated damages penalties.

40. Additionally, as noted in the February 24 Order, while Mystic is assuming responsibility for its gas-related liquidated damages, Mystic also is subject to Long Term Service Agreement (LTSA) penalty charges with its units' turbine vendor. Under the LTSA, Mystic is assessed a penalty charge of \$216,488 for each unit trip (\$432,936 per block) after 100 starts in a maintenance cycle. Mystic proposes that customers pay these costs, in addition to the Monthly Fixed Cost Charge.<sup>75</sup> While the proposed self-scheduling would allow Mystic to mitigate its gas-related liquidated damages, it increases Mystic's chance of receiving LTSA penalty charges, which Mystic proposes to pass on to customers. Intervenors state that, as proposed, the RMR Agreement requires ratepayers

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<sup>72</sup> Mystic Request for Rehearing at 2-3.

<sup>73</sup> *Id.* at 2, 6-8.

<sup>74</sup> *Id.* at n. 6.

<sup>75</sup> Mystic Transmittal Letter at n 37.



to subsidize Mystic's mitigation of its liquidated damages by allowing Mystic to externalize the LTSA penalty costs associated with additional unit starts due to self-scheduling. In the February 24 Order, the Commission set the issue of LTSA penalty charges for hearing and found that Mystic must demonstrate that it takes into account the possibility of LTSA penalty charges when it self-schedules to mitigate its gas-related liquidated damages.<sup>76</sup>

41. The Commission clarifies that if Mystic is allowed to sell (either by itself or through a third party) gas it does not take from its weekly gas quantity requirement, these revenues would be considered "related to the resource"<sup>77</sup> and thus Mystic must credit any revenues earned from those sales to the Monthly Fixed Cost Charge. Further, the Commission clarifies that Mystic must also credit to the Monthly Fixed Cost Charge any compensation that Mystic may receive from Dstrigas resulting from Dstrigas not meeting Mystic's gas demand. Consistent with section 3.1.2 of the *pro forma* RMR agreement, any revenues will be offset against payments under the RMR Agreement.<sup>78</sup> Mystic is directed to make a compliance filing within 30 days of the date of this order reflecting these changes to the RMR Agreement as discussed below.

## **H. Levelized Rate Base**

### **1. Requests for Rehearing**

42. Intervenors contend that the Commission erred in rejecting summarily the request that any cost-of-service RMR Agreement rates for Mystic be set on a levelized basis.<sup>79</sup> They state that the February 24 Order appears to have confused Commission rulings with respect to limiting RMR agreement recoveries to going forward costs with those concerning whether RMR agreement rates should be set on a levelized basis. They state that the Commission has treated these issues separately in prior orders.<sup>80</sup>

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<sup>76</sup> February 24 Order at P 52.

<sup>77</sup> If the revenues or charges are considered "related to the resource" then they must be credited to the Monthly Fixed Cost Charge.

<sup>78</sup> FERC Electric Tariff No. 3, Section III – Market Rule 1- Standard Market Design Appendix A, Exhibit 4 – Form of Cost of Service Agreement, Original Sheet No. 7557 at section 3.1.2.

<sup>79</sup> Levelized rate basis recognizes the costs of the units on a uniform basis over time.

<sup>80</sup> Municipals Request for Rehearing at 7-8, 47-51; NSTAR Request for Rehearing at 27-29.

## 2. Commission Determination

43. The Commission agrees with intervenors and will grant rehearing. The Commission has set the issue of levelized rates for hearing in prior proceedings.<sup>81</sup> Therefore, upon further consideration, we find that the issue of whether rates should be set on a levelized basis raises issues of material fact that cannot be resolved on the record before us and are more appropriately addressed in the hearing that the Commission established in the February 24 Order.

### I. Going Forward Costs

#### 1. Request for Rehearing

44. Municipals contend that the Commission erred in not limiting Mystic's recovery to its going forward costs.<sup>82</sup> Municipals assert that section 3.3.1(c)(iii) of Market Rule 1 makes clear that full cost-of-service is not a mandate in all instances, stating that the would-be RMR generator "shall file for cost-based rates under Section 205 with each party free to take any position it determines appropriate regarding recovery of return of and on investment."<sup>83</sup> Municipals argue that it would make little sense to allow parties to take any position regarding recovery of return of and on investment if Market Rule 1 required full cost-of-service rates in all circumstances.<sup>84</sup> Municipals contend that the Commission has expressly rejected generators' claims that they are entitled to recovery of their full cost-of-service.<sup>85</sup> Municipals further assert that once the transition payments begin to flow to Mystic, it is no longer just or reasonable to continue to provide full cost-of-service guarantees for the generators.<sup>86</sup>

#### 2. Commission Determination

45. The Commission denies rehearing on this issue. It is unclear why Municipals would cite to *Bridgeport I* and *Bridgeport II*, given that in those cases the Commission

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<sup>81</sup> *E.g.*, *Bridgeport I*, 112 FERC ¶ 61,077 at P 52.

<sup>82</sup> Municipals define going forward costs as fixed O&M, A&G and taxes. Municipals Request for Rehearing at n. 45.

<sup>83</sup> Municipals Request for Rehearing at 55 (*citing* Market Rule 1 Appendix A, Exhibit 2, section 3.3.1).

<sup>84</sup> *Id.* at 56.

<sup>85</sup> *Id.* at 58 (*citing Bridgeport I*, 112 FERC ¶ 61,077 at P 39; *Bridgeport II*, 113 FERC ¶ 61,311 at P 29).

<sup>86</sup> *Id.* at 56.

did not restrict the generator to going-forward costs.<sup>87</sup> Indeed, the Commission has consistently rejected the proposal that it limit generators to their going-forward costs<sup>88</sup> and has permitted recovery of fixed and variable costs under RMR contracts as essential costs for the services that the units provide.<sup>89</sup> As the Commission has noted, the cost-of-service approach is appropriate for RMR agreements because any infra-marginal or “other” revenues that these units earn are credited against the monthly fixed charges.<sup>90</sup> Accordingly, to the extent that ISO-NE needs the Mystic units for reliability, we will, consistent with precedent, accord them an appropriate cost-of-service recovery. Also in keeping with precedent, Mystic must credit all transition payments to the Monthly Fixed Cost Charge.

## **J. Common Equity Ratio**

### **1. Request for Rehearing**

46. NSTAR argues that the Commission must reject Mystic’s rate base (set forth in Exhibit ACH-3) as overstated and unsupported. NSTAR asks the Commission to summarily require Mystic to submit a compliance filing with a revised test year rate base predicated on a reasonably-developed and fully explained and supported allocation to the Mystic plants of the \$1.1 billion five-plant portfolio investment as of year-end 2003, which is also the beginning of the 2004 test year. NSTAR asserts that the Commission should reject the 50 percent common equity ratio that Mystic proposes and should substitute the 24 percent ratio that Mystic witness, Mr. Horton, used in his calculations.<sup>91</sup>

### **2. Commission Determination**

47. The Commission denies NSTAR’s request for rehearing. As stated above, the Commission set the issue of Mystic’s cost-of-service for hearing. If it is determined that

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<sup>87</sup> *Bridgeport I*, 112 FERC ¶ 61,077 at PP 44,46; (refusing to limit the facility to going forward costs and finding that recovery of cost-of-service is consistent with the provisions of Market Rule 1); *Bridgeport II*, 113 FERC ¶ 61,311 at P 36 (Commission has historically recognized cost-of-service recovery for generators under RMR agreements).

<sup>88</sup> *Mirant I*, 109 FERC ¶ 61,227 at P 36; *Milford I*, 110 FERC ¶ 61,299 at P 70; *Milford II*, 112 FERC ¶ 61,154 at PP 28-29; *Bridgeport I*, 112 FERC ¶ 61,077 at PP 44, 46; *Bridgeport II*, 113 FERC ¶ 61,311 at P 36; *Berkshire I*, 112 FERC ¶ 61,253 at P 29; *Berkshire II*, 114 FERC ¶ 61,099 at PP 10-11.

<sup>89</sup> *Id.* See also, *PSEG I*, 110 FERC ¶ 61,020 at P 30.

<sup>90</sup> *Bridgeport I*, 112 FERC ¶ 61,077 at P 46.

<sup>91</sup> NSTAR Request for Rehearing at 26 (citing Exhibit TTH-1 at 11, n. 8).

Mystic is eligible for an RMR Agreement, then the hearing will resolve rate base and cost-of-service issues, including the issue of Mystic's actual debt/equity ratio.<sup>92</sup>

**K. Other Matters**

48. Section 3 of Schedule 4 of the RMR Agreement states:

Owner may operate the Units as a "Limited Energy Generator" as that term is defined in Market Rule 1, such that the total amount of fuel burned does not exceed 1,400,000 MMBTU per week, with the week beginning and ending at 10 am Monday.

49. Upon further review, it is unclear whether this provision is consistent with Mystic's obligation under the RMR Agreement to perform when dispatched by ISO-NE or whether it exempts Mystic from its obligations under the RMR Agreement's non-performance penalties (section 3.4). That is, it is unclear whether this provision allows Mystic not to operate when dispatched by ISO-NE once it has burned 1,400,000 MMBtu for the week.

50. In Mystic's request for rehearing, Mystic states that its must-take obligation for 1,400,000 MMBtu per week with Distrigas is a "minimum take" provision.<sup>93</sup> It appears that Mystic could take more than its must-take obligation of 1,400,000 MMBtu per week, if necessary.

51. It is also unclear whether the RMR Agreement requires Mystic to use all available gas for units 8 and 9 before using the gas for Mystic's affiliated non-RMR generators.

52. These matters raise issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing that the Commission established in the February 24 Order.

**L. Compliance Filing**

53. On March 27, 2006, Mystic filed a compliance filing in response to the February 24 Order. Notice of the compliance filing was published in the *Federal Register*, 71 Fed. Reg. 18, 313 (2006), with interventions and protests due on or before April 17, 2006. None was filed.

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<sup>92</sup> February 24 Order at P 50.

<sup>93</sup> Mystic Request for Rehearing at 2.

54. Mystic's compliance filing revises the Fuel Index Price in Schedule 1 as directed in the February 24 Order.<sup>94</sup> However, the compliance filing also made a change that the Commission had not directed. It revised section 3.1.2 of the RMR Agreement to allow Mystic to fully recover its gas costs, including any liquidated damages arising under the gas supply agreement, before crediting revenues against the Monthly Fixed Cost Charge.<sup>95</sup> The Commission rejects Mystic's unauthorized change to section 3.1.2 of the RMR Agreement. Therefore, we will conditionally accept Mystic's compliance filing and direct Mystic to remove the change to section 3.1.2 and make an additional compliance filing within 30 days of the date of this order.

The Commission orders:

(A) The requests for rehearing of the February 24, 2006 Order are hereby granted in part and denied in part, as discussed above.

(B) The hearing previously ordered in this proceeding should also include the issues of whether: (a) Mystic has recovered or will recover its Facility Costs; (b) payments to Boston Generating are appropriately classified as debt service payments and debt is properly allocated among the Boston Generating Portfolio and Mystic units 8 and 9; (c) specific costs Mystic has described as variable O&M expenses for 2004 and 2005 are properly classified as variable O&M expenses; (d) the allocation of variable O&M costs between the RMR units and non-RMR units is correct; (e) Mystic's cost-of-service RMR rates should be set on a levelized basis; (f) the provision in Section 3 of Schedule 4 under the RMR Agreement is consistent with Mystic's obligation under the RMR Agreement to perform when dispatched by ISO-NE or whether it exempts Mystic from its obligations under the RMR Agreement's non-performance penalties (section 3.4); and (g) the RMR Agreement requires Mystic to use all available gas for units 8 and 9 before using the gas for Mystic's affiliated, non-RMR generators.

(C) Mystic's compliance filing is hereby conditionally accepted subject to Mystic making a further compliance filing within 30 days of the date of this order, removing the proposed change to section 3.1.2 of the RMR Agreement discussed in the body of this order.

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<sup>94</sup> *Id.* at P 51.

<sup>95</sup> Mystic compliance filing at 1-2.

(D) ISO-NE is hereby directed to update its reliability determination for the Mystic units in a compliance filing within 30 days of the date that the BECo 345 kV transmission project commences service.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.