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October 4, 2005

**VIA ELECTRONIC FILING**

Honorable Magalie Roman Salas  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

**Re: Mystic Development, LLC; Docket No. ER05-1304-000  
Mystic I, LLC; Docket No. ER05-1305-000**

Dear Secretary. Salas:

Transmitted electronically for filing in the above-referenced dockets is the Motion to Supplement and in the Alternative Answer ISO New England Inc.'s Motion to Intervene, Protest and Comments and Motion for Consolidation of ISO New England Inc.

If there are any questions concerning this filing, please call Theodore Paradise at (413) 540-4585 or me at (202) 661-7616.

Very truly yours,

/s/

Perry D. Robinson  
Counsel for  
ISO New England Inc.

Enclosure

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**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

	)	
<b>Mystic Development, LLC</b>	)	<b>Docket No. ER05-1304-000</b>
<b>Mystic I, LLC</b>	)	<b>Docket No. ER05-1305-000</b>
	)	

**MOTION TO SUPPLEMENT THE  
INTERVENTION, PROTEST AND COMMENTS OF ISO NEW ENGLAND INC. TO  
ADDRESS SUBSTANTIVE ADDITIONS TO PROPONENT’S FILING  
AND IN THE ALTERNATIVE,  
REQUEST OF ISO NEW ENGLAND INC. FOR LEAVE TO ANSWER  
THE RESPONSE OF MYSTIC DEVELOPMENT, LLC AND MYSTIC I, LLC**

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.212 (2005), ISO New England Inc. (“ISO”) moves to supplement its previous motion to intervene in the above-referenced dockets and, in the alternative, requests leave to answer the joint response of Mystic Development, LLC (“Mystic Development”) and Mystic I, LLC (“Mystic I”) (collectively “Mystic”) filed on September 19, 2005 (“Mystic Answer”).<sup>1</sup> As discussed further below, the ISO believes Mystic has proposed for the first time substantive modifications to the reliability must run (“RMR”) agreements submitted in its August 9, 2005 filings (“RMR Agreements”). As such, the ISO believes it has the right to supplement its September 2, 2005 Motion to Intervene, Protest and Comments and Motion for Consolidation (“Motion to Intervene”).

The ISO believes that its comments concern new proposals made for the first time in the Mystic Answer that represent amendments to its September 19, 2005 filing. To the extent that the ISO’s comments do not address new proposals submitted to the Commission, the ISO

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<sup>1</sup> In an order dated August 30, 2005, the Commission extended the comment period until September 2, 2005.

believes that its additional comments provided below in response to the Mystic Answer will assist the Commission in its decision-making on the issues presented in these proceedings. If the Commission chooses to treat the ISO's pleading as an answer, which is not normally permitted, the ISO hereby moves, pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 213 (2005), for leave to file an answer. The Commission has the authority to waive the prohibition against answers for good cause. *See* 18 C.F.R. § 385.101(e) (2005). The Commission has found good cause to permit answers where they are otherwise prohibited in various circumstances, including where the answer would assure a complete record in the proceeding, *see, e.g., Pacific Interstate Transmission Co.*, 85 FERC ¶ 61,378, at p. 62,443 (1998), *reh'g denied*, 89 FERC ¶ 61,246 (1999), provide information helpful to the disposition of an issue, *see, e.g., CNG Transmission Corp.*, 89 FERC ¶ 61,100, at p. 61,287 n.11 (1999), permit the issues to be narrowed or clarified, *see, e.g., PJM Interconnection, LLC*, 84 FERC ¶ 61,224, at p. 62,078 (1998); *New Energy Ventures, Inc. v. Southern California Edison Co.*, 82 FERC ¶ 61,335, at p. 62,323 n.1 (1998), or aid the Commission in understanding and resolving issues, *see, e.g., Tennessee Gas Pipeline Co.*, 92 FERC ¶ 61,009, at p. 61,016 (2000). Therefore, the ISO believes that its answer will assure a more complete record in this proceeding and otherwise assist the Commission in understanding and resolving the issues presented.

Notwithstanding its supplemental comments, the ISO wishes to acknowledge its appreciation for Mystic's efforts to address the ISO's concerns. Several of the changes proposed by Mystic improve its original filing, although certain open issues still remain to be addressed.

## I. STATEMENT OF ISSUES

The ISO separately lists below the issues it raises in this pleading pursuant to the Commission's recent changes to Rules 203 and 713 of the Commission's Rules of Practice and Procedure:<sup>2</sup>

- Mystic's proposed "refund floor" is contrary to past treatment of RMR agreements. *See generally, Mirant Kendall, LLC et al.*, 109 FERC ¶61,227 (2004)( Commission conditionally accepted filed RMR agreement and set the matter for hearing subject to refund); *see also Milford Power Company, LLC*, 110 FERC ¶61,299 (2005)(Commission conditionally accepted filed RMR agreement and set the matter for hearing subject to refund). In addition, the proposed "refund floor" may result in shifting risk away from the generator to rate payers and will lead to difficulties in resettling the markets.
- Mystic's "refund floor" proposal described in its answer represents a substantive modification to its original RMR Agreements. Although the Commission has the discretion to accept the Mystic Answer, 18 C.F.R. § 213(a)(2); *see, e.g., Entergy Services, Inc.*, 101 FERC ¶61,291, at P 24 (2002)(Commission accepted answer clarifying supplemental filing in response to intervenors' comments), given the proposed substantive change, the ISO should be permitted as a matter of right to supplement its prior intervention, protest and comments.
- Many of the sections in the Mystic Answer labeled "Applicant's Response" contain proposals that are changes to the previously filed proposed RMR agreement and represent substantive modifications to its September 19, 2005 filing. As such, the ISO should be permitted as a matter of right to supplement its prior intervention, protest, and comments (*see* authority cited in Section I.B, *supra*).
- Mystic should be required to file clean and redlined versions of all changes proposed to the RMR Agreements so that all parties are able to see exactly what changes are being proposed. 18 C.F.R. § 35.10(c) (requires changes to a rate schedules previously filed to be provided in a marked version showing additions and deletions).

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<sup>2</sup> Revision of Rules of Practice and Procedure Regarding Issue Identification, 70 Red. Reg. 55,723 (Sept. 23, 2005). By listing issues relevant to this pleading, the ISO does not waive any issues previously raised in its September 2, 2005 Motion to Intervene, Protest and Comments and Motion for Consolidation.

- Mystic’s explanation of its proposed Schedule 6 of the RMR Agreement and some type of true-up mechanism for costs associated with its gas arrangements (presumably for costs above the recovery provided through Stipulated Bidding) does not resolve the the ISO’s concern. To the extent that Mystic is revising its filing it must provide clean and redlined versions. Resolution of these issues, as well as all issues on what is included in the Monthly Fixed Cost Payment should be reserved for settlement or hearing.
- Mystic’s proposes two options for addressing “trip penalties.” To the extent that Mystic is revising its filing to offer a “true-up option,” it must provide clean and redlined versions. Resolution of the trip penalty issues, as well as all issues on what is included in the Monthly Fixed Cost Payment, should be reserved for settlement or hearing.

## **II. BACKGROUND**

On August 9, 2005, Mystic submitted unexecuted RMR Agreements for filing with the Commission. These RMR Agreements involve the two gas-fired generation facilities known as Mystic Unit 8 and Mystic Unit 9 (under Docket No. ER05-1304-000) and an oil and gas-fired facility known as Mystic Unit 7 (under Docket No. ER05-1305). As the ISO noted in its Motion to Intervene (at p. 2), the Mystic units are need for reliability in the NEMA/Boston region, where they collectively provide 54% of total generation for that region.

The ISO, along with various stakeholders, intervened in the two dockets, protesting certain matters and providing comments on others. In response to the comments and protests of the various intervenors, Mystic submitted an answer on September 19, 2005. Mystic asserts that its answer “will facilitate the Commission’s decisional process or aid in the explanation of issues.”<sup>3</sup>

## **II. SUPPLEMENTAL COMMENTS OF ISO NEW ENGLAND INC.**

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<sup>3</sup> Mystic Answer at p. 12.

The Mystic Answer presents novel elements in the form of proposed alterations to a contract affecting rates already on file with the Commission and, as such, the parties are entitled as a matter of procedural right to address such new elements. *See* 18 C.F.R. § 35.8 (2005). The Commission has allowed parties to supplement their previously filed interventions where “good cause” exists, *Pennsylvania-New Jersey-Maryland Interconnection and Philadelphia Electric Co.*, 26 FERC ¶61,121, at p. 61,302 ((1984) (motion to supplement original pleading granted because party “expressed its concerns with reasonable dispatch”), and where there is a demonstration of an interest that may be directly affected by the outcome of the proceeding, *Louisiana-Nevada Transit Co.*, 56 FERC ¶61,421, at p. 62,513 (1991) (intervenor was a major gas producer attached to Louisiana-Nevada Transit’s gas transportation system). As discussed more fully below, the ISO believes good cause exists to allow its supplemental comments because Mystic’s answer presents for the first time substantive modifications to the RMR in the form of proposed changes to the language of the proposed RMR Agreements, proposed schedules to those agreements, and a request for a relief mechanism to limit Mystic’s potential risk if it is allowed to commence Stipulated Bidding prior to a Commission order and is found ultimately not to qualify for an RMR agreement. In addition, because this proposal, if accepted by the Commission, would have a direct affect on the proceedings at issue, the ISO believes that its supplemental comments should be allowed.

**A. Mystic’s “Refund Floor” Proposal Is Contrary To Past Commission Action, May Result In Shifting Risk Away From The Generator To Rate Payers And Will Lead To Difficulties In Resettling The Markets**

In Section V.C of the Mystic Answer, Mystic indicates that if it begins Stipulated Bidding but the Commission sets the issue of financial eligibility<sup>4</sup> for hearing as requested by certain intervenors, it will be “faced with the prospect of potentially recovering only their marginal costs in the event that the Commission were erroneously convinced that the Applicants [Mystic Development and Mystic I] did not meet the [financial eligibility] criteria.”<sup>5</sup> The solution to this “Catch-22” problem, as Mystic terms it, is for the Commission to establish a “refund floor” whereby the Mystic units would be assured a level of recovery “at which the Units are currently bid into the ISO market without mitigation - in the case of energy bids, cost plus \$25/MWh under the recently instituted *Reference Price Rule*.”<sup>6</sup>

The ISO has several concerns with Mystic’s proposal. First, RMR agreements approved for New England generators heretofore have not included a recovery floor. New England generators seeking RMR treatment in the past recognized that it was their voluntary choice to abandon the use of market-based rate authority for the “protection” of a cost-based RMR agreement. In most of the prior RMR agreement filings, the generators *chose* to begin Stipulated Bidding one day after their Section 205 filing. In all cases, the generators began Stipulated Bidding by the date that the Commission issued an order making the agreement effective subject to refund. Again, these generators assumed the risk that their request for RMR treatment might ultimately be denied. While the ISO understands the apparent dilemma suggested by Mystic,

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<sup>4</sup> As described in *Bridgeport Energy, LLC*, 112 FERC ¶61,077 at P 36 (2005) (“*Bridgeport*”), financial eligibility will be determined through the Commission’s comparison of “facility costs like fixed O&M, A&G, and taxes to revenues earned in the energy and capacity markets.”

<sup>5</sup> See Mystic Answer at p. 15.

<sup>6</sup> *Id.* (footnote omitted).

Mystic has not provided a reasoned basis for why the Commission should deviate from past practice, other than to assure Mystic of some minimum level of cost recovery.<sup>7</sup> It is incontrovertible that Mystic can assure itself of some level of recovery simply by continuing to bid under its market-based authority, while awaiting final disposition on its RMR request. Allowing a recovery floor would inequitably shift risk from Mystic to the market.

The second, and perhaps a more pertinent concern to the ISO, is that the recovery floor formulation proposed by Mystic could result in an adverse impact on other Market Participants (and ultimately ratepayers) and could also present an administratively burdensome challenge to resettle the market. Although Mystic's proposal is clearly designed to deal with regulatory risk, a legitimate business concern for Mystic, the proposal would not be fair to Market Participants. For one thing, the entities that would pay the \$25/MWh "floor" (*i.e.*, presumably Network Load) upon a Commission order adverse to Mystic are not the same entities that would have paid the \$25/MWh "uplift" charge had Mystic continued under Reference Price bidding. In addition, Mystic's proposal does not account for the likelihood that, under Stipulated Bidding, Mystic's units will have been dispatched more (and other generators less) than under its current bidding using the Reference Price. The ISO cannot change which generators were dispatched and which were not, as well as the characteristics of the dispatch after-the-fact. Even if this fact were to be accepted, implementing a "refund floor" would be extremely difficult.<sup>8</sup> Not only will such a

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<sup>7</sup> The ISO recognizes that the Commission's clarification of the financial eligibility analysis inherent in its just and reasonable determination may be more clear after *Bridgeport*; however, this clarification does not in itself warrant departure from past practice.

<sup>8</sup> Mystic did not provide any specific proposal for how such "refund floor" would be calculated. The ISO is not able to gauge how difficult it might be to bill a rate proposal that has not been reduced to specific language or been fully defined.

situation cause the ISO to expend many hours and resources attempting to achieve such a goal, but as alluded to, the outcome may also result in some overpayments and/or some underpayments even under the best approximation of a rough justice, never mind what the actual market results would be with the continuation of Reference Price bidding.

**B. Mystic Should Be Required To File Clean And Redlined Versions Of All Changes Proposed To The RMR Agreements**

Mystic states that it “largely accede[s] to the concerns raised by the ISO’s Protest.”<sup>9</sup> In this vein, Mystic proposes a number of changes that could be made to the RMR Agreements previously submitted. These ideas for change are submitted for Commission review for the first time in the Mystic Answer. While the ISO acknowledges that it has interfaced a number of times with Mystic representatives and certainly welcomes changes to the RMR Agreements that address the ISO’s concerns, the discussions are not complete and the ISO cannot say at this point it has approved a revised version of the RMR Agreements. Therefore, based on these discussions with the ISO, if Mystic wants to revise the RMR Agreements it should be required to file clean and redlined versions of the RMR Agreements. If, upon review of these documents, it becomes clear that certain of the proposed modifications are more than minor or administrative and yet still deviate from the *pro forma* RMR agreement under Market Rule 1, the ISO reasserts its position in its original intervention that Mystic is required to support such deviations under Section 206 of the Federal Power Act.

**C. Mystic’s Explanation About Schedule 6 Being A Mathematical Simplification Does Not Resolve The ISO’s Concerns About An Automatic Liquidated Damages Penalty**

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<sup>9</sup> Mystic Answer at p. 32.

In its Motion to Intervene, the ISO raised a concern that Schedule 6 of the RMR Agreement for Mystic Units 8 and 9 appeared to build in an automatic liquidated damages penalty, even if Mystic complies with the requirements of its gas supply agreement by taking the firm weekly quantities of gas.<sup>10</sup> Mystic's answer states that the ISO's concern is "misplaced" and seeks to explain Schedule 6 as a "mathematical simplification."<sup>11</sup> In addition, Mystic asserts that "any payments associated with this provision of the Mystic Development RMR Agreement be escrowed, with funds distributed at a later date in accordance with the terms of any settlement or final order of the Commission."<sup>12</sup>

Mystic's further "clarification" of its initial filing simply amounts to a true-up proposal that is not explained in any detail; nor was it discussed in any detail with the ISO before being memorialized in its answer. Thus, a further explanation of Schedule 6's original intent does not resolve the issue regarding the structure and reasonableness of a true-up provision. If Mystic seeks to include such a provision in its RMR Agreement, it should file a clean and blacklined version so that all parties have an opportunity to review and comment on such changes in the settlement or hearing processes.

#### **D. How Start-up Costs Will Be Treated Remains Unresolved**

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<sup>10</sup> Motion to Intervene at p. 38.

<sup>11</sup> Mystic Answer at p. 49. The ISO also notes that the "simplification" appears to have deleted the factor "z1" set forth in Schedule 6. This factor addressed "reasonable transportation costs." It is unclear whether this deletion was intended or inadvertent; however, it should be clarified either way.

<sup>12</sup> *Id.* at p. 50.

Mystic indicates in its answer that it has been interfacing with the ISO on a number of technical inputs which relate to Stipulated Bidding and provides, in Attachments A and B to its answer changes that it believes will be acceptable to the ISO.<sup>13</sup> The ISO acknowledges that it has been working with Mystic on a number of these technical inputs and agrees with most of what Mystic proposes in Attachments A and B. However, regarding Mystic's proposed options for addressing start-up costs in the RMR Agreement for Mystic Units 8 and 9, in particular "trip penalties" under Long-Term Service Agreements with the turbine manufacturer (*i.e.*, Tables 3 and 3a of Attachment A), the ISO has not reached full agreement. Mystic's proposed options involve questions of fact about the actual impacts on Mystic's costs and, thus, should be reserved as a matter for settlement or hearing.

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<sup>13</sup> Mystic Answer at pp.33, 54.

## VIII. CONCLUSION

For the foregoing reasons, the ISO respectfully requests that the Commission accept its supplemental comments, or in the alternative its answer in response to Mystic' September 19, 2005 answer.

Respectfully submitted,

/s/

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/s/

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Date: October 4, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this 4<sup>th</sup> day of October, 2005.

/s/

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