

119 FERC ¶ 61,168
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.

PSEG Power Company, LLC

Docket Nos. ER05-231-000
ER05-231-001
ER05-231-002
ER05-231-003

ORDER ON CONTESTED SETTLEMENT AGREEMENT

(Issued May 18, 2007)

1. On April 21, 2006, as amended on May 26, 2007, PSEG Power Company, LLC (Power Connecticut), on behalf of the Settling Parties,¹ submitted for filing a Joint Offer of Settlement (Settlement Agreement) intended to resolve all issues arising from Power Connecticut's two Reliability Must Run (RMR) agreements with ISO-NE, including those issues raised in a petition for review currently before the United States Court of Appeals for the District of Columbia Circuit.² As discussed below, we approve the Settlement Agreement in part, subject to conditions, reject the Settlement Agreement in part, and direct the Settling Parties to make a compliance filing.

I. Procedural History

2. On November 17, 2004, Power Connecticut submitted for filing its two proposed RMR agreements with ISO-NE. The RMR agreements provide that Power Connecticut

¹ The Settling Parties are Power Connecticut, PSEG Energy, Resources and Trade (PSEG ER&T) (PSEG ER&T and Power Connecticut, collectively "PSEG"), ISO New England Inc. (ISO-NE), the Connecticut Department of Public Utility Control (CT DPUC), and the Connecticut Office of Consumer Counsel (CT OCC).

² *PSEG Power Connecticut LLC*, 110 FERC ¶ 61,020 (2005) (*PSEG I*), order on reh'g, *PSEG Power Connecticut LLC*, 110 FERC ¶ 61, 441 (*PSEG II*), reh'g denied, 113 FERC ¶ 61,210 (*PSEG III*) (2005), appeal pending sub nom. *Connecticut Department of Public Utility Control v. FERC*, (U.S.C.A., D.C. Circuit, Docket No. 06-1044).

will collect a fixed monthly payment, based on its Annual Fixed Revenue Requirement (AFRR), for providing reliability services from its New Haven Harbor Generating Station (New Haven Unit) and Unit 2 of its Bridgeport Harbor Generating Station (Bridgeport Unit). As originally filed, Power Connecticut's payments were based on an AFRR of \$19,012,116 for the Bridgeport Unit and \$47,368,806 for the New Haven Unit.

3. Power Connecticut and ISO-NE negotiated the RMR agreements under section 3.3 of Exhibit 2, Appendix A of Market Rule 1 of ISO-NE's tariff.³ The RMR agreements generally conform to the *pro forma* Cost of Service Agreement contained in Market Rule 1. Power Connecticut claimed that the RMR agreements are necessary to ensure that the New Haven and Bridgeport Units continued to operate and support reliability in New England. Power Connecticut supported its claim by noting that ISO-NE determined, on two separate occasions, that the New Haven and Bridgeport Units are necessary for reliable system operation. Power Connecticut also submitted affidavits in support of its contention that it has under-recovered its costs for operation of the units and expects to receive inadequate revenues from the market to recover the costs of continued operation.

4. In *PSEG I*, the Commission accepted the RMR agreements for filing, suspended them for a nominal period, made them effective January 17, 2005, subject to refund, and set them for hearing and settlement judge procedures. The Commission held the hearing in abeyance pending the outcome of settlement judge procedures. The Commission also rejected certain proposed deviations from the *pro forma* Cost of Service Agreement, rejected Power Connecticut's request for waiver of the 60-day notice requirement, and required Power Connecticut to make a compliance filing. In the compliance filing, the Commission directed Power Connecticut to revise portions of the RMR agreements that deviated from the *pro forma* Cost of Service Agreement, implement certain modifications recommended by ISO-NE, and separate out the one-time maintenance expenses associated with four reliability projects undertaken at the Bridgeport Unit in spring 2005 for recovery in a separate tracking mechanism (Cost Tracker). On February 14, 2005, Power Connecticut submitted a compliance filing that, *inter alia*, established a Cost Tracker to recover \$2,409,239 in spring 2005 maintenance expenses and reduced the Bridgeport Unit's AFRR to \$16,567,343.

5. In *PSEG II*, the Commission accepted the RMR agreements for filing, as modified by the compliance filing, granted in part and denied in part several requests for rehearing and clarification of *PSEG I*, and revised the RMR agreements to become effective November 18, 2004. The Commission denied further requests for rehearing in *PSEG III*.

³ Market Rule 1 was approved by the Commission in *New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287, *reh'g granted in part and denied in part*, 101 FERC ¶ 61,344 (2002), *order on reh'g*, 103 FERC ¶ 61,304 (2003).

6. Power Connecticut filed the instant Settlement Agreement on behalf of the Settling Parties on April 21, 2006. The Settling Parties state that the Settlement Agreement resolves each issue in this proceeding, including those raised in a petition for review currently before the United States Court of Appeals for the District of Columbia Circuit. The Settlement Agreement amends several provisions of the RMR agreements, including reducing the New Haven Unit's AFRR to \$37,492,000, the Bridgeport Unit's AFRR to \$14,008,000, and the Cost Tracker to \$2,263,446.

7. The Connecticut Municipal Electric Energy Cooperative (CMEEC) and Richard Blumenthal, Attorney General for the State of Connecticut (the Connecticut Attorney General) filed separate comments opposing the Settlement Agreement. Commission Trial Staff (Trial Staff) filed initial comments supporting the Settlement Agreement. PSEG, Trial Staff, and CT DPUC and CT OCC (CT DPUC and CT OCC, collectively as the Connecticut Parties) filed reply comments supporting the Settlement Agreement. Following the submission of initial and reply comments, the Presiding Judge certified that the Settlement Agreement was contested. PSEG filed a Response to the Presiding Judge's certification. CMEEC and the Connecticut Attorney General filed a Response to PSEG's answer to the Presiding Judge's certification.

8. The comments opposing the Settlement Agreement fall into two broad categories. First, CMEEC and the Connecticut Attorney General oppose the Settling Parties' attempt to require the Commission to evaluate challenges to the RMR agreements by non-signatories under the public interest standard of review. Second, the Connecticut Attorney General offers separate arguments that generally dispute Power Connecticut's eligibility for RMR treatment.

II. Discussion

A. Procedural Issues

9. We are not persuaded to accept PSEG's July 7, 2006 Motion and will, therefore, reject it. CMEEC and the Connecticut Attorney General's answer to PSEG's July 7 Motion is therefore moot.

B. Provisions Regarding Standard of Review

1. The Settlement Agreement

10. The Settlement Agreement contains two sections, section 4(t) and section 8 (collectively, the *Mobile-Sierra*⁴ provisions), that address the standard of review.

⁴ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353-55 (1956) (*Sierra*).

Section 4(t) of the Settlement Agreement adds section 9.5.3 to the RMR agreement. Section 9.5.3 states that the Commission will review proposed amendments or modifications to the RMR agreements filed by ISO-NE or Power Connecticut pursuant to sections 9.5.1, 9.5.2 or 9.5.2.2(e) of the RMR agreements under the just and reasonable standard of review,⁵ while modifications or amendments sought by the Commission or non-signatories will be subject to the “public interest” standard of review. Section 8 of the Settlement Agreement states that the public interest standard of review will apply to all proposed modifications of the Settlement Agreement, whether they are on the Commission’s own motion or by request or complaint of a non-signatory.

2. Initial Comments

11. CMEEC characterizes the Settling Parties’ attempt to establish the public interest standard of review for section 206 complaints filed by non-signatories as “the proposed hijacking” of its rights.⁶ In CMEEC’s view, “it is unjust, unreasonable, and inconsistent with both the FPA and Commission precedent for the Settling Parties to agree—and for

⁵ Section 4(t) amends section 9.5 of the RMR agreements to provide that neither Power Connecticut nor ISO-NE may seek to amend or modify the New Haven Unit’s or Bridgeport Unit’s AFRR for the duration of the RMR agreements, and that, except as provided in sections 9.5.1 and 9.5.2 of the RMR agreements, neither party may seek a determination under sections 205 or 206 of the FPA that the RMR agreements, as amended by the Settlement Agreement, are unjust, unreasonable, unduly discriminatory, or unduly preferential.

Section 4(t) further modifies section 9.5 of the RMR agreements by adding subsections 9.5.1 and 9.5.2. Subsection 9.5.1 provides that, commencing on July 1, 2008, ISO-NE may file a complaint under section 206 of the FPA to modify the RMR agreements to ensure that the New Haven and Bridgeport Units perform as is necessary to meet their required reliability obligations. Subsection 9.5.2.1 permits Power Connecticut to make a filing under section 205 of the FPA to seek recovery of any additional costs associated with modifications sought by ISO-NE under subsection 9.5.1. Subsection 9.5.2.2(a) provides that, *inter alia*, no later than December 31, 2009, Power Connecticut may file a cost tracker, pursuant to section 205 of the FPA, to recover the cost of reliability related Major Maintenance Project(s). Subsection 9.5.2.2(b) permits Power Connecticut to file under section 205 of the FPA to recover the additional costs of any new or increased taxes, fees or regulatory requirements that are attributable to either the Bridgeport Unit or the New Haven Unit and that exceed ten percent of the unit’s AFRR.

⁶ CMEEC’s Initial Comments at 2.

the Commission to sanction—a diminution in the statutory filing rights of non-signatories or in the statutory rights and obligations of the Commission itself.”⁷

12. CMEEC advances four arguments against the *Mobile-Sierra* provisions. First, CMEEC claims that Commission approval of the public interest standard would be “contrary to long-standing Commission precedent.”⁸ CMEEC acknowledges the Commission’s recent approval of settlement agreements binding non-signatories to the public interest standard, but claims that these cases are inconsistent with the weight of Commission precedent.⁹ CMEEC further acknowledges *PJM*, specifically the Commission’s conclusion that “there is no Commission or court precedent that supports a finding that a non-signatory may unilaterally seek changes to a *Mobile-Sierra* ‘public interest’ contract under the ‘just and reasonable’ standard of review,” (the *PJM* language).¹⁰ CMEEC argues, however, that the *PJM* language refers to a litigant’s ability to invoke the just and reasonable standard after the Commission has already approved a settlement agreement containing *Mobile-Sierra* language.¹¹ CMEEC claims that this case is different from *PJM* because the issue here is whether it is just and reasonable for the Commission to approve the Settlement Agreement without ordering changes to the *Mobile-Sierra* provisions in the first place.¹²

13. CMEEC next argues that binding non-signatories to the public interest standard violates the FPA.¹³ CMEEC claims that the FPA imposes an affirmative obligation on the Commission to protect consumer interests, and that approving the *Mobile-Sierra* provisions contradict that command.¹⁴ CMEEC argues that Congress carefully crafted a

⁷ *Id.* at 4.

⁸ *Id.* at 5.

⁹ *Id.* at 4-7 (citing, *inter alia*, *Wisconsin Power & Light Co.*, 106 FERC ¶ 61,112 (2004) (Commissioner Kelly, dissenting in part); *Westar Generating Inc.*, 100 FERC ¶ 61,255, at P 6 (2002); *Carolina Power & Light Co.*, 67 FERC ¶ 61,074, at 61,205 (1994) (*Carolina Power*)).

¹⁰ *Id.* at 7 (citing *PJM Interconnection*, 105 FERC ¶ 61,294 (2003), *reh’g denied*, 108 FERC ¶ 61,032 (2004), *pet. for review dismissed for lack of jurisdiction sub nom. Old Dominion Elec. Coop. v. FERC*, No. 04-1307 (Dec. 7, 2005) (*PJM*)).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 8-10.

¹⁴ *Id.* at 8-10.

balance between contract sanctity and the need to ensure that rates, contracts, and the terms and conditions of essential services are, and remain, just and reasonable, and that the Commission is prohibited from altering that balance by permitting the Settling Parties to limit non-signatories' rights.¹⁵ CMEEC objects to what it characterizes as the Settling Parties' attempt to diminish its statutory rights. CMEEC also claims that, absent a clear and voluntary waiver by CMEEC, the Commission lacks the authority to require CMEEC to waive its statutory rights.¹⁶

14. Third, CMEEC argues that RMR agreements are "last resorts" under Commission policy, and it is therefore crucial that Power Connecticut meets the Commission's financial eligibility requirements.¹⁷ CMEEC questions whether Power Connecticut will continue to meet these requirements given the "transition payments" Power Connecticut will collect under the LICAP/Forward Capacity Market (FCM) Settlement.¹⁸ CMEEC claims that the Commission has "made abundantly clear" that RMR agreements are last resorts, appropriate "*only* when there are *no other* reasonable and available options,"¹⁹ and requests that the Commission not compromise its right to advance a future eligibility challenge by approving the *Mobile-Sierra* provisions in the Settlement Agreement.²⁰

15. Lastly, CMEEC argues that the Commission should accord no weight to the Settling Parties' claim that reliance on their ability to bind non-signatories to the public interest standard played an important role in concluding the Settlement Agreement. CMEEC states that while the Settling Parties' desire to restrict the rights of third parties is understandable, it is inconsistent with the FPA.²¹ CMEEC also argues that policies favoring settlement agreements cannot override statutory rights.²²

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 12.

¹⁷ *Id.*

¹⁸ *Id.* at 13.

¹⁹ *Id.* Emphasis original.

²⁰ *Id.* at 14.

²¹ *Id.* at 14.

²² *Id.*

16. The Connecticut Attorney General agrees with and adopts CMEEC's comments.²³ The Connecticut Attorney General is also concerned that the Commission's disposition of the *Mobile-Sierra* provisions in this case will determine the outcome in other pending RMR cases.

17. Trial Staff filed initial comments supporting the Settlement Agreement that do not object to the *Mobile-Sierra* provisions.

3. Reply Comments

18. PSEG contends that CMEEC and the Connecticut Attorney General (and all other non-signatories) have waived their rights to object to the Settlement Agreement and their corresponding rights to have their objections evaluated under the just and reasonable standard of review.²⁴ In PSEG's view, the rights of non-signatories will have been fully satisfied, assuming the Commission determines that the Settlement Agreement is just and reasonable, because neither CMEEC nor the Connecticut Attorney General has actually alleged that the Settlement Agreement's substantive provisions are unjust or unreasonable.²⁵ PSEG argues that CMEEC's and the Connecticut Attorney General's failure to object to the Settlement Agreement's substantive provisions constitutes an affirmative waiver of their rights.²⁶ PSEG further claims that CMEEC's and the Connecticut Attorney General's opposition to the *Mobile-Sierra* provisions is actually aimed at convincing the Commission to modify the Settlement Agreement to indefinitely preserve their rights to file complaints under the just and reasonable standard of review.²⁷ PSEG argues that the Commission could not indefinitely preserve this right without disregarding "long-standing Supreme Court, lower court, and Commission precedent holding that, once the Commission has found an agreement to be just and reasonable under section 205, the standard of review for any subsequent unilateral amendments or modifications to that agreement shall be the 'public interest' standard, *unless* the parties to the contract have agreed otherwise."²⁸ PSEG adds that under the Settlement

²³ Connecticut Attorney General's Comments at 15-16.

²⁴ PSEG's Reply Comments at 8.

²⁵ *Id.* at 8-9.

²⁶ *Id.* at 9.

²⁷ *Id.*

²⁸ *Id.* (emphasis in original).

Agreement CMEEC, the Connecticut Attorney General, and other non-signatories will have the right to file protests, under the just and reasonable standard of review, to any amendment or modification ISO-NE or Power Connecticut files under section 9.5.3.²⁹

19. PSEG next argues that the *Mobile-Sierra* provisions are consistent with case law and Commission precedent. PSEG argues that in the context of FPA section 206 complaints courts have consistently held that the “public interest” standard applies by default, unless the parties include contrary language indicating their intent to permit the just and reasonable standard, and that there is no exception to this rule for challenges from non-signatories to the contract or agreement.³⁰ PSEG points to the *PJM* language and several recent cases where the Commission has accepted settlement agreements containing *Mobile-Sierra* language binding non-signatories to the “public interest” standard.³¹

20. PSEG argues that CMEEC’s assertion that Commission precedent and case law does not apply to *Mobile-Sierra* clauses when they come before the Commission in a settlement agreement seeking Commission approval “turns the *Mobile-Sierra* doctrine on its head and would, in fact, completely swallow the doctrine whole.”³² PSEG further claims that under CMEEC’s position “non-signatories could eviscerate the contracting parties’ *Mobile-Sierra* protection simply by opposing a *Mobile-Sierra* clause, thereby allowing them to file to change the contract at any time under the just and reasonable standard of review.”³³ PSEG contests CMEEC’s claim that the weight of Commission precedent supports CMEEC’s position. PSEG argues that CMEEC’s position rests on a single case, *Carolina Power*,³⁴ where the Commission held that contracting parties could not bind the Commission to a public interest standard of review when the Commission

²⁹ *Id.* at 8-9.

³⁰ PSEG’s Reply Comments at 11.

³¹ *Id.* at 12 (citing *Sierra Pacific Resources Operating Companies*, 111 FERC ¶ 61,173 (2005); *Mirant Zeeland L.L.C.*, 110 FERC ¶ 61,307 (2005); *Cabrillo Power I LLC.*, 110 FERC ¶ 61,143 (2005); *Entergy Services, Inc.*, 110 FERC ¶ 61,051 (2005); *Wolverine Power Supply Cooperative*, 109 FERC ¶ 61,191 (2004); *Entergy Services, Inc.*, 107 FERC ¶ 61,193 (2004); *Wisconsin Power & Light Co.*, 106 FERC ¶ 61,112 (2004)).

³² *Id.*

³³ *Id.*

³⁴ *Supra* note 10.

acts on its own motion or pursuant to a complaint filed by a non-signatory.³⁵ PSEG claims that *Carolina Power* “simply cannot be reconciled with decades of Commission and court rulings” reaching contrary conclusions.³⁶

21. PSEG further argues that there are sound reasons for the Commission to approve the *Mobile-Sierra* provisions. First, PSEG claims that no party has raised specific objections to, or challenged the justness or reasonableness of, the Settlement Agreement’s substantive terms.³⁷ Moreover, PSEG argues that the Settling Parties, with the exception of itself (PSEG ER&T and Power Connecticut), all have some responsibility for acting to protect the interests of the affected public utilities and consumers in this case.³⁸ PSEG concludes, therefore, that the Commission should “give considerable weight” to the Settling Parties’ decision to agree to the Settlement Agreement and the *Mobile-Sierra* provisions.³⁹ Second, PSEG argues that the Commission and non-signatories have greater rights to seek modifications to the RMR agreements, even under the public interest standard, than do the Settling Parties, who are bound by the “no contest” provisions in Section 7 of the Settlement Agreement.⁴⁰ Third, PSEG states that the *Mobile-Sierra* provisions substantially reduce the regulatory risk that non-signatories will succeed in modifying the Settlement Agreement or RMR agreements.⁴¹ PSEG characterizes this reduction in regulatory risk as a “substantial benefit” to consumers and other affected non-signatories because it enabled the Settling Parties to agree to lower AFRRs than those already on file with the Commission.⁴² Fourth, PSEG states that since the Settlement Agreement provides that the RMR agreements will terminate no later than June 1, 2011, the Commission does not need to be as concerned about significant risks to non-signatories here as it arguably would be if the RMR agreements had no defined termination date.⁴³ Finally, PSEG claims that approval

³⁵ PSEG’s Reply Comments at 14.

³⁶ *Id.* at 14.

³⁷ *Id.* at 16.

³⁸ *Id.* at 16-17.

³⁹ *Id.* at 17.

⁴⁰ *Id.*

⁴¹ *Id.* at 17-18.

⁴² *Id.* at 18.

⁴³ *Id.* at 18-19.

of the *Mobile-Sierra* provisions is particularly appropriate because the Settlement Agreement is simply seeking to implement cost-based rates through the end of the transition period required to correct the current structural market flaws that necessitated the RMR agreements.⁴⁴ PSEG argues that full cost-based rates are *per se* just and reasonable under the FPA, the Settlement Agreement is therefore just and reasonable, and the *Mobile-Sierra* provisions should be approved because their purpose is to preserve the benefits of the Settlement Agreement.⁴⁵

22. The Connecticut Parties support the public interest standard of review as a form of risk allocation that provides certainty and stability during the transition period, prior to the full implementation of the LICAP/FCM Settlement's FCM. The Connecticut Parties emphasize that the public interest standard for modifications is reciprocal in nature; that is, in return for applying the public interest standard to non-signatories and the Commission, PSEG has limited its own section 205 rights by fixing the term of its eligibility for cost-of-service rates to the full term of the RMR agreement.⁴⁶ The Connecticut Parties conclude that both parties therefore assume some risk for changed conditions. The Connecticut Parties also note that, as an additional safeguard, the Settlement Agreement permits modifications to the RMR agreement based on the just and reasonable standard of review when such modifications are necessary to maintain the core principles of a reliability contract.⁴⁷

23. Trial Staff argues that the *Mobile-Sierra* provisions are just and reasonable.⁴⁸ Trial Staff states that the Settlement Agreement establishes rates for a set term, and argues that the Settling Parties should be able to count on those rates for the limited time that the Settlement Agreement will be in effect. Trial Staff argues that CMEEC has not alleged that any rates in the Settlement Agreement are unjust or unreasonable, but if the rates were to become unjust and unreasonable, the Commission would still be able to fulfill its obligations under the FPA, just under the public interest standard.⁴⁹ Trial Staff further argues that any adjustment in the rates would be prospective after a hearing, and

⁴⁴ *Id.* at 19.

⁴⁵ *Id.*

⁴⁶ Connecticut Parties' Reply Comments at 9.

⁴⁷ *Id.*

⁴⁸ Trial Staff's Reply Comments at 8.

⁴⁹ *Id.*

as a result, even if a non-signatory were to successfully challenge the rates, the change would only take effect toward the end of the Settlement Agreement.⁵⁰

24. Trial Staff also disputes the Connecticut Attorney General's claim that the Commission's decision here will determine the outcome in other pending RMR cases. Trial Staff states that it recommended that the Commission reject the public interest standard in two similar cases.⁵¹ Trial Staff argues that each RMR case must be evaluated on an independent basis.⁵²

4. Commission Determination

25. As we found in *Bridgeport*,⁵³ while the parties agreed to a *Mobile-Sierra* "public interest" standard, we believe that RMR agreements like the one at issue here are the kinds of agreements that warrant the Commission declining to be so bound to such a standard.⁵⁴ RMR agreements are contracts between a generator and the ISO that commit a generator to provide reliability service in return for fixed monthly payments by load in the affected zone. The purpose of an RMR agreement is not simply to allow one party to buy electricity or capacity from another for resale but to ensure the reliable operation of the regional transmission grid for the benefit of users of the grid.⁵⁵ Given this reliability component, RMR agreements have wide applicability to the market and to market

⁵⁰ *Id.*

⁵¹ Trial Staff is referring to the proceedings in Docket Nos. ER05-611-005 and ER05-611-006 and the proceedings in Docket Nos. ER05-163-000 *et al.*

⁵² Trial Staff's Reply Comments at 8.

⁵³ *Bridgeport Energy LLC*, 118 FERC ¶ 61,243 at P 41 (2007) (*Bridgeport*).

⁵⁴ As a general matter, parties may bind the Commission to a public interest standard of review. *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993). Under limited circumstances, such as when the agreement has broad applicability, the Commission has the discretion to decline to be so bound. *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir. 2006).

⁵⁵ *Devon Power LLC*, 117 FERC ¶ 61,133, at P 99 (2006) (stating that "the increase in RMR agreements provides substantial evidence that signals a greater problem in the market, namely, its inability to compensate capacity resources needed to maintain the reliability of the system" and noting "substantial record evidence regarding the inability of generators to earn sufficient revenues in the current market, both to continue operating or to support new investment").

participants. For example, the market participants that pay for the reliability services provided under the RMR agreements are much broader in number than the single entity that executes the agreements (here, ISO-NE). RMR agreements suppress market-clearing prices and deter investment in new generation.⁵⁶ Moreover, the market participants that pay for the agreements pay out-of-market prices for the service provided under the RMR agreements, which broadly hinders market development and performance.⁵⁷ As a result of these factors, we have concluded that RMR agreements should be used as a last resort.⁵⁸ Because of the uniquely broad applicability of RMR agreements to markets and market participants alike, we find that it would be inconsistent with our duty under the Federal Power Act to be bound to the higher “public interest” standard when reviewing RMR agreements. Therefore, we find that the standard of review applicable to the Commission’s review of the RMR agreement shall be the just and reasonable standard. Further, for the reasons set forth in this paragraph, the Commission also finds that any challenges to the RMR agreement by non-parties under section 206 of the FPA shall be reviewed by the Commission under the just and reasonable standard.

26. Accordingly, acceptance of the Settlement Agreement is subject to the condition that, within 30 days of the issuance of this order, the parties file revisions to provide that the Commission will be bound to the “just and reasonable” standard and not the “public

⁵⁶ *Devon Power LLC*, 103 FERC ¶ 61,082, at P 31, *order on reh’g*, 104 FERC ¶ 61,123 (2003) (finding that “the proliferation of these agreements is not in the best interest of the competitive market”).

⁵⁷ *Id.* P 29 (stating that “extensive use of RMR contracts undermines effective market performance”).

⁵⁸ The Commission has repeatedly expressed dissatisfaction with these “non-market” mechanisms and has adopted a “last resort” policy when considering RMR agreements. *See, e.g., Berkshire Power Company*, 112 FERC ¶ 61,253, at P 22 (2005) (stating that “an RMR agreement should be viewed as a tool of last resort for a generator”); *Devon Power LLC*, 110 FERC ¶ 61,315, at P 40 (2005) (noting that “[t]he Commission has stated on several occasions that it shares the concerns . . . that RMR agreements not proliferate as an alternative pricing option for generators, and that they are used strictly as a last resort so that units needed for reliability receive reasonable compensation”); *Devon Power LLC*, 103 FERC ¶ 61,082 at P 31 (finding “that RMR agreements should be a last resort”). The Commission does not wish RMR agreements to represent a crutch for temporary shortfalls in generator cost recovery; these agreements address a specific, temporary reliability need necessary for all users of the regional grid.

interest” standard for changes to the RMR agreement and that any challenges to the RMR agreement by non-parties under section 206 of the FPA shall be reviewed by the Commission under the just and reasonable standard.⁵⁹

C. Entitlement to and Eligibility for an RMR Agreement

1. Initial Comments

27. The Connecticut Attorney General argues that the Commission’s approval of the LICAP/FCM Settlement has fundamentally altered the circumstances underpinning the Commission’s previous determination that Power Connecticut is eligible for the RMR agreements.⁶⁰ Specifically, the Connecticut Attorney General points out that Power Connecticut will now receive additional compensation in the form of transition payments under the LICAP/FCM Settlement. The Connecticut Attorney General speculates that Power Connecticut’s financial condition will improve as a result of these transition payments, and that Power Connecticut will most likely fail to qualify for RMR agreements under the Commission’s Facility Costs Test.⁶¹ In the Connecticut Attorney General’s view, the Commission’s approval of the Settlement Agreement would effectively ignore the impact that these transition payments may have on Power Connecticut’s eligibility for an RMR agreement. The Connecticut Attorney General claims that the Commission has an obligation to review Power Connecticut’s RMR eligibility in light of these new revenues,⁶² and that Commission approval of the Settlement Agreement would effectively endorse previous Commission decisions made under factual circumstances that no longer exist.⁶³

28. The Connecticut Attorney General also raises several other arguments challenging Power Connecticut’s RMR eligibility. First, the Connecticut Attorney General argues that the Commission has failed to make an independent determination that

⁵⁹ We do not adopt the Presiding Judge’s reasoning to recommend that the Commission apply the just and reasonable standard. As discussed above, we rest our conclusion here on the Commission’s policy regarding the standard of review with respect to RMR agreements.

⁶⁰ Connecticut Attorney General’s Comments at 5.

⁶¹ *Id.*

⁶² *Id.* at 6.

⁶³ *Id.* at 7.

the New Haven and Bridgeport Units are needed for reliability,⁶⁴ that the Commission improperly delegated whatever authority it has to make reliability determinations to ISO-NE,⁶⁵ and that the Commission is obligated to independently verify that the New Haven and Bridgeport Units meet the Commission's reliability and financial requirements for an RMR agreement.⁶⁶ The Connecticut Attorney General argues that the Commission recognized its obligation to conduct an independent review of ISO-NE's reliability determinations in *Bridgeport Energy*,⁶⁷ where it set the matter for hearing.⁶⁸ The Connecticut Attorney General further argues that the extent of the Commission's authority to make reliability determinations in place of the states, and its ability to delegate whatever decision making authority it has to ISO-NE, should be resolved by the Court of Appeals, and not foreclosed by Commission approval of the Settlement Agreement.⁶⁹

29. The Connecticut Attorney General next argues that Commission approval of the Settlement Agreement would unfairly endorse and insulate from appellate review the Commission's decision to allow Power Connecticut to "cherry pick" which generating units should receive RMR contracts.⁷⁰ The Connecticut Attorney General asserts that the Commission was unable to make a fair determination about Power Connecticut's eligibility for the RMR agreements because Power Connecticut's revenue analysis only included information for the New Haven and Bridgeport Units; that is, it failed to consider revenue and financial information for Power Connecticut's other Connecticut generating stations, including Bridgeport Harbor Unit 3 (Unit 3), which is directly adjacent to the Bridgeport Unit.⁷¹ The Connecticut Attorney General speculates that if the Commission examined Power Connecticut's entire Bridgeport portfolio in conjunction with the New Haven Unit, rather than considering the New Haven and Bridgeport Units in isolation, the Commission would find that the revenues from Power

⁶⁴ *Id.* at 7-8.

⁶⁵ *Id.* at 8.

⁶⁶ *Id.* at 9.

⁶⁷ *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311, at P 10 (2005).

⁶⁸ Connecticut Attorney General's Comments at 9-10.

⁶⁹ *Id.* at 10.

⁷⁰ *Id.* at 6.

⁷¹ *Id.* at 10.

Connecticut's other units would offset Power Connecticut's losses and eliminate the need for the RMR agreements.⁷² The Connecticut Attorney General claims that the Commission's decision to exclude Unit 3's revenues and expenses from its analysis ignores that RMR agreements are intended to ensure that generators which are losing money, but are necessary for reliability, are able to receive the financial support to continue operations. The Connecticut Attorney General claims that Power Connecticut will be earning windfall profits from Unit 3 "for years to come," and that Power Connecticut will therefore have the funds to support the New Haven and Bridgeport Unit.⁷³ In the Connecticut Attorney General's view, Power Connecticut is already receiving an "extraordinarily excessive" return on its investment in its Connecticut generating plants overall, without the benefits of the RMR agreements, and Commission approval of the Settlement Agreement will enable Power Connecticut to "game the regulatory process" by extracting windfall profits from its unit-by-unit analysis.⁷⁴

30. Finally, the Connecticut Attorney General argues that Power Connecticut should not be entitled to recover all of its fixed and variable costs under the RMR agreements.⁷⁵ The Connecticut Attorney General claims that the fundamental purpose of RMR agreements is to guarantee reliability, not guarantee that generators will fully recover their sunk costs. The Connecticut Attorney General asserts that any payments under the RMR agreements need only be adequate to ensure that the New Haven and Bridgeport Units avoid shutting down.

31. Trial Staff supports the Settlement Agreement as fair, reasonable, and in the public interest. Trial Staff asserts that the Settlement Agreement is the result of intensive negotiations and reflects a comprehensive resolution of the all the issues in this proceeding achieved through a fair balance of competing interests.⁷⁶

2. Reply Comments

32. PSEG argues that most of the Connecticut Attorney General's objections are impermissible collateral attacks on prior Commission orders.⁷⁷ PSEG asserts that since

⁷² *Id.*.

⁷³ *Id.* at 11-13.

⁷⁴ *Id.* at 13.

⁷⁵ *Id.* at 14.

⁷⁶ Trial Staff's Initial Comments at 10.

⁷⁷ PSEG's Reply Comments at 19, 25.

Commission policy favors settlement, the Commission has held that it will not entertain claims that it has previously rejected.⁷⁸ PSEG links this policy to section 313 of the FPA, which establishes a 30 day deadline for parties to submit rehearing requests.⁷⁹ PSEG argues that here the Commission has already addressed and rejected the Connecticut Attorney General's claims that the Commission erred by relying on ISO-NE's reliability determinations, by permitting Power Connecticut to file RMR agreements only for the New Haven and Bridgeport Units, by not requiring that revenues from other Power Connecticut generating units offset the costs of the New Haven and Bridgeport Units, and by failing to limit Power Connecticut's recovery under the RMR agreements to variable or marginal operating costs.⁸⁰

33. PSEG states that the Connecticut Attorney General's speculation that Power Connecticut's RMR eligibility will be affected by the transition payments is without merit.⁸¹ PSEG argues that the Connecticut Attorney General has failed to demonstrate that the transition payments, in conjunction with other market revenues, will provide the New Haven and Bridgeport Units with a reasonable opportunity to recover an adequate amount of their fixed costs.⁸² PSEG further claims that the Settlement Agreement was "*specifically designed* to produce just and reasonable rates with or without the LICAP Settlement."⁸³ PSEG states that the Settlement Agreement provides that the transition payments, along with any revenues earned in the New England market, will be credited against the fixed monthly charge that Power Connecticut collects under the RMR agreements, so that the transition payments become a component of Power Connecticut's cost based rates and its total revenues never exceed its full cost-based rates.⁸⁴

34. The Connecticut Parties agree with PSEG that the Settlement Agreement fully considers and accounts for the transition payments.⁸⁵ The Connecticut Parties further

⁷⁸ *Id.* at 22-23.

⁷⁹ *Id.* at 22-23.

⁸⁰ *Id.* at 24.

⁸¹ *Id.* at 20-22.

⁸² *Id.* at 20.

⁸³ *Id.* (emphasis in original).

⁸⁴ *Id.* at 22.

⁸⁵ Connecticut Parties' Reply Comments at 2-3.

claim that the transition payments may create an incentive for the RMR units to return to fully market-based operations.⁸⁶ The Connecticut Parties note that if the New Haven or Bridgeport Unit earns revenues from energy and ancillary services markets (including transition payments) that exceed its costs, Power Connecticut must credit those excess revenues to customers; Power Connecticut can only recover its locked-in return on equity. Since Power Connecticut may unilaterally terminate either of the RMR agreements if it expects that the either the New Haven or Bridgeport Unit's market revenues, including the transition payments, will be greater than its revenues under the RMR agreement, the Connecticut Parties conclude that Power Connecticut will have a "strong financial motivation to relinquish the RMR safety net."⁸⁷

35. The Connecticut Parties claim that the Commission has already addressed the other issues raised by the Connecticut Attorney General. While the Connecticut Parties might wish to continue pursuing these issues in appellate proceedings, they support the Settlement Agreement because of "the potential benefits of peace now and the uncertain prospects of a potentially better outcome through further litigation."⁸⁸ The Connecticut Parties argue that, taken as a whole, the Settlement Agreement ultimately benefits customers. According to the Connecticut Parties, the primary consumer benefits include:

- (1) reduction of the cost of service—and, thus, the RMR payments that customers will bear—by almost 20%;
- (2) more exacting performance standards in the RMR [a]greement to ensure that customers receive the reliability that their RMR payments are intended to assure;
- (3) coordination of the RMR [a]greement with the terms of the proposed LICAP Settlement to preserve the most rigorous availability incentives;
- (4) immediate rate relief for customers, who will benefit from a refund of about \$19 million, plus interest, instead of having to wait for the conclusion of the litigation;
- (5) shifting the risk to PSEG of increased operations and maintenance costs over the term of the RMR [a]greement by freezing the Annual Fixed Revenue Requirement; and
- (6) final resolution of contentious RMR issues at least until

⁸⁶ *Id.* at 3-4.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 7.

commencement of the Forward Capacity Market under the LICAP Settlement.⁸⁹

36. Trial Staff agrees with PSEG and the Connecticut Parties that the Commission has already addressed the issues raised by the Connecticut Attorney General, and rejects the Connecticut Attorney General's assertion that the Settlement Agreement insulates the Commission's determinations on those issues from judicial review.⁹⁰ Trial Staff notes that CT DPUC was the only party to petition for judicial review, and that it has agreed to withdraw its petition in exchange for the benefits of the Settlement Agreement. Trial Staff concludes, therefore, that the Settlement Agreement does not insulate the issues from judicial review, but settles them in accordance with the wishes of the party that sought judicial review in the first place.⁹¹

3. Commission Determination

37. We agree with PSEG, the Connecticut Parties, and Trial Staff that the Commission's previous orders in this proceeding have resolved several of the issues the Connecticut Attorney General raises, including: whether the Commission should have relied on ISO-NE's reliability determination,⁹² whether Power Connecticut should have been permitted to file RMR agreements only for the New Haven and Bridgeport Units and whether revenues from Power Connecticut's other generating units should offset the costs of the New Haven and Bridgeport Units,⁹³ and whether Power Connecticut's recovery under the RMR agreements should be limited to variable or marginal operating costs.⁹⁴ Accordingly, we reject these arguments as impermissible collateral attacks on prior Commission orders.

38. The Commission's previous orders have not, however, addressed whether the transition payments Power Connecticut will receive under the LICAP/FCM Settlement will result in Power Connecticut becoming financially ineligible for the RMR

⁸⁹ *Id.* at 7-8.

⁹⁰ Trial Staff's Reply Comments at 9.

⁹¹ *Id.*

⁹² *PSEG I*, 110 FERC ¶ 61,020 at P 19; *PSEG II*, 110 FERC ¶ 61,441 at P 10-12.

⁹³ *PSEG I*, 110 FERC ¶ 61,020 at P 33; *PSEG II* 110 FERC ¶ 61,441 at P 29-33; *PSEG III*, 113 FERC ¶ 61,210 at 18-21.

⁹⁴ *PSEG I*, 110 FERC ¶ 61,020 at P 30; *PSEG II* 110 FERC ¶ 61,441 at P 21-24.

agreements. However, in this proceeding, the Commission determined that Power Connecticut was initially financially eligible for an RMR agreement and therefore, did not set the financial eligibility issue for hearing. Although the Connecticut Attorney General has raised the continuing eligibility issue here, the issue of whether transition payments will result in Power Connecticut becoming financially ineligible for continuing RMR treatment is beyond the scope of this settlement proceeding, as discussed below. Furthermore, the Connecticut Attorney General's unsupported claim that the transition payments render Power Connecticut financially ineligible for the RMR agreements is not directed to whether the Settlement Agreement is just and reasonable.

39. The circumstances here are different than those in *Bridgeport*, where the Commission directed the Presiding Judge to examine Bridgeport Energy's continued eligibility for RMR treatment in light of the transition payments it is entitled to collect.⁹⁵ In *Bridgeport*, the Commission remanded the question of Bridgeport Energy's initial RMR eligibility to the Presiding Judge because Bridgeport Energy never provided the Commission with the information necessary to make this threshold determination.⁹⁶ Consequently, the Commission remanded the issue to the Presiding Judge to develop a record for the Commission to review,⁹⁷ and in addition, directed the Presiding Judge to consider whether the transition payments would affect Bridgeport Energy's continued eligibility, since the hearing would be underway after the December 1, 2006 start of transition payments that must be included in the Facility Costs Test from that date forward.⁹⁸ Here, the Commission has already made the threshold determination that Power Connecticut is eligible for the RMR agreements, so any further challenge to continuing eligibility is beyond the scope of this settlement proceeding.⁹⁹ However, if the Connecticut Attorney General has evidence that the transition payments will render

⁹⁵ *Bridgeport*, 118 FERC ¶ 61,243 at P 62.

⁹⁶ *Id.* at P 61.

⁹⁷ *Id.*

⁹⁸ *Id.* at P 62.

⁹⁹ Our decision here simply acknowledges that the Commission approved Power Connecticut's financial eligibility prior to December 1, 2006, and that continued RMR eligibility is beyond the scope of this proceeding.

Power Connecticut financially ineligible for the RMR agreements, he is free to initiate a separate section 206 complaint proceeding.¹⁰⁰

40. Finally, we observe that Power Connecticut is not entitled to retain any revenues related to the Resource (including transition payments) above its AFRR under the terms of the settlement since such payments will be credited against the Monthly Fixed Cost Charge it collects under the RMR agreement. As stated above, the question of financial eligibility is not pending before us in the instant proceeding. The only issue before us now is whether the Settlement Agreements are fair and reasonable and in the public interest.

C. RMR Agreement Termination Provisions

1. The Settlement Agreement

41. Section 5(d) of the Settlement Agreement permits Power Connecticut to unilaterally terminate the proposed RMR agreements prior to the end of the term provided that the terminated generator remains as a listed resource until the earlier of the end of the operating hour beginning at 11:00 p.m. on the day before June 1, 2011, or the first day of the first Commitment period of the Forward Capacity Market.

2. Commission Determination

42. We find that allowing Power Connecticut to unilaterally cancel either or both of its RMR agreements (with or without the use of the public interest standard for challenges to RMR eligibility) is unreasonable.¹⁰¹ We recently rejected a similar provision in *Bridgeport*, where we noted the potential for generators to abuse such a provision by switching back and forth from RMR agreements to market based rates depending on which regime produced a higher income.¹⁰² That same potential for abuse is present here. Since generators operating under an RMR agreement do not relinquish

¹⁰⁰ *Blumenthal*, 117 FERC ¶ 61,038, at P 71 (stating that “[t]hus, to the extent that any party feels that an RMR agreement is no longer necessary (especially in light of transition payments under the FCM Settlement Agreement), that party is free to file for relief with the Commission under section 206.”).

¹⁰¹ The Commission notes that ISO-NE’s *pro forma* RMR agreement contains no such termination provision for a generator. ISO-NE’s *pro forma* RMR agreement allows ISO-NE to terminate the RMR agreement at any time with 120-days written notice to the owner. ISO-NE FERC Tariff No. 3, Section III – Market Rule 1 – Standard Market Design – Appendix A, Exhibit 4 – Cost of Service Agreement at 2.2.1.

¹⁰² *Bridgeport*, 118 FERC ¶ 61,243 at P 66.

their market-based rate authority, Power Connecticut could terminate one or both of its RMR agreements and collect market based rates. If Power Connecticut then was not content with its market earnings, it could again seek RMR treatment.¹⁰³ By approving section 5(d) of the Settlement Agreement, the Commission would theoretically permit Power Connecticut to toggle between RMR cost-of-service rates and market-based rates at will.¹⁰⁴ As in *Bridgeport*, we refuse to approve that provision here. Accordingly, the Commission directs the Settling Parties to remove all language in the Settlement Agreement that would allow Power Connecticut to unilaterally cancel the RMR agreements and directs the Settling Parties to make a compliance filing reflecting this change within 30 days of the date of this order.

D. Contested Nature of the Settlement Agreement

1. Comments

43. PSEG argues that neither CMEEC nor the Connecticut Attorney General raises any genuine issues of material fact, and therefore, the Commission should approve the Settlement Agreement. PSEG further argues that even if the Connecticut Attorney General and CMEEC claim to have raised a genuine issue of material fact, they have failed to submit a supporting affidavit as required by Commission rules. Therefore, PSEG argues that the Settlement Agreements should be treated as uncontested.

2. Commission Determination

44. As we discuss earlier in this order, the Settlement Agreement is indeed contested. PSEG is correct in noting that Rule 602(f)(4) requires that affidavits be filed in support of oppositions to settlements when a party suggests that material issues of fact are in

¹⁰³ Power Connecticut would be required to meet the then-applicable requirements for RMR eligibility, and would, prior to the date on which the term would otherwise have ended, be limited to seeking a cost-of-service no greater than the Defined COS.

¹⁰⁴ In addressing this issue in our order on the Connecticut Attorney General's complaint against ISO-NE, we stated that "the Complainants are incorrect in their allegation that 'owners of generation can opt into or out of RMR coverage, shifting investment risk fully to ratepayers.'" *Blumenthal v. ISO New England Inc.*, 117 FERC ¶ 61,038, at P 69 (2006). We note that, in the recent order on uncontested settlement in *Berkshire Power Co., LLC* 116 FERC ¶ 61,311 (2006), the Commission approved a 60-day unilateral opt-out provision. However, the acceptance of an uncontested settlement does not constitute Commission precedent. *See Berkshire*, 116 FERC ¶ 61,311 at P 2.

dispute.¹⁰⁵ However, we independently find that there is a question of material fact that has not been addressed by the Settlement Agreement, and therefore, we reject PSEG's request to treat the agreement as uncontested as moot.

III. Disposition of Filing and Compliance Requirement

45. Under the Commission's regulations, the Commission can approve an uncontested settlement upon a finding that the settlement appears to be fair and reasonable and in the public interest,¹⁰⁶ "without a determination on the merits that the rates approved are 'just and reasonable.'"¹⁰⁷ However, the Supreme Court has held that where a settlement is contested, the Commission must make an "independent finding supported by 'substantial evidence on the record as a whole,' that the proposal will establish 'just and reasonable' rates for the area."¹⁰⁸ We have found that the Settlement Agreement is contested, and accordingly, we now must determine whether its terms are just and reasonable. As discussed above, the Commission has determined that the Settlement Agreement has not been shown to be just and reasonable and in the public interest. Accordingly, the Commission approves in part, subject to conditions, and rejects in part the Settlement Agreement, as discussed herein.

46. Moreover, the Commission directs the Settling Parties to submit, within 30 days of the date of this order, a compliance filing adopting revisions to the provisions in the Settlement Agreement regarding the standard of review and termination, as discussed above.

¹⁰⁵ Rule 602(f)(4) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f)(4) (2006), states in pertinent part:

Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim.

¹⁰⁶ 18 C.F.R. § 385.602(g) (3) (2006).

¹⁰⁷ *United Municipal Distributors Group v. FERC*, 732 F.2d 202, 207, n.8 (D.C. Cir. 1984).

¹⁰⁸ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974) (internal citations omitted).

The Commission orders:

(A) The Settlement Agreement is hereby approved in part, subject to conditions, and rejected in part as discussed in the body of this order.

(B) The Settling Parties are directed to submit, within 30 days of the date of this order, a compliance filing, as directed in the body of this order.

By the Commission. Commissioner Kelly concurring with a separate statement attached.

Commissioner Wellinghoff concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Philis J. Posey,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PSEG Power Connecticut, LLC

Docket Nos. ER05-231-000
ER05-231-001
ER05-231-002
ER05-231-003

(Issued May 18, 2007)

KELLY, Commissioner, *concurring*:

This order approves, subject to conditions, a settlement agreement related to two Reliability Must Run (RMR) Agreements between ISO-New England and PSEG Power Company, LLC. The parties to the settlement agreement request that the Commission apply the *Mobile-Sierra* “public interest” standard of review to proposed amendments or modifications to the RMR agreements or proposed modifications to the Settlement Agreement sought by the Commission acting on its own motion or by a non-signatory. As I have stated previously, in the absence of an affirmative showing by the parties and a reasoned analysis by the Commission regarding the appropriateness of approving the “public interest” standard of review to the extent future changes are sought by a non-party or the Commission acting *sua sponte*, I do not believe the Commission should approve such provisions.¹ Under the facts of this case, I do not think the parties have made an affirmative showing, and I support this order’s rejection of the proposed “public interest” standard provisions.

I agree with the order’s reasoning that RMR agreements can broadly impact market participants and the operation of the market as a whole. In this regard, I believe that RMR agreements differ from the bilateral contracts at issue in *Mobile*² and *Sierra*.³ Therefore, the “just and reasonable” standard should apply. I think the same reasoning applies when the Commission considers whether to approve proposed “public interest” standard of review provisions in other types of agreements that can broadly impact non-party market participants and the operation of the market.⁴ Therefore, although I disagree

¹ See *Transcontinental Gas Pipe Line Corp.*, 117 FERC ¶ 61,232 (2006).

² *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

³ *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

⁴ See, e.g., *Southwest Power Pool, Inc.*, 117 FERC ¶ 61,207 (2006) (Comm’r Kelly, dissenting in part; Comm’r Wellinghoff, dissenting in part) (order approving a

with the characterization of the applicability of the *Mobile-Sierra* “public interest” standard in footnote 54 of the order, I agree with the order’s rejection of the proposed “public interest” standard provisions. For these reasons, I concur.

Suedeem G. Kelly

“public interest” standard provision in a contested settlement between SPP and the SPP balancing authorities related to the pending implementation of SPP’s energy imbalance service market).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PSEG Power Company, LLC

Docket Nos. ER05-231-000
ER05-231-001
ER05-231-002
ER05-231-003

(Issued May 18, 2007)

WELLINGHOFF, Commissioner, concurring in part and dissenting in part:

The Settling Parties in this case have asked the Commission to apply the “public interest” standard of review when it considers future changes to the instant settlement that may be sought by a non-party or the Commission acting *sua sponte*.

As the majority finds that the Commission should not be bound to the “public interest” standard in this case, my conclusion on that issue is the same as that reached in this order. Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,¹ I believe that it is inappropriate for the Commission to grant the parties’ request and agree to apply the “public interest” standard to future changes to the instant settlement that may be sought by a non-party or the Commission acting *sua sponte*.

For the reasons that I identified in *Southwestern Public Service Co.*,² however, I disagree with the majority’s characterization of case law on the applicability of the “public interest” standard. Therefore, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

¹ 117 FERC ¶ 61,055 (2006).

² 117 FERC ¶ 61,149 (2006).