

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.

Southwest Power Pool, Inc.

Docket No. ER06-451-003

ORDER CONDITIONALLY APPROVING PARTIAL CONTESTED SETTLEMENT

(Issued November 17, 2006)

1. On May 22, 2006, the Southwest Power Pool, Inc. (SPP) submitted the Offer of Settlement as directed in the *SPP Market Order*.¹ The Offer of Settlement, negotiated between the SPP and its balancing authorities² resolves issues related to the division of functional responsibilities among SPP and balancing authorities participating in the SPP energy imbalance service market (imbalance market). As discussed below, the Commission conditionally approves the partial contested settlement, finding that, as a package, it presents a just and reasonable outcome for this proceeding.

¹ *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,289, at P 90-91 (2006) (*SPP Market Order*).

² The balancing authorities are: American Electric Power, Aquila, Inc. (Missouri Public Service and WestPlains Energy); Kansas City Power & Light Company; OG&E Electric Services; Southwestern Public Service Company; The Empire District Electric Company; Westar Energy, Inc.; Sunflower Electric Power Corporation; Western Farmers Electric Cooperative; The Board of Public Utilities, Kansas City, Kansas; and Grand River Dam Authority (collectively, balancing authorities).

I. Background

2. SPP has been authorized as a regional transmission organization (RTO) since October 1, 2004.³ The Commission accepted SPP's commitment to develop an imbalance market, including implementation of a real-time, offer-based energy market that will be used to calculate the price of imbalance energy.⁴ The Commission also required SPP to provide a market monitoring and market power mitigation plan.⁵

3. On January 4, 2006, SPP submitted proposed revisions to its Open Access Transmission Tariff (OATT or tariff) intended to implement SPP's imbalance market and establish a market monitoring and market power mitigation plan (January 4 Filing). With these revisions, SPP proposed to implement a real-time energy imbalance market, based on the least cost bid-based security constrained economic dispatch and locational marginal pricing. The Commission found that SPP's proposed tariff required modification or elaboration before it could determine whether the imbalance market "is designed and monitored properly and is just and reasonable."⁶ Thus, the Commission rejected in part, conditionally accepted and suspended in part SPP's proposed revisions. The Commission set the effective date for the revised provisions as October 1, 2006,⁷ subject to further orders as discussed in the *SPP Market Order*.

³ See *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,009 (2004), *order on reh'g*, 110 FERC ¶ 61,137 (2005).

⁴ *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110, at P 134, *order on reh'g*, 109 FERC ¶ 61,010 (2004).

⁵ *Id.* P 173.

⁶ *SPP Market Order*, 114 FERC ¶ 61,289 at P 1.

⁷ On August 2, 2006, SPP submitted a letter indicating that the Board of Directors adopted a motion to delay the start of its imbalance market until November 1, 2006. On September 29, 2006, SPP submitted a letter notifying the Commission that the scheduled implementation of SPP's energy imbalance market has been extended to December 1, 2006. On October 25, 2006, SPP submitted a letter advising the Commission of a further delay in the scheduled implementation of SPP's energy imbalance market. SPP states that the Board of Directors decided not to certify SPP's readiness for a December 1, 2006 start date, but agreed to consider certification for a February 1, 2007 market start date at the December 12, 2006 meeting.

4. Moreover, in the *SPP Market Order*, the Commission found that SPP's proposed revisions in the SPP Membership Agreement provided some detail on the Northern American Electric Reliability Council (NERC) functional responsibilities, but did not adequately address the functional responsibilities of SPP and the balancing authorities and how they will work together to implement the new imbalance market arrangements.⁸ Therefore, the Commission established settlement judge proceedings and directed SPP to make a filing no later than 60 days from the date of the *SPP Market Order* containing: (1) a detailed allocation between SPP and the balancing authorities of the tasks within the balancing function and the reliability function; and (2) a proposed resolution of the allocation of the costs and liability among SPP and the balancing authorities.⁹

II. Settlement Agreement on Balancing Authority-SPP Relationship

A. General Information

5. The Offer of Settlement contains two attachments: Attachment A, the Balancing Function Agreement (Balancing Agreement) between SPP and its balancing authorities (together, Signatories)¹⁰ relating to implementation of the imbalance market; and Attachment B that sets forth a new tariff section – Liabilities Relating to Balancing Function Agreement – to be incorporated into SPP's OATT. SPP states that the Offer of Settlement, together with its attachments, represents an integrated agreement; and that if the Commission does not accept the entire agreement without modification or with condition unacceptable to the Signatories, then the Offer of Settlement will be considered

⁸ *SPP Market Order*, 114 FERC ¶ 61,289 at P 89.

⁹ *Id.* P 91.

¹⁰ The following Signatories have executed the Balancing Agreement: American Electric Power; The Empire District Company; Kansas City Power & Light Company; OG&E Electric Services; Southwest Power Pool; The Board of Public Utilities, Kansas City, Kansas; Westar Energy, Inc.; Western Farmers Electric Cooperative; Grand River Dam Authority; and Southwestern Public Service Company. Sunflower Electric Power Corporation is going through its approval process and has indicated that it intends to sign the Balancing Agreement. Upon receiving regulatory approval from the Missouri Public Service Commission for Missouri Public Service to join SPP, Aquila, Inc. will sign the Balancing Agreement. Aquila, Inc. is divesting from WestPlains Energy. SPP states that it understands that the new owner, Mid-Kansas Electric Company, L.L.C., intends to sign the Balancing Agreement after the acquisition is completed.

null and void.¹¹ SPP also states that the Offer of Settlement follows the Midwest Independent Transmission Operator Inc's (Midwest ISO) Balancing Authority Agreement (Midwest ISO Agreement) that was approved by the Commission.¹²

6. The terms of the Offer of Settlement provide that the Offer of Settlement will become effective coincident with the start-up date of the SPP imbalance market, provided that the tariff language in Attachment B does not become effective until the date on which the tariff revisions implementing the imbalance market become effective.¹³ The Offer of Settlement notes that SPP will file sheets with the Commission in accordance with the Offer of Settlement after the Offer of Settlement has been accepted. The Offer of Settlement also notes that the Signatories were unable to work out a tariff provision on the balancing function cost allocation due to the 60-day time limit.¹⁴ The Signatories have agreed to develop such a tariff provision and SPP has committed in the Balancing Agreement to file a cost recovery mechanism that receives the approval of at least two-thirds of the balancing authorities.¹⁵

7. Section 1 of the Balancing Agreement outlines the procedural history leading up to the signing of the Balancing Agreement and states that the parties believe that the Balancing Agreement is in the public interest. Section 2 defines the terms used in the Balancing Agreement. Section 3 states that the SPP Membership Agreement is intended to be a more specific delineation of functions between SPP and the balancing authorities and that any conflict between the SPP Membership Agreement and the Balancing Agreement is to be resolved in favor of the Balancing Agreement. Section 5 specifies limitations on SPP, e.g., that SPP may not issue any orders to balancing authorities or take any actions that it knows or should have known would damage any of the balancing authorities' facilities, cause injury to any person or violate applicable law. Section 9 provides that disputes arising under the Balancing Agreement shall be resolved by dispute resolution procedures as specified in the section. Section 10 provides inspection and auditing procedures, including a requirement that the balancing authorities and SPP

¹¹ SPP Explanatory Statement at 3.

¹² *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,177 (2005) (*Midwest ISO Settlement Order*).

¹³ *See* Offer of Settlement at 3; Balancing Agreement § 12.1.

¹⁴ SPP Explanatory Statement at 4, 6-7.

¹⁵ *Id.* at 4.

make their books, records and facilities available to one another for purposes of determining compliance with the Balancing Agreement. Section 11 states that except for force majeure events as described in section 14.10, any failure to carry out any term of the Balancing Agreement shall constitute non-performance and specifies procedures for notice and cure of non-performance.

B. Allocation of Operational Responsibilities

8. Section 4 of the Balancing Agreement divides operational responsibilities between the SPP and the balancing authorities.¹⁶ It specifies that SPP shall be responsible for a host of tasks relating to: (1) scheduled interchange; (2) approving and confirming market schedules; (3) net scheduled interchange calculations; (4) inadvertent interchange; (5) providing each balancing authority with dispatch instructions every five minutes; (6) deployment of regulation and operating reserves; and (7) declaring energy emergency alerts and documenting each emergency procedure. Section 4 also states that the balancing authorities will: (1) implement scheduled interchange curtailment directives; (2) collect, calculate and verify actual interchange values for each interconnection with one another or with external balancing authorities, and provide hourly data to SPP; (3) comply with NERC reporting requirements for the area interchange error report; (4) maintain their responsibilities concerning Area Control Error, frequency bias value and time error corrections; (5) coordinate with other market participants to manage resource commitment to meet demand with support from SPP; (6) comply with NERC and SPP Criteria control performance requirements; (7) provide SPP with hourly seven-day load forecasts subject to confidentiality requirements; (8) coordinate deployment of regulation and operating reserves with SPP; and (9) comply with SPP's directives as the reliability coordinator.

9. Further, section 4.13.3 states that SPP and a balancing authority may “agree by separate written contract to a modification of the division of responsibilities” and that such an agreement will not be considered a modification or an amendment to the Balancing Agreement.

¹⁶ In general, it states that in carrying out obligations under the Balancing Agreement, the balancing authorities and SPP shall: (1) follow good utility practice, (2) comply with applicable policies, standards and requirements of NERC Standards and SPP Criteria and their successors, and (3) comply with applicable laws and regulations. Balancing Agreement, section 4.1.

C. Liability and Indemnification

10. Section 6 of the Balancing Agreement contains provisions related to liabilities, indemnification, and insurance. With respect to indemnification, the Balancing Agreement requires that:

SPP shall at all times indemnify, defend, and save each [b]alancing [a]uthority harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, . . . and all other obligations by or to third parties, arising out of or resulting from the [b]alancing [a]uthority's performance of obligations under this Agreement on behalf of SPP, except in cases of gross negligence or intentional wrongdoing by the [b]alancing [a]uthority.¹⁷

11. In section 6.5, the Signatories agree that these indemnification provisions shall only apply in instances in which the balancing authority is acting under SPP's direction pursuant to provisions of the Balancing Agreement. Also, the proposed SPP tariff in Attachment B states that transmission customers waive their rights to sue the balancing authorities and their respective officers, shareholders, directors, agents, contractors, employees and members and SPP in certain circumstances related to the implementation of the Balancing Agreement.¹⁸ Attachment B also proposes that third parties, who take action at the direction of the balancing authority or SPP relating to the performance of the Balancing Agreement, are accorded the same protection.¹⁹

12. Section 6.3 provides that a balancing authority should not be liable to SPP for actions or omissions by the balancing authority in performing its obligations under the Balancing Agreement except to the extent that the balancing authority is found liable for gross negligence or intentional wrongdoing. It further states that neither SPP nor the balancing authorities shall be liable for any incidental, consequential, punitive, special, exemplary, or indirect damages, loss of revenues or profits, arising out of, or connected in any way with the performance or non-performance under the Balancing Agreement. Finally, section 6.3 states that neither the balancing authorities nor SPP shall be liable for damages arising out of services provided under the Balancing Agreement that cause

¹⁷ Balancing Agreement § 6.1.

¹⁸ Proposed Attachment AE § 8.1.

¹⁹ *Id.* § 8.2.

interruptions, deficiencies, or imperfections of service as a result of conditions or circumstances beyond SPP's or the balancing authorities' control. As set forth in section 6.5, the Signatories agree that Section 6.3 shall only apply in instances in which the balancing authority is acting pursuant to SPP's direction pursuant to provisions of the Balancing Agreement.

13. In regard to insurance, section 6.4 directs SPP to obtain adequate insurance coverage to cover indemnifications and liabilities under the Balancing Agreement, subject to its ability to secure such coverage at a reasonable cost.

D. Cost Recovery

14. The Signatories state that they could not devise an appropriate cost recovery mechanism in the 60-day period the Commission provided for negotiations in the *SPP Market Order*.²⁰ They state that the balancing authorities did not have enough time to assess what costs should be eligible, ensure no double recovery could occur, and develop an appropriate cost recovery formula. The Signatories further state that there exists a possibility that costs may be recovered on a regional basis, and that therefore each balancing authority may need to consider the costs that each other balancing authority may seek to recover.²¹ For these reasons, the Signatories commit to further negotiations in section 7.2, and submit that the lack of a cost recovery mechanism should not delay Commission acceptance of the Balancing Agreement.²²

15. Section 7.1 enumerates non-exclusive categories of costs to be considered in the discussions to develop cost recovery mechanism. Section 7.3 provides that in the event that an SPP action or inaction causes the incurrence of certain types of penalties on a balancing authority, SPP shall reimburse the balancing authority subject to SPP recovery of those costs. In the event of an investigation of a balancing authority action implementing an SPP action or directive, under section 7.4, SPP shall aid the balancing authority in responding to any inquiry, investigation or sanction. Lastly, section 7.5 states that if an action taken by a balancing authority is determined to be inappropriate, SPP shall not require the balancing authority to take such an action in the future. Similarly, if a regulatory agency requires that the balancing authority take an action inconsistent with the Balancing Agreement, SPP will permit the action.

²⁰ See *SPP Market Order*, 114 FERC ¶ 61,289 at P 91.

²¹ SPP Explanatory Statement at 7.

²² *Id.*

E. Confidentiality

16. Section 8 provides that balancing authority personnel performing functions under the Balancing Agreement must keep confidential all information received from SPP or other entities relating to its performance under the Balancing Agreement, and shall not disclose such information to market participants, including marketing personnel that are part of the same company. The exception to this rule is for entities with personnel who perform both balancing authority and marketing functions. In such cases, SPP has the authority to limit the information provided to that balancing authority, unless no other market participant controls generation in the balancing authority's area or the balancing authority is a signatory to the NERC Confidentiality Agreement for Electric System Operating Reliability Data. However, section 8.1(c) also provides that SPP will ensure that it provides sufficient information to balancing authorities to ensure that they can perform their obligations under the Balancing Agreement and comply with NERC and regional reliability requirements and no balancing authority will be obligated to restructure its operations. Moreover, a balancing authority may provide confidential information at the request of NERC, the Electric Reliability Organization (ERO) or any regulatory agency, provided that the balancing authority has made a good faith attempt to maintain the confidentiality of the information.

F. Termination and Modification of Balancing Agreement

17. Under section 13, if the Commission modifies or conditions any term of the Balancing Agreement, it shall become null, void, and without legal effect except as specified in section 12.1. However, the Signatories agree to negotiate in good faith to determine if the Commission's proposed modifications or conditions can be accommodated. Section 13.1 further provides that the Balancing Agreement is not to be modified except by the agreement of at least two-thirds of the balancing authorities and the assent of SPP, as described in section 13.4.

18. Section 13.2 states that the Signatories do not intend that the Balancing Agreement will be further modified absent their agreement (with limited exceptions). However, in the event of any changes in NERC, Commission, regional reliability council or imbalance market requirements that materially affect the Balancing Agreement, the Signatories agree to negotiate in good faith appropriate changes to the Balancing Agreement and to use the dispute resolution procedures if they cannot reach an agreement. Further, section 13.3 states that absent the parties' agreement, the standard of review for changes

or conditions to the Agreement, whether proposed by a party, a non-party, or the Commission, shall be the *Mobile-Sierra* “public interest” standard.²³

G. Miscellaneous Provisions

19. Section 14 of the Balancing Agreement contains miscellaneous provisions. Most significantly, section 14.3 states that by entering into the Balancing Agreement, the balancing authorities are not agreeing that their activities under the Balancing Agreement are subject to Commission jurisdiction, and that nothing in the Balancing Agreement shall be construed to confer jurisdiction over balancing authorities that are non-public utilities or to cause a non-public utility to take action that would subject them to Commission jurisdiction.

III. Protests and Comments

20. As detailed below, the following parties filed initial comments contesting certain aspects of the Offer of Settlement: Golden Spread Electric Cooperative (Golden Spread); Lafayette Utilities System (Lafayette); and the City of Independence, Missouri, the Kansas Power Pool, the Missouri Joint Municipal Electric Utility Commission, the Oklahoma Municipal Power Authority, and the West Texas Municipal Power Agency (collectively, TDU Intervenors). SPP filed reply comments stating that the Balancing Agreement is modeled after the Midwest ISO Agreement that was approved by the Commission, and therefore urges the Commission to approve the Balancing Agreement. The Settlement Judge issued a report on the contested settlement on July 6, 2006.

IV. Discussion

A. Procedural Issues

1. Comments

21. Lafayette and TDU Intervenors argue that the Commission should not accept the Balancing Agreement’s *Mobile-Sierra* public interest provisions prior to the resolution of cost recovery issues. They both distinguish the Midwest ISO situation on the ground that the Midwest ISO Agreement included the cost recovery provision, unlike the SPP

²³ See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

Balancing Agreement.²⁴ Lafayette argues that the Commission should not lock in the SPP functional responsibility provisions, through the approval of a *Mobile-Sierra* clause, based on only a subset of the terms needed by the Commission to evaluate the justness and reasonableness of the overall arrangement.²⁵

22. Lafayette and TDU Intervenors also contend that the use of the *Mobile-Sierra* provision restricts the section 206 rights of non-signatories. TDU Intervenors argue that Commission approval of the Balancing Agreement will effectively limit third parties' statutory rights under section 206 to seek modifications where provisions of a Commission-jurisdictional contract have become unjust, unreasonable, or unduly discriminatory.²⁶ Lafayette also argues that it would be "legally indefensible for the Commission to accept contractual provisions that would limit the section 206 rights of third parties by imposing the *Mobile-Sierra* public interest standard on any exercise of those rights."²⁷ Therefore, Lafayette and TDU Intervenors contend that section 206 complaints by non-signatories should be subject to a just and reasonable standard of review, and urge the Commission to condition its approval of the Offer of Settlement on the imposition of a just and reasonable standard of review to future changes to the Balancing Agreement sought by non-signatories or *sua sponte* by the Commission.²⁸

23. In addition, TDU Intervenors argue that if the Commission does not reject the proposed *Mobile-Sierra* provision, it should at least delay acceptance of the proposed Balancing Agreement until SPP and the balancing authorities finalize the cost recovery provisions to be reviewed in tandem with the proposed Balancing Agreement and the terms of SPP's imbalance market have been finalized.²⁹ TDU Intervenors assert that cost recovery issues are inextricably linked to the terms of the proposed Balancing Agreement, and therefore the Commission should not limit non-signatories' or its own ability to ensure that the proposed Balancing Agreement as a complete package is just and reasonable.

²⁴ Lafayette Comments at 4-5; TDU Intervenors Comments at 11-13.

²⁵ Lafayette Comments at 4-5.

²⁶ TDU Intervenors Comments at 2.

²⁷ Lafayette Comments at 5.

²⁸ *Id.*; TDU Intervenors at 2, 15.

²⁹ TDU Intervenors Comments at 13.

24. Further, Lafayette states that, unlike the Midwest ISO Agreement,³⁰ the SPP Balancing Agreement has no limitation on the term of the agreement. As a result, Lafayette contends that the *Mobile-Sierra* protection in the Balancing Agreement would effectively lock-in the provisions of the Balancing Agreement for an undefined period of time.³¹

25. SPP replies that the *Mobile-Sierra* provision is consistent with Commission precedent and should be retained in the Balancing Agreement. SPP argues that the *Mobile-Sierra* provision contained in the Balancing Agreement is modeled after the standard of review provision in the Midwest ISO Agreement that the Commission approved.³² In addition, SPP asserts that the Balancing Agreement contains additional language that limits the *Mobile-Sierra* provision, not included in the Midwest ISO Agreement, and provides explicit protection to non-signatories in the event that the Commission changes its existing policy on *Mobile-Sierra* public interest standard of review.³³ SPP therefore contends that comments of TDU Intervenors and Lafayette lack merit.

26. SPP further states that there is no difference between the Midwest ISO and SPP situations. In regard to the duration of the Midwest ISO Agreement, SPP states that in spite of the five-year term specified in the Midwest ISO Agreement, it was a long-term agreement to be in effect year after year unless the Midwest ISO or three-fourths of the balancing authorities terminates the agreement in writing. Also, in regard to the cost

³⁰ Midwest ISO Agreement states:

. . . . This Agreement shall remain in effect for five (5) years from the Effective Date and shall remain in effect from year to year thereafter unless either (i) the Midwest ISO or (ii) three-fourths of the Balancing Authorities then subject to this Agreement give one year advance notice in writing that they wish to terminate this Agreement. *See* Midwest ISO Agreement § 12.1.

³¹ Lafayette Comments at 4.

³² *See Midwest ISO Settlement Order*, 110 FERC ¶ 61,177 at P 32-33.

³³ SPP Reply Comments at 5. Section 13.3 of the Balancing Agreement states that if the Commission changes its policy with regard to non-signatories and imposes a standard different than the *Mobile-Sierra* standard of review, the Signatories will modify the Balancing Agreement to reflect the new standard.

recovery provision, SPP contends that the Commission approved *Mobile-Sierra* provision in the Midwest ISO Agreement before the cost recovery mechanism was finalized.³⁴ It states that the Commission ordered the parties to the Midwest ISO Agreement to submit a detailed accounting of what costs would be collected and how double recovery would be avoided, and the Commission accepted the cost recovery provision in a later filing.³⁵ SPP therefore argues that there is no practical distinction between the Midwest ISO Agreement approved by the Commission and the proposed Balancing Agreement.

2. Commission Determination

27. In the *Midwest ISO Settlement Order*, the Commission accepted the *Mobile-Sierra* public interest provision as the standard of review for future modifications to the Midwest ISO Agreement.³⁶ The Commission noted that modifications will not be easy to effect, but did not agree with the commenters that the “restriction is unacceptable.”³⁷ The Commission noted that other means were available to implement changes, including negotiations, dispute resolution, and voting to make modifications. Therefore, it stated that making changes via section 206 of the FPA “appears to be a second-choice means of resolving issues that require the modification of the [Midwest ISO] Agreement.”³⁸

28. Similarly, we find that the terms for modification under section 13 of the Balancing Agreement provide other means for making future changes to the Balancing Agreement. Section 13 provides for modification of the Balancing Agreement with the assent of SPP and two-thirds affirmative vote of the balancing authorities. Section 13 also provides that, in the event of changes to Commission requirements that materially affect the Balancing Agreement, Signatories will negotiate changes to the agreement, or should negotiations fail, will decide changes pursuant to the dispute resolution procedures of the Balancing Agreement. Therefore, we disagree with Lafayette and TDU Intervenors that the Balancing Agreement provides inadequate mechanisms for seeking modifications. Moreover, section 13.3 notes that notwithstanding the *Mobile-Sierra*

³⁴ SPP Reply Comments at 6-7. See also *Midwest ISO Settlement Order*, 110 FERC ¶61,177 at P 59.

³⁵ *Midwest Independent Transmission System Operator, Inc.*, 113 FERC ¶ 61,198 (2005).

³⁶ *Midwest ISO Settlement Order*, 110 FERC ¶ 61,177 at P 32.

³⁷ *Id.*

³⁸ *Id.*

clause, the Signatories will modify the Balancing Agreement to reflect any changes in Commission policy on standard of review.³⁹ In this respect, the Balancing Agreement is more limited than the Midwest ISO Agreement approved by the Commission.

29. As a general matter, parties may bind the Commission to a public interest standard.⁴⁰ Under limited circumstances, such as when the agreement has broad applicability, the Commission has the discretion to decline to be so bound.⁴¹ In this case we find that the public interest standard should apply because it provides the parties needed certainty. Accordingly, we accept the section 13 provision that the applicable standard of review for any changes to the Balancing Agreement, whether proposed by a party, a non-party, or the Commission, acting *sua sponte*, is the *Mobile-Sierra* public interest standard.⁴²

30. We also disagree with the commenters that the *Mobile-Sierra* public interest standard should not be accepted by the Commission prior to the resolution of cost recovery issues. SPP and the balancing authorities state that they are in negotiation to resolve the cost recovery issues to develop such a tariff provision. The non-signatories will be able to comment on the cost recovery provision after the cost recovery issues are resolved and filed with the Commission. This is consistent with the approach taken in the *Midwest ISO Settlement Order*.⁴³

³⁹ The Commission also noted in the Midwest ISO Agreement that if the public interest standard of review “imperatively demands” a change, the Commission can make amendments. *Id.* (citing *Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 856 n. 29 (D.C. Cir. 1979)).

⁴⁰ *Northeast Utilities Service Co v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993).

⁴¹ *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir. 2006).

⁴² We note that, while the Balancing Agreement is subject to the *Mobile-Sierra* public interest standard of review, Attachment B that sets forth a new tariff section – Liabilities Relating to Balancing Function Agreement - will be filed as part of SPP’s OATT and as such any changes to Attachment B will be pursuant to the just and reasonable standard of review applicable to the SPP OATT. *See* SPP Explanatory Statement at 10.

⁴³ *Midwest ISO Settlement Order*, 110 FERC ¶ 61,177 at P 32.

31. Further, we do not find that the lack of a defined term limit in the Balancing Agreement should have an effect on our approval of the *Mobile-Sierra* provision. Under section 13.4, the Balancing Agreement can be modified (or terminated for practical purposes) by a two-thirds vote of the balancing authorities, with the assent of SPP. As noted, it can also be modified, if necessary, pursuant to section 206 of the FPA should the public interest so require. Therefore, the approval of the *Mobile-Sierra* provision will not lock-in the terms of the Balancing Agreement in perpetuity.

B. Liability and Indemnification

1. Comments

32. Golden Spread argues that the final sentence of Section 6.3 should be amended from its current form to read, “[b]alancing [a]uthorities shall not be liable for acts or omissions done in compliance or good faith attempts to comply with directive of SPP, *except in cases of gross negligence*” (emphasis shows proposed change). Golden Spread contends that even if a balancing authority was acting in good faith, it should not be insulated from damage claims if its efforts to comply with SPP’s directives fall so far short of competence as to constitute gross negligence.⁴⁴

33. Lafayette argues that the limitation of liability provision appended to the Offer of Settlement as Attachment B is problematic. In particular, Lafayette argues that the elevation of the liability threshold to “gross negligence” removes important incentives to avoid conduct that would be actionable under a simple negligence standard.⁴⁵

34. SPP maintains that the gross negligence standard in the limitation of liability provision included in Attachment B to the Offer of Settlement is in accord with Commission precedent and should therefore be accepted by the Commission.⁴⁶ SPP claims that Lafayette’s opposition to the gross negligence standard is unjustified. SPP further contends that the language limiting liability included in the Offer of Settlement already severely limits the exception to liability,⁴⁷ and that therefore Golden Spread’s proposed additional language is unnecessary.

⁴⁴ Golden Spread Comments at 3.

⁴⁵ Lafayette Comments at 8.

⁴⁶ SPP Reply Comments at 9.

⁴⁷ *Id.* at 10-11.

2. Commission Determination

35. Taken together, the liability and indemnification provisions in section 6 of the Balancing Agreement and in the new tariff language of Attachment B propose to have the following implications:

- SPP and the balancing authorities will not be liable to transmission customers or market participants for acts or omissions in performing obligations under the Balancing Agreement, except to the extent that such act or omission is the result of gross negligence or intentional misconduct. SPP waives its right to sue the balancing authorities for, and must indemnify the balancing authorities against, damages stemming from the balancing authority's performance of its obligations, except in cases of gross negligence or intentional misconduct by the balancing authority.
- Neither the balancing authorities nor SPP will be liable for damages arising out of services provided under the Balancing Agreement that occur as a result of conditions beyond the balancing authorities' or SPP's control.
- The balancing authorities shall not be liable for acts or omissions in compliance or good faith attempts to comply with SPP's directions.
- With limited exceptions, the balancing authorities shall not be liable for money damages or other compensation to SPP for actions or omissions by the balancing authority in performing obligation under the Balancing Agreement. SPP's liability to the balancing authorities is also limited.

36. We find that these provisions are in accordance with Commission precedent.⁴⁸ Similar to the liability provision in the Midwest ISO Agreement, the Balancing Agreement and its accompanying tariff language limits SPP's and the balancing authorities' liability to third parties except under limited circumstances. Also, in providing third parties with a right to sue in those limited circumstances, the Balancing Agreement appropriately assigns liability to the party most responsible for damages. Further, we find that the Balancing Agreement complies with the Commission directive in the *Midwest ISO Settlement Order* to provide for limitation of liability for generators

⁴⁸ *Midwest Independent Transmission System Operator, Inc.* 110 FERC ¶ 61,177 (2005); *see also ISO New England*, 106 FERC ¶ 61,280 (2004).

and market participants⁴⁹ by providing in the new tariff language of Attachment B that certain third parties are also eligible for the waiver of liability provision.⁵⁰

37. Further, we find that the gross negligence standard in the Balancing Agreement is consistent with the liability provision in the Midwest ISO Agreement approved by the Commission. Therefore, there is no basis to deviate at this time and adopt the simple negligence standard that Lafayette proposes. In that respect, we agree with Golden Spread that section 6.3 should be amended to add “except in cases of gross negligence” in the final sentence. Although, section 6 provides provisions that limit exceptions to liability, in this instance the proposed language will clarify that a balancing authority, acting in good faith to comply with SPP’s directive, would be liable if its actions amount to gross negligence. This is consistent with the gross negligence standard in the Balancing Agreement. Therefore, we direct SPP to amend section 6.3 accordingly.

C. Cost Recovery

1. Comments

38. Golden Spread argues that SPP and its balancing authorities failed to comply with the *SPP Market Order* because the Signatories claimed they “were not able to work out a tariff provision on [b]alancing [a]uthority cost recovery.” Therefore, Golden Spread reserves its right to comment on whatever cost recovery provisions the Signatories eventually file, and notes that any such provisions must limit recovery to costs incurred in performing balancing authority functions under the OATT, and must not include any costs otherwise reimbursed to control areas by SPP, or costs otherwise recovered under the OATT.

39. In addition, Golden Spread requests the Commission to clarify that its approval of sections 7.1 and 7.2 is limited to the signatories’ agreement to engage in further discussions, and does not commit the Commission to automatically approve the agreement that results from those discussions. Golden Spread also requests the Commission to order that each intervening party receive a notice of the time and place of

⁴⁹ *Midwest ISO Settlement Order*, 110 FERC ¶ 61,177 at P 46.

⁵⁰ Proposed Attachment AE § 8.2 states:

The provisions set forth in Section 8.1 also shall apply to entities that take responsive action to implement or comply with the directives or needs of the Transmission Provider or Balancing Authority relating to the performance of this Balancing Function Agreement.

discussions referenced in section 7.1 and that they be permitted to attend and participate in those discussions.⁵¹

40. SPP maintains that section 7.1 commits SPP and its balancing authorities to discuss the non-exclusive list of costs enumerated in the section, and does not imply that the Commission should approve the costs for recovery at this time. SPP states that once the cost recovery mechanism is developed, it will file the provision with the Commission, and entities will have the opportunity to submit comments at that time.⁵²

2. Commission Determination

41. We accept SPP's and the balancing authorities' commitment as enumerated in sections 7.1 and 7.2 that they will continue to discuss cost recovery issues and that SPP will file a new cost recovery schedule(s) to the SPP OATT prior to imbalance market implementation. We also clarify that our acceptance of section 7 does not constitute an acceptance of any cost recovery rates, terms or conditions. While SPP failed to comply within the 60-day timeframe in the Commission's explicit directive to negotiate a new cost allocation related to the new functional responsibilities in the imbalance market, we find that the Signatories have successfully negotiated the allocation of responsibility for the balancing and reliability functions that will apply once the SPP imbalance market is implemented. Since proper functional allocation is paramount given the potential reliability impacts and since the partial settlement, in essence, provides that there will be no recovery of any additional costs incurred on behalf of SPP or the balancing authorities until SPP files a new cost recovery schedule, we find that SPP has met the spirit of the directives in the *SPP Market Order*.

42. We reject Golden Spread's request to direct SPP to provide notice of the discussions on cost recovery because the Commission-ordered settlement negotiations have terminated.⁵³ Golden Spread will have the opportunity to comment on any new schedule related to recovery of functional responsibility costs that is filed with the Commission by SPP. Until SPP files a new cost recovery schedule, SPP may not collect any additional costs related to the allocation of functional responsibilities associated with

⁵¹ Golden Spread Comments at 2.

⁵² SPP Reply Comments at 12.

⁵³ *Southwest Power Pool, Inc., Order Of Chief Judge Terminating Settlement Judge Procedures*, Docket No. ER06-451-000, *et al.* (July 11, 2006).

the imbalance market and customers and market participants will not incur any such costs.

D. Confidentiality

1. Comments

43. Lafayette states that section 8.1(b) and (c) pertaining to the sharing of market sensitive information with balancing authorities performing both balancing authority and market functions are not well drafted and are ambiguous. Lafayette states that it is unclear whether section 8.1(c)(i) is meant to override sections 8.1(a) and 8.1(b) or meant to grant authority to limit the information sharing stated in the introductory portion of 8.1(b) because of the phrase “notwithstanding the above” in the beginning of section 8.1(c).⁵⁴ Lafayette claims that “notwithstanding the above” is generally understood to mean that ‘what follows will override what was previously stated.’⁵⁵ Therefore, Lafayette proposes to change “notwithstanding the above” to read “notwithstanding SPP’s authority to limit the sharing of information in the circumstances described in Section 8.1(b). . . .” Furthermore, Lafayette argues that section 8.1(c)(i) should be clarified to state that SPP will share information necessary to allow a balancing authority to comply with “any obligation imposed on itself by NERC or anyone with authority over a balancing authority’s operations.”⁵⁶ Lafayette claims that the current language in the section is too narrowly drawn, and that it does not account for situations in which personnel who perform both balancing authority and market functions require information from SPP to meet regulatory or other obligations beyond just NERC and regional reliability requirements.

44. SPP replies that sections 8.1(b) and (c) require no modification and that Lafayette’s objection is an argument about drafting and has little impact on the Balancing Agreement. SPP maintains that the language of Section 8.1(c) is unambiguous and that it

⁵⁴ Section 8.1(c) states: Notwithstanding the above, (i) SPP shall provide, to the extent necessary, information to allow the [b]alancing [a]uthority to perform its functions under this [Balancing] Agreement and to comply with NERC and regional reliability requirements, and (ii) no [b]alancing [a]uthority shall be obligated to restructure its operations (in place as of the time of its execution of this [Balancing] Agreement) to separate [b]alancing [a]uthority personnel from marketing personnel.

⁵⁵ Lafayette Comments at 6.

⁵⁶ *Id.* at 6-7.

is intended (1) to ensure that SPP will provide sufficient information to Balancing Authorities to ensure that they can perform their obligations under the Balancing Agreement and comply with NERC and regional reliability requirements, and (2) no balancing authority will be obligated to restructure its operations. Therefore, SPP states that, section 8.1(c) will control if there is a conflict between section 8.1(c) and section 8.1(a) or (b). SPP also opposes Lafayette's proposed modification to Section 8.1(c)(i), because section 8.1 (c) is intended to address reliability requirements for the SPP imbalance market, not regulatory issues.

2. Commission Determination

45. We find that the effect of section 8.1 is ambiguous because it appears to permit balancing authorities, including those that are subject to the Commission's Standards of Conduct,⁵⁷ to share non-public transmission and customer information with marketing or merchant personnel. The Commission requires adherence to the Standards of Conduct only by public utilities, not other utilities that may be balancing authorities. Under the independent functioning requirements of the Standards of Conduct, the transmission and reliability functions of a Transmission Provider must operate independently of its marketing and energy affiliates, including marketing functions.⁵⁸ We believe that the Signatories do not intend for section 8.1 to waive the Commission's Standards of Conduct. Rather, we believe the Signatories' intent would be better reflected in the Balancing Agreement if section 8.1 were revised to begin as follows:

This Agreement does not require any Balancing Authority to separate Balancing Authority personnel from marketing personnel; nor does this Agreement waive any requirement of the Commission's Standards of Conduct or exempt any public utility Balancing Authority from the Standards of Conduct.

46. Accordingly, we direct the Signatories to revise section 8.1 by inserting this language, deleting section 8.1(c)(ii) from the Balancing Agreement, and clarifying that the existing section 8.1(a)-(c) applies to balancing authorities that are not public utilities (other than the last two sentences following section 8.1(c) which apply to all balancing

⁵⁷ Generally, the Standards of Conduct contain information sharing prohibitions that restrict the ability of a Transmission Provider to share non-public transmission or customer information with its Marketing and Energy Affiliates. 18 C.F.R. §358.5(a) and (b)(1) and (2) (2006).

⁵⁸ 18 C.F.R. § 358.2(a).

authorities). Signatories should make these revisions prior to SPP filing the Balancing Agreement as an SPP rate schedule, as discussed below.

47. Additionally, we find that that the language following section 8.1(c) permitting balancing authorities to share confidential information with NERC, the ERO, or any regulatory agency in certain circumstances⁵⁹ to be in conflict with the confidentiality provision related to disclosure to state regulators mandated by the Commission in section 7 of Attachment AE.⁶⁰ Under Attachment AE, disclosure to state regulators is restricted to instances where such disclosure is required to fulfill statutory responsibilities and the state regulators execute non-disclosure agreements. Consistent with the *SPP Market Order*,⁶¹ SPP is directed to amend this provision to state that balancing authorities may provide confidential information to state regulatory agencies as long as the information is necessary to satisfy state regulatory agency statutory responsibilities and state regulatory agencies execute a non-disclosure agreement. Otherwise, we find section 8 of the Balancing Agreement to be reasonable and that the modifications proposed by Lafayette are not necessary.

E. Allocation of Operational Responsibilities

1. Comments

48. Golden Spread argues that the Commission should not permit SPP and an individual balancing authority to bilaterally alter the terms of section 4 of the Balancing Agreement without Commission Approval.⁶² In that section, the Signatories agree that SPP and a balancing authority may agree to a modification of the division of responsibilities between the balancing authority and SPP. Golden Spread contends that permitting SPP and a balancing authority to alter any of the terms of Section 4 without

⁵⁹ Specifically it states that “. . . if NERC, the ERO, or any regulatory agency requires that the [b]alancing [a]uthority provide information required to be confidential under this provision, the [b]alancing [a]uthority may provide such information to the requesting entity, provided that the [b]alancing [a]uthority shall make a good faith attempt to maintain the confidentiality of the information, notwithstanding the information request.”

⁶⁰ See *SPP Market Order*, 114 FERC ¶ 61,289 at P 216-221.

⁶¹ *Id.*

⁶² Golden Spread Comments at 2-3.

requiring Commission approval creates the risk that an alteration will permit a balancing authority to provide itself with a competitive advantage, or permit it to discriminate among market participants.⁶³

49. SPP replies that section 4.13.3 is reasonable because the Balancing Agreement may not be able to address all of the specific issues of each balancing authority. It claims that customers are protected since any such an agreement would be filed with the Commission.⁶⁴

2. Commission Determination

50. We accept the proposed allocation of responsibilities as outlined in section 4. However, we direct that SPP clarify section 4.9.6.⁶⁵ The second sentence in this provision is ambiguous because it may be interpreted to reference SPP's operating reserve contingency program or SPP's day-ahead resource planning requirements under Attachment AE, section 2.2 *et seq.* We are concerned that the language could be read to allow balancing authorities to preempt SPP's authority pursuant to Attachment AE to evaluate market participant's resource plans and direct market participants to commit or decommit resources. Although such preemption would not be reasonable, we find that coordination between market participants and balancing authorities to meet demand during an operating reserve contingency is appropriate and reasonable. Accordingly, SPP must modify this language to clarify that balancing authorities may not preempt SPP's day-ahead resource planning authority under Attachment AE.

51. Regarding bilateral alteration of the terms of the Balancing Agreement, we note that we are directing SPP to refile the Balancing Agreement. We affirm that any such separate agreements that modify section 4 of the Balancing Agreement must be filed with

⁶³ *Id.*

⁶⁴ SPP Reply Comments at 11-12.

⁶⁵ This section states:

The [b]alancing [a]uthorities retain the responsibility of resource commitment to ensure operating reserve (SPP Criteria 6) sufficiency. The [b]alancing [a]uthorities, with support from SPP, will coordinate with other Market Participants within the Balancing Area to manage resource commitment to meet demand.

the Commission for review of the justness and reasonableness of any deviation from the terms of the Balancing Agreement.

F. Disposition of Filing and Compliance Requirement

52. The Balancing Agreement constitutes a just and reasonable resolution of the issues that the Commission set for settlement procedures in the *SPP Market Order*, with the exception of the modification of sections 4.9.6, 6.3, and 8.1 ordered above, and we approve it. We direct SPP to file within 30 days of the date of this order, the tariff language in Attachment B. Further, within 30 days of the date of this order, SPP is directed to refile the Balancing Agreement, modified as directed above, as a rate schedule consistent with Order No. 614.⁶⁶

53. We also direct SPP, pursuant to section 13 of the Balancing Agreement, to inform the Commission within seven days of the date of this order whether the Signatories will accept the modifications directed above.

The Commission orders:

(A) The Offer of Settlement is hereby conditionally approved, as discussed in the body of this order.

(B) SPP is directed to inform the Commission on whether the Signatories accept the modifications directed herein.

(C) If the Signatories accept the modifications directed above, SPP is directed to make compliance filings as described in the body of this order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

⁶⁶ *Designation of Electric Rate Schedule Sheets*, Order No. 614, 65 Fed. Reg. 18,221, FERC Stats. & Regs. ¶ 31,096 (2000).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket No. ER06-451-003

(Issued November 17, 2006)

KELLY, Commissioner, *dissenting in part*:

This order conditionally approves a contested settlement between SPP and the SPP balancing authorities related to the pending implementation of SPP's energy imbalance service market. I disagree with this order to the extent it approves provisions that apply the *Mobile-Sierra* "public interest" standard to future changes to the Balancing Agreement sought by a non-party or the Commission acting *sua sponte* and provisions that limit the liability of SPP and the balancing authorities.

SPP is developing a new energy imbalance market, including the implementation of a real-time, offer-based energy market that will be used to calculate the price of imbalance energy. Through its implementation of the imbalance market, SPP will unilaterally perform many balancing authority functions and also share some tasks with the balancing authorities. The Balancing Agreement sets forth the division of the functional responsibilities between SPP and the balancing authorities and how they will work together to implement SPP's new energy imbalance market arrangements.

The settling parties request that the standard of review the Commission should apply to future changes to the Balancing Agreement, whether proposed by a party, a non-party, or the Commission acting *sua sponte* is the *Mobile-Sierra* "public interest" standard. The order rejects comments by Lafayette Utilities System and TDU Intervenors opposing the "public interest" standard provision. Instead, the order approves the "public interest" provision on grounds that the Commission previously accepted a similar provision in the *Midwest ISO Settlement Order*¹ and that the Balancing Agreement allows the signatories to make changes through means other than FPA section 206, either through voting, negotiations or dispute resolution. The order also notes that the Balancing Agreement contains a provision stating that signatories will modify the agreement if the Commission changes its policy regarding the standard of review with regard to non-signatories. I do not find this reasoning persuasive and I would strike the "public interest" standard provision.

¹ *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,177 (2005) (Cmr Kelly dissenting) (*Midwest ISO Settlement Order*).

I do not believe that the contracting parties have affirmatively demonstrated why the “public interest” standard should apply with respect to future changes sought by the Commission acting *sua sponte* or non-parties, particularly since the responsibilities and tasks performed under the Balancing Agreement will impact not only the parties, but also non-party market participants and the operation of SPP’s new energy imbalance market as a whole. In this regard, the Balancing Agreement differs from the fixed-rate contracts at issue in *Mobile* and *Sierra* “where one party to a rate contract on file with FERC attempt[ed] to effect a unilateral rate change by asking FERC to relieve its obligations under a contract whose terms are no longer favorable to that party.”² Furthermore, while I agree that the Balancing Agreement enables the *signatories* to effectuate future modifications through means other than FPA section 206, this does not address my concern that the Balancing Agreement does not allow *non-signatory* market participants and the *Commission* to seek future changes under the “just and reasonable” standard pursuant to FPA section 206. In addition, the existence of a provision requiring the signatories to modify the Balancing Agreement if the Commission imposes a different standard than the “public interest” standard does not change the fact that the “public interest” standard provision applies to changes sought by non-parties or the Commission acting *sua sponte* in the meantime.

Furthermore, the order accepts provisions in the Balancing Agreement and proposed tariff language whereby SPP and the balancing authorities would not be liable to transmission customers or market participants for acts or omissions in performing obligations under the Balancing Agreement, except in cases of gross negligence or intentional misconduct. These provisions are similar to the broadly-worded liability limitation provisions SPP filed to its Open Access Transmission Tariff, and which were approved by the Commission in *Southwest Power Pool, Inc.*³ For the reasons set forth in my partial dissent from *Southwest Power Pool, Inc.*, I do not believe that the parties have shown that these provisions achieve a proper balance between reasonable customer rates and the rights of harmed parties to seek recovery for certain acts by jurisdictional utilities.

For these reasons, I respectfully dissent in part from this order.

Suedeen G. Kelly

² See *Maine PUC v. FERC*, 454 F.3d 278, 284 (D.C. Cir. 2006).

³ 112 FERC ¶ 61,100 (2005).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket No. ER06-451-003

(Issued November 17, 2006)

WELLINGHOFF, Commissioner, dissenting in part:

SPP is in the process of implementing an imbalance market, including a real-time, offer-based energy market that will be used to calculate the price of imbalance energy.¹ In conjunction with that market, SPP will unilaterally carry out certain tasks within the balancing function and the reliability function. SPP, however, also will share certain tasks in these areas with the balancing authorities in the region. The Balancing Agreement that is the subject of the instant settlement allocates between SPP and the balancing authorities the tasks within the balancing function and the reliability function.

The settling parties ask the Commission to apply the “public interest” standard of review to future changes to the Balancing Agreement sought by any of the parties, a non-party, or the Commission acting *sua sponte*. Lafayette Utilities System and TDU Intervenors protest that application of the “public interest” standard. Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,² I believe that it is inappropriate for the Commission to grant the settling parties’ request and agree to apply the “public interest” standard to future changes to the Balancing Agreement sought by a non-party or the Commission acting *sua sponte*. Therefore, I dissent with respect to the Commission’s decision on that issue in this case.

I stated in *Entergy* that the electric and natural gas industries have operated and thrived under the “just and reasonable” standard for seven decades, during which time that standard has served the Commission well as a tool to protect the interests of consumers. That fact lends support to my further statement in *Entergy* that the Commission should only grant requests to apply the “public interest” standard to future changes sought by a non-party or the Commission acting *sua sponte* in narrowly proscribed circumstances where substantial evidence affirmatively demonstrates that the

¹ On October 25, 2006, SPP advised the Commission of a further delay in the scheduled implementation of its imbalance market. SPP stated that its Board of Directors decided not to certify SPP’s readiness for a December 1, 2006 start date, but agreed to consider certification for a February 1, 2007 start date at its December 12, 2006 meeting.

² 117 FERC ¶ 61,055 (2006) (*Entergy*).

agreement at issue has broad-based benefits to both parties and non-parties. I also stated that in assessing such benefits, I would take into consideration, among other factors: (1) whether the agreement was negotiated through a stakeholder process reflecting a wide range of interests, (2) whether state commissions had meaningful opportunity to participate in the stakeholder process, (3) the extent of and justification for opposition to the request for the Commission to apply the “public interest” standard, and (4) whether granting the request is necessary to the resolution of the proceeding.

A well-functioning imbalance market can provide benefits to all market participants. With that potential in mind, the Commission two years ago accepted SPP’s commitment to develop an imbalance market,³ and we have since conditionally accepted as just and reasonable SPP’s operations proposal for that market.⁴ In today’s order, we are further finding the allocation of responsibilities set forth in the Balancing Agreement to be just and reasonable. I agree with these conclusions, which highlight the “just and reasonable” standard of review as central to the Commission’s analysis.

I believe that parties seeking a different, more stringent standard of review must demonstrate the counterbalancing, broad-based benefits that their agreement provides. In *Entergy*, for example, repeated attempts to resolve an extensive and persistent problem with access to transmission capacity had failed, and the agreement at issue presented a significantly different approach to remedy the situation. Likewise, the Commission recently agreed to apply the “public interest” standard in narrow circumstances requested by the parties to a settlement that is designed to resolve longstanding capacity problems in New England.⁵ Here, the parties have failed to show that such counterbalancing, broad-based benefits will stem from the Balancing Agreement.

Moreover, it is evident that granting the parties’ request is not necessary to the resolution of this proceeding. SPP states that Section 13.3 of the Balancing Agreement provides that, if the Commission changes its policy with regard to non-signatories and imposes a standard different than the “public interest” standard of review, then the settling parties will modify the Balancing Agreement to reflect the new standard.

³ *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 at P 134, *order on reh’g*, 109 FERC ¶ 61,010 (2004).

⁴ *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,289, *order on reh’g*, 116 FERC ¶ 61,289 (2006).

⁵ *Devon Power LLC*, 117 FERC ¶ 61,133 (2006).

In addition, for the reasons that I identified in *Southwestern Public Service Co.*,⁶ I disagree with both the majority's statement that the Commission has discretion only "under limited circumstances" as to the applicability of the "public interest" standard, and the majority's corresponding characterization of case law on that subject.

Finally, I share many of Commissioner Kelly's concerns with regard to the limitation of liability provisions in the instant settlement. I do not believe that the settling parties have adequately supported their selection of a gross negligence standard.

For these reasons, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

⁶ 117 FERC ¶ 61,149 (2006).