119 FERC ¶ 61,167
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Milford Power Company, LLC Docket Nos. ER05-163-000
ER05-163-001
ER05-163-002
ER05-163-003
ER05-163-004

ORDER ON CONTESTED SETTLEMENT AGREEMENTS

(Issued May 18, 2007)

1. On April 19, 2006, Milford Power Company, LLC (Milford), ISO New England Inc. (ISO-NE), the Connecticut Department of Public Utility Control (CT DPUC), and the Connecticut Office of Consumer Counsel (CT OCC) (collectively, the Settling Parties) submitted for filing a Joint Offer of Partial Settlement (Partial Settlement Agreement) intended to resolve all issues in this proceeding, except for the dollar amount Milford would collect as its cost-of-service payment under its Reliability Must Run (RMR) agreement with ISO-NE. On October 27, 2006, the Settling Parties submitted for filing a second Settlement Agreement (Defined COS Settlement Agreement) establishing Milford's cost-of-service. Collectively, the Partial Settlement Agreement and the Defined COS Settlement Agreement (Settlement Agreements) purport to resolve all issues in this proceeding. As discussed below, we approve the Settlement Agreements in part, subject to conditions, reject the Settlement Agreements in part, and direct the Settling Parties to make a compliance filing.

I. Procedural History

2. On November 1, 2004, as supplemented on January 21, 2005, Milford submitted for filing its unexecuted RMR agreement with ISO-NE. The RMR agreement provides that Milford will collect a fixed monthly payment, based on its Annual Fixed Revenue Requirement (AFRR), for providing reliability services from Milford Station—a new,

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approximately 555 MW, two-unit, combined cycle generating facility in Southwest Connecticut.[1]

3. Milford and ISO-NE negotiated the RMR agreement under section 3.3 of Exhibit 2, Appendix A of Market Rule 1 of ISO-NE's tariff.[2] The RMR agreement generally conforms to the *pro forma* Cost of Service Agreement contained in Market Rule 1. Milford claimed that the RMR agreement is necessary to ensure that Milford Station continues to operate and support reliability in New England. Milford supported its claim by noting ISO-NE's determination that Milford Station was necessary for reliable system operation. Milford also submitted affidavits in support of its contention that it has under-recovered its costs for operation and expects to receive inadequate revenues from the market to recover the costs of continued operation. Milford provided further clarification about its cost information and the losses it sustained in the market in a supplemental filing responding to a Commission deficiency letter.

4. In *Milford I*, the Commission accepted the RMR agreement for filing, suspended it for a nominal period, made it effective November 3, 2004, subject to refund, and set it for hearing and settlement judge procedures.[3] The Commission held the hearing in abeyance pending the outcome of settlement judge procedures. The Commission also directed Milford to submit a compliance filing. In *Milford II*, the Commission denied rehearing, but granted clarification on certain issues. Milford's compliance filing was accepted in a separate order.[4]

5. The Settling Parties filed the Partial Settlement Agreement on April 19, 2006. The Settling Parties state that the Partial Settlement Agreement would resolve each issue in this proceeding, except for the amount Milford would collect as its cost-of-service. On October 27, 2006, the Settling Parties filed the Defined COS Settlement Agreement. The Settling Parties state that the Defined COS Settlement Agreement resolves the cost-of-

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[1] Milford Station shares use of a substation with two deactivated units, Devon 7 and 8. Devon 7 and 8 formerly provided reliability services under an RMR agreement with ISO-NE.

[2] Market Rule 1 was approved by the Commission in *New England Power Pool*, 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).

[3] *Milford Power Co., LLC*, 110 FERC ¶ 61,299 (2005) (*Milford I*), *reh'g denied and clarification granted*, 112 FERC ¶ 61,154 (2005) (*Milford II*).

[4] *Milford Power Co., LLC*, Docket No. ER05-163-003 (October 11, 2005) (unpublished delegated letter order).

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service issue. Under the Defined COS Settlement Agreement, Milford's AFRR is reduced from $81.62 million to $72.5 million.

6. The Connecticut Municipal Electric Energy Cooperative (CMEEC) and Richard Blumenthal, Attorney General for the State of Connecticut (Connecticut Attorney General) filed separate comments opposing the Partial Settlement Agreement. Commission Trial Staff (Trial Staff) filed initial comments supporting the Partial Settlement Agreement. Milford, Trial Staff, and CT DPUC and CT OCC (CT DPUC and CT OCC, collectively as the Connecticut Parties) filed reply comments supporting the Partial Settlement Agreement. Following the submission of initial and reply comments, the Settlement Judge reported that the Partial Settlement Agreement was contested.

7. CMEEC and the Connecticut Attorney General filed comments opposing the Defined COS Settlement Agreement. Trial Staff filed initial comments supporting the Defined COS Settlement Agreement. Milford and CT DPUC filed reply comments supporting the Defined COS Settlement Agreement. Following the submission of initial and reply comments, the Settlement Judge reported that the Defined COS Settlement Agreement was contested.

8. The comments opposing the Settlement Agreements 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 agreement by non-signatories under the public interest standard of review. Second, the Connecticut Attorney General offers separate arguments that generally dispute Milford's eligibility for RMR treatment.

II. Discussion

A. Provisions Regarding Standard of Review

1. The Settlement Agreements

9. The Settlement Agreements contain two sections addressing the standard of review. Section 5(u) of the Partial Settlement Agreement amends the RMR agreement to include a *Mobile-Sierra*[5] provision.[6] The *Mobile-Sierra* provision states that the Commission will apply the "public interest" standard of review to all challenges to or proposed modifications of the RMR agreement, Milford's RMR eligibility, or Milford's entitlement to its cost-of-service, whether brought by the Commission on its own motion,

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[5] *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*).

[6] The *Mobile-Sierra* provision is proposed section 9.6.1of the RMR agreement.

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or by a non-signatory. The *Mobile-Sierra* provision further provides that: (a) commencing on July 1, 2008, ISO-NE may submit filings under section 206 of the Federal Power Act (FPA)[7] seeking changes to the RMR agreement related to Milford Station's performance or reliability, subject to the just and reasonable standard of review; (b) Milford may file under section 205 of the FPA[8] to seek recovery of any additional costs associated with modifications required by changes ISO-NE seeks in a section 206 filing, subject to the just and reasonable standard of review; and (c) if Milford Station is sold or its book value is the subject of impairment during the term of the RMR agreement, the Commission, on its own motion, or a signatory or non-signatory upon complaint, may initiate a section 206 proceeding, subject to the just and reasonable standard of review, for the sole purpose of determining whether Milford's defined cost-of-service should be adjusted to reflect the sale price or the post-impairment book value, prospectively from the date of the closing of the sale or the write-down.

10. Section 4(c) of the Defined COS Settlement Agreement makes a conforming change to the *Mobile-Sierra* provision. Section 4(c) provides that challenges to the Defined COS Settlement Agreement, whether on the Commission's own motion, on complaint by a non-signatory, or on complaint by one of the Settling Parties, will be subject to the public interest standard of review.

2. Initial Comments on the Partial Settlement Agreement

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.[9] 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 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."[10]

12. CMEEC advances four arguments against the *Mobile-Sierra* provision. First, CMEEC claims that Commission approval of the public interest standard would be "contrary to long-standing Commission precedent."[11] CMEEC acknowledges the

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[7] 16 U.S.C. § 824e (2000).

[8] 16 U.S.C. § 824d (2000).

[9] CMEEC's Initial Comments on Partial Settlement Agreement at 1.

[10] *Id*. at 3-4.

[11] *Id*. at 4.

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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.[12] 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).[13] 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.[14] 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 Agreements without ordering changes to the *Mobile-Sierra* provision in the first place.[15]

13. CMEEC next argues that binding non-signatories to the public interest standard violates the FPA.[16] CMEEC claims that the FPA imposes an affirmative obligation on the Commission to protect consumer interests, and that approving the *Mobile-Sierra* provision contradicts that command.[17] CMEEC argues that Congress carefully crafted a 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.[18] CMEEC further objects to what it characterizes as the Settling Parties' attempt to diminish its statutory rights. CMEEC claims that, absent a

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[12] *Id*. at 4-6 (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*)).

[13] *Id*. at 6 (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*)).

[14] *Id*. at 6-7.

[15] *Id*. at 6-7.

[16] *Id*. at 8-10.

[17] *Id*. at 8-10.

[18] *Id*. at 9.

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clear and voluntary waiver by CMEEC, the Commission lacks the authority to require CMEEC to waive its statutory rights.[19]

14. Third, CMEEC argues that RMR agreements are "last resorts" under Commission policy, and it is therefore crucial that Milford meets the Commission's financial eligibility requirements.[20] CMEEC questions whether Milford will continue to meet these requirements given the "transition payments" Milford will collect under the LICAP/Forward Capacity Market (FCM) Settlement.[21] 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,"[22] and requests that the Commission not compromise its right to advance a future eligibility challenge by approving the *Mobile-Sierra* provision.[23]

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 Agreements. CMEEC states that while the Settling Parties' desire to restrict the rights of third parties is understandable, it is inconsistent with the FPA.[24] CMEEC also argues that policies favoring settlement agreements cannot override statutory rights.[25]

16. The Connecticut Attorney General agrees with and adopts CMEEC's comments.[26]

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

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[19] *Id*. at 11.

[20] *Id*. at 11-12.

[21] *Id*. at 12-13.

[22] *Id*. at 13 (emphasis in original).

[23] *Id*.

[24] *Id*. at 14.

[25] *Id*.

[26] Connecticut Attorney General's Initial Comments on the Partial Settlement Agreement at 16.

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3. Reply Comments on the Partial Settlement Agreement

18. Milford argues that the *Mobile-Sierra* provision is consistent with case law and Commission precedent. Milford points to the *PJM* language, and argues that CMEEC's assertion that Commission precedent and case law does not apply to *Mobile-Sierra* clauses when they first come before the Commission "turns the *Mobile-Sierra* doctrine on its head and would, in fact, completely swallow the doctrine whole."[27] Milford 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."[28]

19. Milford contests CMEEC's claim that the weight of Commission precedent supports CMEEC's position. Milford argues that CMEEC's position rests on a single case, *Carolina Power*,[29] where the Commission held that contracting parties could not bind the Commission to the public interest standard of review when the Commission acts on its own motion or pursuant to a complaint filed by a non-signatory.[30] Milford claims that *Carolina Power* "simply cannot be reconciled with decades of Commission and court rulings" reaching contrary conclusions.[31]

20. Milford also argues that its potential to collect transition payments under the LICAP/FCM Settlement does not render the Settling Parties' choice of the public interest standard unjust or unreasonable. Milford states that its cost-based rates will be collected through a combination of RMR and transition payments and that the transition payments will be credited against its monthly fixed charge so that its total revenue never exceeds its full cost-of-service rate.

21. 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

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[27] Milford's Reply Comments on the Partial Settlement Agreement at 15.

[28] *Id*. at 15-16.

[29] *See supra* note 12.

[30] Milford's Reply Comments on the Partial Settlement Agreement at 20.

[31] *Id*.

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Commission, Milford 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.[32] 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 Partial 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.[33]

22. Trial Staff initially did not object to the *Mobile-Sierra* provision,[34] but urges caution in its reply comments. Trial Staff states that the Commission should carefully consider whether binding non-signatories to the public interest standard is appropriate given "the length of time the RMR [a]greement and the Defined COS are likely to be in effect" and "the historic level of controversy associated with Installed Capacity and the almost inevitable unforeseen consequences concerning generator compensation in the ISO-NE market."[35]

23. Trial Staff raises two specific concerns for the Commission to consider before approving the public interest standard. Trial Staff first notes that section 5(c) of the Partial Settlement Agreement allows Milford to impose its cost-of-service for five years, while section 5(f) preserves Milford's right to terminate the Partial Settlement Agreement upon 30 days notice.[36] Trial Staff is concerned that these sections could work with the *Mobile-Sierra* provision to create a classic safety net situation.[37] Trial Staff argues that Milford is guaranteed a cost-of-service if it perceives that market rates are too low. If market rates are high, however, Trial Staff states that Milford could abandon the RMR

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[32] Connecticut Parties' Reply Comments on the Partial Settlement Agreement at 8.

[33] *Id*. at 9.

[34] In its initial comments, Trial Staff supported the Partial Settlement Agreement because it permitted the parties to focus their attention on the cost-of-service issue. Trial Staff argued that the Partial Settlement Agreement was fair, reasonable, and in the public interest. Trial Staff also stated that the Partial Settlement Agreement potentially provides rate stability and assures the availability of generation capacity in a load pocket, thereby contributing to grid stability. Trial Staff noted, but did not object to, the *Mobile-Sierra* provision.

[35] Trial Staff's Reply Comments on the Partial Settlement Agreement at 4.

[36] *Id*. at 5.

[37] *Id*.

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agreement and enjoy the benefits of a robust market. Trial Staff takes this scenario one step further, and states that if Milford abandons the RMR agreement, and later perceives a market downshift, it could again seek RMR status up to its former rate level under the just and reasonable standard of review. In Trial Staff's view, applying the just and reasonable standard to future eligibility challenges by non-signatories would limit opportunities for this type of whipsawing.

24. Second, Trial Staff states that under section 5(u) of the Partial Settlement Agreement, the Commission, the Settling Parties, and non-signatories can institute a section 206 complaint under the just and reasonable standard of review if there is an impairment in Milford's book value. Trial Staff is concerned, however, that if a non-signatory successfully argues that Milford's cost-of-service should be reduced because of an impairment, Milford will simply terminate the Partial Settlement Agreement under section 5(f) and file for an entirely new cost-of-service, up to its previous defined cost-of-service, under the just and reasonable standard. This would negate the effect of the negative adjustment. Trial Staff recognizes that intervening parties would also be subject to the just and reasonable standard, but argues that this would be a relatively insignificant benefit because Milford would be the entity deciding whether and when to initiate a rate change proceeding. Trial Staff states that while Milford is free to proceed under the just and reasonable standard, other parties would have to meet the public interest standard if they initiated a future complaint concerning Milford's rates or eligibility for RMR treatment. Trial Staff concludes:

> [T]he profound lingering uncertainties concerning the New England energy market and how the provisions of the Settlement may operate in the future here causes Staff to urge the Commission not to exercise its power to impose the public interest standard on non-signatories as set forth in Section 5(u) and grant the relief requested by the CMEEC and the CT AG [Connecticut Attorney General].[38]

4. <u>Initial Comments on the Defined COS Settlement Agreement</u>

25. Trial Staff's initial comments supporting the Defined COS Settlement Agreement are similar to its initial comments supporting the Partial Settlement Agreement. Trial Staff mentions the *Mobile-Sierra* provision, but does not caution the Commission as it did in its reply comments on the Partial Settlement Agreement.

26. CMEEC's initial comments reiterate its opposition to the *Mobile-Sierra* provision. CMEEC acknowledges that the Defined COS Settlement Agreement includes a

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[38] *Id*. at 7.

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conforming change to the *Mobile-Sierra* provision, but states that this change does not address CMEEC's previous objection. CMEEC resubmits its initial comments on the Partial Settlement Agreement, and claims that its position has been strengthened by several events since it submitted those initial comments.

27. First, CMEEC points out that the substance of its objection was considered and supported by the Presiding Judge in response to the Offer of Settlement in *PSEG*.[39] There, the Settlement Judge recommended that the Commission not approve the Offer of Settlement unless it was modified to permit non-signatories to retain their statutory rights.[40] Second, CMEEC argues that in *Blumenthal* the Commission confirmed the ability to challenge a generator's continuing need (and thus eligibility) for an RMR agreement following the generator's collection of "transition payments" under the LICAP/FCM Settlement Agreement.[41] Finally, CMEEC argues that application of the just and reasonable standard is particularly appropriate here given the nature of the contract at issue in this case. CMEEC argues:

> Cost-of-service RMR agreements are the opposites of the paradigmatic, market-based or market-establishing contracts that are said to require the greatest protection against contract changes. . . . Rather, RMR agreements are market-disrupting, opt-out arrangements, entered into for narrow purposes, under circumstances where the ISO's reliability needs give the generator market power. . . . As such, they are exactly the sort of agreements that ought *not* be insulated against changes sought under the "just and reasonable" standard of [s]ection 206.[42]

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[39] *PSEG Power Connecticut, L.L.C.*, 115 FERC ¶63,071, at P 59-63 (2006) (*PSEG*).

[40] CMEEC's Initial Comments on the Defined COS Settlement Agreement at 3-4 (citing *PSEG*, 115 FERC ¶ 63,071 at P 63).

[41] *Id*. at 4-5 (citing *Blumenthal v. ISO New England Inc.*, 117 FERC ¶ 61,038, at P 71 (2006) (*Blumenthal*)).

[42] *Id*. at 7 (emphasis in original).

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28. The Connecticut Attorney General again joins and adopts CMEEC's comments opposing the *Mobile-Sierra* provision.[43]

5. Reply Comments on the Defined COS Settlement Agreement

29. Milford states that CMEEC and the Connecticut Attorney General raise no new arguments. Milford asserts that the Defined COS Settlement Agreement does not deprive non-signatories of their right to file future complaints; it only requires that such complaints be reviewed under the public interest standard.[44] Milford further states that the LICAP/FCM Settlement Agreement expressly recognized the Commission's right to approve an RMR settlement that limits the rights of future complainants to challenge the RMR settlement.[45]

30. CT DPUC reiterates the position it articulated in its reply comments on the Partial Settlement Agreement.

6. Commission Determination

31. As we found in *Bridgeport*,[46] 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.[47] 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

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[43] Connecticut Attorney General's Comments on the Defined COS Settlement Agreement at 3.

[44] Milford's Reply Comments on the Defined COS Settlement Agreement at 2.

[45] *Id*.

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

[47] 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).

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the regional transmission grid for the benefit of users of the grid.[48] Given this reliability component, RMR agreements have wide applicability to the market and to market 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.[49] 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.[50] As a result of these factors, we have concluded that RMR agreements should be used as a last resort.[51] 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

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[48] *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").

[49] *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").

[50] *Id*. at P 29 (stating that "extensive use of RMR contracts undermines effective market performance").

[51] 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.

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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.

32. 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 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.

B. Entitlement to and Eligibility for an RMR Agreement

1. Initial Comments

33. 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 Milford is eligible for an RMR agreement. Specifically, the Connecticut Attorney General points out that Milford will now receive additional compensation in the form of transition payments under the LICAP/FCM Settlement. The Connecticut Attorney General speculates that Milford's financial condition will improve as a result of these transition payments, and that Milford will most likely fail to qualify for an RMR agreement under the Commission's Facility Costs Test.[52] The Connecticut Attorney General claims that the Commission has an obligation to review Milford's RMR eligibility in light of these new revenues, and that Commission approval of the Settlement Agreements would effectively endorse previous Commission decisions made under factual circumstances that no longer exist.

34. The Connecticut Attorney General raises several other arguments challenging Milford's RMR eligibility. First, the Connecticut Attorney General claims that RMR agreements are intended to provide appropriate compensation for older, seldom run generators that are necessary for reliability, and that Milford is ineligible for an RMR agreement because Milford Station is a new and efficient baseload generation facility that operates at a high capacity factor.[53] The Connecticut Attorney General further argues

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[52] Connecticut Attorney General's Initial Comments on the Partial Settlement Agreement at 8. In his comments opposing the Defined COS Settlement Agreement, the Connecticut Attorney General resubmitted his Initial Comments on the Partial Settlement Agreement to renew his opposition to Milford's entitlement to and eligibility for an RMR agreement. *See* Connecticut Attorney General's Comments on the Defined COS Settlement Agreement at 3.

[53] Connecticut Attorney General's Initial Comments on the Partial Settlement Agreement at 7.

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that Milford has not shown that an RMR agreement is necessary to ensure Milford Station's continued availability, as is required by Market Rule 1.[54]

35. In addition, the Connecticut Attorney General argues that the Commission has failed to make an independent determination that Milford Station is needed for reliability, that the Commission improperly delegated whatever authority it has to make reliability determinations to ISO-NE, and that the Commission is obligated to independently verify that Milford Station meets the Commission's reliability and financial requirements for an RMR agreement.[55] 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*,[56] where it set the matter for hearing.[57] 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 Agreements.[58]

36. The Connecticut Attorney General next argues that Commission approval of the Settlement Agreements would unfairly endorse and insulate from appellate review the Commission's failure to consider reactivating the Devon 7 and 8 units as an alternative means of ensuring reliability in Southwest Connecticut.[59] The Devon 7 and 8 units are connected to the grid through the same substation as Milford Station. The Connecticut Attorney General asserts that the Devon 7 and 8 units were adequate to meet ISO-NE's reliability needs before Milford Station came online, that there has been no showing that they are no longer adequate, and that they "are substantially cheaper to operate than the

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[54] *Id*.

[55] *Id*. at 11-12.

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

[57] Connecticut Attorney General's Initial Comments on the Partial Settlement Agreement at 12-13.

[58] *Id*. at 13.

[59] *Id*.

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Milford units."[60] The Connecticut Attorney General further claims that the Commission is obligated to evaluate the possibility of reactivating these lower cost alternatives.[61]

37. The Connecticut Attorney General also argues that Milford should not be entitled to recover all of its fixed and variable costs under the RMR agreement.[62] 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 RMR agreements need only be adequate to ensure that Milford Station avoids shutting down. The Connecticut Attorney General states that the Commission should limit Milford's RMR cost recovery to going-forward costs or require a form of levelized costs that emulates the recovery of a merchant generator in a competitive market.

38. Finally, the Connecticut Attorney General states that the LICAP/FCM Settlement provides that RMR payments will continue into 2010, longer than envisioned by the Commission in *Milford I*.[63] The Connecticut Attorney General cites this as evidence that approving the Settlement Agreements would

> effectively endorse[] and accept[] a number of Commission determinations that are no longer valid as a result of the profoundly changed circumstances resulting from the LICAP[/FCM] Settlement . . . foreclos[ing] the Commission's re-evaluation of these important public policy issues, which include questions of first impression that have not been subject to review by the United States Court of Appeals.[64]

39. Trial Staff supports the Settlement Agreements as fair, reasonable, and in the public interest.[65]

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[60] *Id*. at 13-14.

[61] *Id*. at 14.

[62] *Id*. at 14-15.

[63] *Id*. at 3.

[64] *Id*. at 4-5.

[65] Trial Staff's Initial Comments on the Partial Settlement Agreement at 1; Trial Staff's Comments on the Defined COS Settlement Agreement at 1.

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2. **Reply Comments**

40. Milford argues that the Connecticut Attorney General's objections are impermissible collateral attacks on prior Commission orders.[66] Milford states that the Commission has already held that the age and design of its units do not disqualify it from RMR eligibility,[67] that the RMR agreement does not shelter Milford from the normal workings of a competitive market,[68] that Milford's cost recovery may include its fixed and variable costs,[69] that the Devon 7 and 8 units are not substitutes for Milford Station,[70] and that the Commission did not improperly defer to ISO-NE's reliability determinations.[71] Milford further emphasizes that the Partial Settlement Agreement enjoys either support or non-opposition from all entities directly representing the electric customers of the State of Connecticut,[72] and that the Connecticut Attorney General has no statutory or common law responsibility to oversee electric rates in Connecticut.[73]

41. Milford states that the Connecticut Attorney General's speculation that Milford's RMR eligibility will be affected by the transition payments is without merit.[74] Milford acknowledges that the Settlement Agreements provide for revenues above facility costs, but argues that this is not indicative of unjust or unreasonable ratemaking. Milford

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[66] Milford's Reply Comments on the Partial Settlement Agreement at 6. In its Reply Comments on the Defined COS Settlement Agreement, Milford states that the Connecticut Attorney General's arguments should be rejected for the same reasons set forth in Milford's Reply Comments on the Partial Settlement Agreement. *See* Milford's Reply Comments on the Defined COS Settlement Agreement at 1.

[67] Milford's Reply Comments on the Partial Settlement Agreement at 6-7.

[68] *Id*. at 7-8.

[69] *Id*. at 9.

[70] *Id*. at 10-11.

[71] *Id*. at 11.

[72] *Id*. at 2-3.

[73] *Id*. at 3, n.8 (citing Conn. Gen. Stat. §16-6a; *Blumenthal v. Barnes*, 261 Conn. 434, at 463 (2002); *City of New Haven v. Connecticut Siting Council*, 2002 Conn. Super. LEXIS 2753 at *24).

[74] *Id*. at 8-9.

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explains that the Partial Settlement Agreement and LICAP/FCM Settlement were negotiated in tandem, and that the Partial Settlement Agreement was "*specifically designed* so that Milford will be compensated at its full cost of service through a combination of RMR payments and LICAP Transition Payments."[75] Milford states that the transition payments will be credited against the fixed monthly charge it collects under the RMR agreement, so that the transition payments become a component of its cost-based rates and its total revenues never exceed its full cost-based rate.[76] Milford claims that allowing full cost-based rates through the end of the transition period was a necessary means of correcting the current structural market flaws that originally necessitated the RMR agreement.

42. The Connecticut Parties agree with Milford that the Partial Settlement Agreement fully considers and accounts for the transition payments.[77] The Connecticut Parties further claim that the transition payments may create an incentive for Milford Station to return to fully market-based operations.[78] The Connecticut Parties note that if Milford Station earns revenues from energy and ancillary services markets (including transition payments) that exceed its costs, Milford must credit those excess revenues to customers; Milford can only recover its locked-in return on equity. Since Milford may unilaterally terminate the RMR agreement if it expects that Milford Station's market revenues, including the transition payments, will be greater than its revenues under the RMR agreement, the Connecticut Parties conclude that Milford has a "strong financial motivation to relinquish the RMR safety net."[79]

43. 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 Partial Settlement Agreement because of "the potential benefits of peace now and the uncertain prospects of a potentially better outcome through further litigation."[80] The Connecticut Parties argue that, taken as a whole, the Partial Settlement Agreement

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[75] *Id*. at 8 (emphasis in original).

[76] *Id*. at 21-22.

[77] Connecticut Parties' Reply Comments on the Partial Settlement Agreement at 2-5.

[78] *Id*. at 3-4.

[79] *Id*. at 4.

[80] *Id*. at 6-7.

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ultimately benefits customers. According to the Connecticut Parties, the primary customer benefits include:

> (1) more exacting performance standards in the RMR Agreement to ensure that customers receive the reliability that their RMR payments are intended to assure; (2) coordination of the RMR [a]greement with the terms of the proposed LICAP Settlement to preserve the most rigorous availability incentives; (3) shifting the risk to Milford of increased operations and maintenance costs over the term of the RMR [a]greement by freezing the annual fixed revenue requirement; and (4) final resolution of most contentious RMR issues at least until commencement of the Forward Capacity Market under the LICAP Settlement.[81]

44. CT DPUC adopts and repeats the Connecticut Parties' arguments in favor of the Partial Settlement Agreement in support of the Defined COS Settlement Agreement.

45. Trial Staff agrees with Milford and the Connecticut Parties that the Commission has already addressed the issues raised by the Connecticut Attorney General. In Trial Staff's view, the Connecticut Attorney General is attempting to revisit *Milford I* and *Milford II* in light of the LICAP/FCM Settlement. Trial Staff claims that the appropriate vehicle for doing so is through a motion to the Commission for reconsideration of its rulings in those orders rather than through comments opposing a settlement premised in part on findings in those orders.

3. <u>Commission Determination</u>

46. We agree with Milford, the Connecticut Parties, and Trial Staff that the Commission's previous orders in this proceeding have resolved most of the issues the Connecticut Attorney General raises, including: whether the Commission would permit RMR contracts for new, efficient baseload units,[82] whether the Commission should have relied on ISO-NE's reliability determination,[83] whether the Commission should have considered the Devon 7 and 8 units as reliability alternatives to a Milford RMR

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[81] *Id*. at 7.

[82] *Milford I*, 110 FERC ¶ 61,299 at P 40; *Milford II*, 112 FERC ¶ 61,154 at P 14-16, 21-22.

[83] *Milford I*, 110 FERC ¶ 61,299 at P 42; *Milford II*, 112 FERC ¶ 61,154 at P 14-16, 21-22.

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agreement,[84] and whether Milford should be allowed to recover all of its fixed and variable costs under the RMR agreement.[85] Accordingly, we reject these arguments as impermissible collateral attacks on prior Commission orders.

47. The Commission's previous orders have not, however, addressed whether the transition payments Milford will receive under the LICAP/FCM Settlement will result in Milford becoming financially ineligible for the RMR agreements. However, in this proceeding, the Commission determined that Milford 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 Milford 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 Milford financially ineligible for the RMR agreement is not directed to whether the Settlement Agreements are just and reasonable.

48. The circumstances here are different than those in *Bridgeport*, where the Commission directed the Presiding Judge to examine Bridgeport Energy's initial eligibility and continued eligibility for RMR treatment in light of the transition payments Bridgeport Energy is entitled to collect.[86] 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.[87] Consequently, the Commission remanded the issue to the Presiding Judge to develop a record for the Commission to review,[88] 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.[89] Here, the Commission has already made the

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[84] *Milford I*, 110 FERC ¶ 61,299 at P 43; *Milford II*, 112 FERC ¶ 61,154 at P 14, 17-18.

[85] *Milford I*, 110 FERC ¶ 61,299 at P 70-71; *Milford II*, 112 FERC ¶ 61,154 at P 28-30.

[86] *Bridgeport*, 118 FERC ¶ 61,243 at P 62.

[87] *Id*. at P 61.

[88] *Id*.

[89] *Id*. at P 62.

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threshold determination that Milford is eligible for an RMR agreement,[90] so any further challenge to continuing eligibility is beyond the scope of this settlement proceeding.[91] However, if the Connecticut Attorney General has evidence indicating that the transition payments will render Milford financially ineligible for an RMR agreement, he may file a separate section 206 complaint proceeding.[92]

49. Finally, we observe that Milford is not entitled to retain any 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 Agreements

50. Section 5(f) of the Partial Settlement Agreement permits Milford to unilaterally terminate the proposed RMR agreement prior to the end of the term upon 30 days' notice to ISO-NE.

2. Comments

51. Trial Staff states that Milford's ability to terminate the RMR agreement upon 30 days' notice, coupled with adoption of the *Mobile-Sierra* provision, will enable Milford to whipsaw between a guaranteed cost-of-service and a lucrative market-based rate.[93]

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[90] *Milford I*, 110 FERC ¶ 61,299 at P 40, *Milford II*, 112 FERC ¶ 61,154 at P 21.

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

[92] *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.").

[93] *Supra* at P 23.

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3. Commission Determination

52. We agree with Trial Staff's concern that allowing Milford to cancel the contract upon 30 days' notice (with or without the use of the public interest standard for challenges to its RMR eligibility) is unreasonable.[94] 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.[95] That same potential for abuse is present here. Since generators operating under an RMR agreement do not relinquish their market-based rate authority, Milford could terminate its RMR agreement and collect market-based rates. If Milford was then not content with its market earnings, it could again seek RMR treatment.[96] By approving section 5(f) of the Partial Settlement Agreement, the Commission would theoretically permit Milford to toggle between RMR cost-of-service rates and market-based rates at will.[97] As in *Bridgeport*, we refuse to approve that provision here. Accordingly, the Commission directs the Settling Parties to remove all language in the Settlement Agreements that would allow Milford to unilaterally cancel the RMR agreement and directs the Settling Parties to make a compliance filing reflecting this change within 30 days of the date of this order.

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[94] 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.

[95] *Bridgeport*, 118 FERC ¶ 61,243 at P 66.

[96] Milford 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.

[97] 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*, 117 FERC ¶ 61,038 at P 69. 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 ¶ 61,311at P 2.

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B. Contested Nature of the Settlement Agreements

1. Comments

53. Milford argues that neither CMEEC nor the Connecticut Attorney General raises any genuine issues of material fact, and therefore, the Commission should approve the Settlement Agreements. Milford 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, Milford argues that the Settlement Agreements should be treated as uncontested.

2. Commission Determination

54. As we discuss earlier in this order, the Settlement Agreements are indeed contested. Milford 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 dispute.[98] However, we independently find that there is a question of material fact that has not been addressed by the Settlement Agreements, and therefore, we reject Milford's request to treat the agreement as uncontested as moot.

III. Disposition of Filing and Compliance Requirement

55. 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,[99] "without a determination on the merits that the rates approved are 'just and reasonable.'"[100] 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

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[98] 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.

[99] 18 C.F.R. § 385.602(g)(3) (2006).

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

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establish 'just and reasonable' rates for the area."[101] We have found that the Settlement Agreements are contested, and accordingly, we now must determine whether their terms are just and reasonable. As discussed above, the Commission has determined that the Settlement Agreements have 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 Agreements, as discussed herein.

56. 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 Agreements regarding the standard of review and termination, as discussed above.

The Commission orders:

(A) The Settlement Agreements are 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.

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

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Milford Power Company, LLC — Docket Nos. ER05-163-000, ER05-163-001, ER05-163-002, ER05-163-003, ER05-163-004

(Issued May 18, 2007)

KELLY, Commissioner, *concurring*:

This order approves, subject to conditions, two settlement agreements related to a Reliability Must Run (RMR) Agreement between ISO-New England and Milford Power Company, LLC. The parties to this settlement agreement request that the Commission apply the *Mobile-Sierra* "public interest" standard of review with respect to future changes to the agreements sought by the Commission on its own motion or a non-party. 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.[102] 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*[103] and *Sierra*.[104] 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.[105] Therefore,

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

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

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

[105] *See, e.g., Southwest Power Pool, Inc.*, 117 FERC ¶ 61,207 (2006) (Comm'r

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although I disagree with the characterization of the applicability of the *Mobile-Sierra* "public interest" standard in footnote 47 of the order, I agree with the order's rejection of the proposed "public interest" standard provisions. For these reasons, I concur.

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Suedeen G. Kelly

Kelly, dissenting in part; Comm'r Wellinghoff, dissenting in part) (order approving a "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

Milford Power Company, LLC

Docket Nos. ER05-163-000
ER05-163-001
ER05-163-002
ER05-163-003
ER05-163-004

(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 certain 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*.,[106] 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*.,[107] 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

[106] 117 FERC ¶ 61,055 (2006).

[107] 117 FERC ¶ 61,149 (2006).