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.

Bridgeport Energy, LLC — Docket Nos. ER05-611-005
ER05-611-006

ORDER ON CONTESTED SETTLEMENT AGREEMENTS

(Issued March 23, 2007)

1. On April 19, 2006, Bridgeport Energy, LLC (Bridgeport), 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), filed a Joint Offer of Partial Settlement (Partial Settlement Agreement) pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.[1] On June 22, 2006, the Settlement Judge issued a report on the Partial Settlement Agreement. On December 11, 2006, the Settling Parties filed a Joint Offer of Settlement as to the remaining issue of the cost-of-service of Bridgeport's facility (Defined COS Settlement Agreement) pursuant to Rule 602 of the Commission's Rules of Practice and Procedure. On January 23, 2007, the Settlement Judge issued a certification of the Defined COS Settlement Agreement. In this order, the Commission approves in part, subject to conditions, and rejects in part the Partial Settlement Agreement and Defined COS Settlement Agreement (collectively, the Settlement Agreements) as discussed below. Moreover, the Commission remands to the Presiding Judge the issue of Bridgeport's financial eligibility for a Reliability Must Run (RMR) agreement, as discussed below.

[1] 18 C.F.R. § 385.602 (2006).

I. Procedural History

2. This proceeding arises from a proposed unexecuted RMR agreement between Bridgeport and ISO-NE, which Bridgeport filed with the Commission on February 18, 2005, as supplemented on May 20, 2005 (RMR Agreement). The RMR Agreement is substantially similar to the *pro forma* Cost of Service Agreement contained in Market Rule 1 of ISO-NE's Tariff.[2] The RMR Agreement relates to Bridgeport's approximately 530 MW gas-fired combined cycle generating facility, located in Southwest Connecticut (Facility). In that filing, Bridgeport submitted its proposed FERC Electric Tariff, Original Volume No. 2, and supporting cost data specifying its revenue requirement for providing cost-based reliability services pursuant to an RMR agreement with ISO-NE. According to Bridgeport, its filing was intended to be in accordance with the ISO-NE's Market Rule 1 (Appendix A) and then-recent orders permitting the use of cost-of-service RMR agreements for cost recovery for generating units required for reliability in constrained areas.

3. The Commission issued an order on July 19, 2005, conditionally accepting the RMR Agreement, suspending it for a nominal period, effective June 1, 2005, subject to refund, and establishing hearing and settlement judge procedures.[3] There, the Commission accepted ISO-NE's determination that the Bridgeport Facility is required for reliability; found that Bridgeport would be entitled to full cost-of-service under ISO-NE Market Rule 1, subject to the outcome of a hearing proceeding regarding financial eligibility (as discussed below); and approved Bridgeport's use of a proxy rate of return. The Commission established hearing and settlement procedures for two issues: (1) whether the RMR Agreement was necessary for Bridgeport to recover its Facility Costs[4]; and (2) the amount of its cost-of-service. The following issues of material fact were identified as requiring an evidentiary hearing: (1) whether Bridgeport has realized

---

[2] The Commission approved Market Rule 1 in *New England Power Pool*, 100 FERC ¶ 61,287, *order on reh'g*, 101 FERC ¶ 61,344 (2002), *order on reh'g*, 103 FERC ¶ 61,304, *order on reh'g*, 105 FERC ¶ 61,211 (2003).

[3] *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077 (July 19, 2005 Order), *reh'g denied*, 113 FERC ¶ 61,311 (2005) (December 22, 2005 Order), *reh'g rejected*, 114 FERC ¶ 61,265 (2006) (March 16, 2006 Order).

[4] Facility Costs are defined as costs ordinarily necessary to keep a facility available, including fixed Operation and Maintenance costs, Administrative and General costs and taxes. July 19, 2005 Order, 112 FERC ¶ 61,077 at P 35; *Mystic Development, LLC*, 116 FERC ¶ 61,168, at n.10 (2006) (*Mystic*).

true losses each year since commencing operating in 1999[5]; and (2) whether the RMR Agreement is necessary to prevent deactivation of the Bridgeport Facility.[6] Further, the July 19, 2005 Order determined that, if the hearing found that the RMR Agreement is necessary to prevent deactivation of the Bridgeport Facility, then the hearing and settlement judge procedures should determine a just and reasonable rate. In determining the just and reasonable rate, the July 19, 2005 Order stated, the Commission would consider Bridgeport's full cost-of-service, exclusive of the issues on which it ruled summarily.[7]

4. Bridgeport sought rehearing of, *inter alia*, the Commission's requirement that Bridgeport demonstrate that it is not recovering its Facility Costs in order to be eligible to recover its full cost-of-service. The Connecticut Municipal Electric Energy Cooperative (CMEEC); Richard Blumenthal, Attorney General for the State of Connecticut (CT AG); the CT DPUC; and the CT OCC jointly requested rehearing of, *inter alia*: (1) the Commission's acceptance of ISO-NE's reliability determination; (2) the Commission's approval of Bridgeport's entitlement to full cost-of-service as Bridgeport proposed; and

---

[5] As we clarified in the December 22, 2005 Order:

> [T]he Commission is not requiring that Bridgeport show six years of losses to demonstrate eligibility for an RMR contract. The purpose of this showing is to further develop the record in the instant filing by verifying Bridgeport's claims concerning historic cost recovery, as many of the costs included in the supplemental filing are not fully explained or supported.

December 22, 2005 Order, 113 FERC ¶ 61,311 at P 30.

[6] As we clarified in the December 22, 2005 Order:

> [I]n using the term "deactivation," we were not attempting to establish a standard that is different than "necessary to ensure that the facility will be available." We consider these terms interchangeable. We note that the Commission has stated previously that generators do not need to initiate retirement procedures prior to negotiating an RMR agreement.

December 22, 2005 Order, 113 FERC ¶ 61,311 at P 31.

[7] July 19, 2005 Order, 112 FERC ¶ 61,077 at P 33, 77.

(3) the Commission's determination that the RMR Agreement would expire when the Locational Installed Capacity (LICAP) mechanism is implemented. In the December 22, 2005 Order, the Commission denied both rehearing requests. ISO-NE sought rehearing of the December 22, 2005 Order, but the Commission rejected the request in the March 16, 2006 Order.

5. Following settlement discussions, the Settling Parties filed the Partial Settlement Agreement on April 19, 2006. According to the Settling Parties, the Partial Settlement Agreement resolves all issues in this proceeding related to: (1) ISO-NE's need for the Bridgeport Facility to assure reliability; (2) the eligibility of Bridgeport for the RMR Agreement; (3) Bridgeport's right to collect RMR payments reflecting the full cost-of-service; and (4) the term of the RMR Agreement. The Settling Parties indicated that the determination of the cost-of-service that Bridgeport should be entitled to recover through RMR payments remained outstanding.

6. On June 22, 2006, following the submission of initial and reply comments, the Settlement Judge issued a report on the Partial Settlement Agreement.[8] On October 30, 2006, the Chief Judge terminated settlement judge procedures and re-established hearing procedures as to the cost-of-service issue.

7. On December 11, 2006, the Settling Parties filed the Defined COS Settlement Agreement. According to the Settling Parties, the Defined COS Settlement Agreement resolves the contested issue of the cost-of-service amount that Bridgeport should be entitled to recover through RMR payments and, therefore, the Partial Settlement Agreement and Defined COS Settlement Agreement resolve all issues raised in this proceeding. On January 23, 2007, following the submission of initial and reply comments, the Settlement Judge certified the Defined COS Settlement Agreement as a contested offer of settlement to the Commission.[9]

II. Comments on the Settlement Agreements and Other Pleadings

8. Initial comments on the Partial Settlement Agreement were filed by: (a) Commission Trial Staff (Trial Staff); (b) the CMEEC; and (c) the CT AG. Reply comments were filed by: (a) Trial Staff; (b) Bridgeport; and (c) the CT DPUC and the CT OCC (jointly). These comments are discussed in greater detail below.

---

[8] *Bridgeport Energy, LLC*, 115 FERC ¶ 63,076 (2006).

[9] *Bridgeport Energy, LLC*, 118 FERC ¶ 63,018 (2007) (Certification of Contested Offer of Defined COS Settlement).

9. Initial comments on the Defined COS Settlement Agreement were filed by: (a) Trial Staff; and (b) the CMEEC. The CT AG filed a motion for permission to file initial comments out of time, but the motion was denied by the Settlement Judge. Reply comments were filed by: (a) the CMEEC; (b) Bridgeport; and (c) the CT DPUC and the CT OCC (jointly). These comments are discussed in greater detail below. On February 6, 2007, Bridgeport filed a motion for leave to file response, response to the Presiding Administrative Law Judge's certification of contested offer of settlement, and motion for expedited consideration. On February 21, 2007, the CMEEC filed an answer to Bridgeport's February 6 Motion.

10. Finally, on March 15, 2006, NSTAR Electric & Gas Corporation, on behalf of its affiliated public utility operating companies, Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company (collectively, NSTAR) filed a motion for leave to intervene out of time and comments in response to ISO-NE's response to answers regarding its request for rehearing of the December 22, 2005 Order. On March 29, 2006, Bridgeport filed an answer to NSTAR's motion.[10]

III. Discussion

A. Procedural Issues

11. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. NSTAR has not met this higher burden of

[10] In addition, on October 20, 2006, ISO-NE filed a motion for expedited consideration in the instant proceeding as well as *Milford Power Company, LLC*, Docket No. ER05-163-000, *et al.* (*Milford*) and *PSEG Power Connecticut LLC*, Docket No. ER05-231-000, *et al.* (*PSEG*) (October 20 Motion). Timely responses to the October 20 Motion were filed by: (a) the CT DPUC and the CT OCC (jointly); and (b) the CMEEC. The CT AG filed a response to the October 20 Motion one day out of time. In its October 20 Motion, ISO-NE seeks expedited consideration of the approval of the Partial Settlement Agreement and two additional RMR-related settlement agreements in the *Milford* and *PSEG* proceedings. We find the October 20 Motion to be moot with respect to this instant proceeding, since we make a determination on the Partial Settlement Agreement here. The *Milford* and *PSEG* proceedings are beyond the scope of this proceeding.

justifying its late intervention.[11] Accordingly, we reject as moot Bridgeport's answer to the NSTAR's motion to intervene.

12. We are not persuaded to accept Bridgeport's February 6 Motion and will, therefore, reject it. The CMEEC's answer to Bridgeport's February 6 Motion is therefore moot.

B. Provisions Regarding Standard of Review

1. The Settlement Agreements

13. The Partial Settlement Agreement revises certain parts of the RMR Agreement in several respects. Most significantly, section 9.5 ("Amendments") of the RMR Agreement is revised by the Partial Settlement Agreement to provide that, when acting on challenges to Bridgeport's eligibility for the RMR Agreement or its entitlement to receive its Defined COS, or on modifications to the RMR Agreement, whether on the Commission's own motion or on complaint by a non-signatory, the public interest standard of review, rather than the just and reasonable standard shall apply. The Partial Settlement Agreement also provides that: (a) commencing on July 1, 2008, ISO-NE has the right to make FPA section 206 filings under the just and reasonable standard of review for changes to the RMR Agreement related to the performance of the Facility or reliability; (b) Bridgeport has the right, under FPA section 205, to seek recovery under the just and reasonable standard of review, of any additional costs associated with modifications required by the changes sought by the ISO-NE in a FPA section 206 filing; and (c) if the Facility 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 FPA section 206 proceeding for the sole purpose of determining, based on the just and reasonable standard of review, whether the Defined COS 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.

14. The Defined COS Settlement Agreement makes a conforming change to section 9.5 of the RMR Agreement, as revised by the Partial Settlement Agreement, to reflect that the provisions regarding the Bridgeport Facility's cost-of-service is set forth in the Defined COS Settlement Agreement.

---

[11] *See, e.g.*, *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

2. Initial Comments on the Partial Settlement Agreement

15. Trial Staff supports the Partial Settlement Agreement and recommends its certification and acceptance. Trial Staff states that the "principal object of the Settlement is to establish Bridgeport's eligibility for its Defined COS and Stipulated Bid Costs during a period extending to 2011, unless terminated sooner. . . . Thus, the Settlement potentially provides rate stability and assures the availability of generation capacity in a load pocket, thereby contributing to grid stability."[12]

16. The CMEEC opposes the Partial Settlement Agreement, particularly the newly proposed section (9.5.1) of the RMR Agreement that would require that all FPA section 206 complaints filed by non-signatories be subject to the public interest, rather than the just and reasonable, standard of review. The CMEEC asserts that this provision would severely curtail the rights of non-signatories, including itself, and requests that the Partial Settlement Agreement be modified by the Commission to allow only the just and reasonable standard of review.

17. The CMEEC also argues that use of the public interest standard would be contrary to Commission precedent, maintaining that more recent cases approving settlements that restrict the FPA section 206 filing rights of non-signatories are inapposite.[13] The CMEEC also states that the adoption of a public interest standard of review would be contrary to the FPA.[14] The CMEEC states that the Commission lacks the authority to require the CMEEC to cede its FPA section 206 filing rights, absent a clear and voluntary waiver. The CMEEC also states that the proposed application of the public interest standard would be permissible if it applied strictly to the Settling Parties' rights and obligations, but that the Settling Parties should not be permitted to impair the statutory rights of non-signatories.

18. The CT AG agrees with the CMEEC that proposed section 9.5.1 unfairly impinges upon the rights of non-signatories to contest Bridgeport's eligibility or seek other modifications to the RMR Agreement.

---

[12] Trial Staff Initial Comments on Partial Settlement Agreement at 6-7.

[13] CMEEC Initial Comments on Partial Settlement Agreement 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*)).

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

3. Reply Comments on the Partial Settlement Agreement

19. In its reply comments, Trial Staff urges the Commission to carefully consider whether the public interest standard would be appropriate in the instant proceeding, in light of "the length of time the RMR Agreement 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."[15]

20. Trial Staff also raises several specific concerns with the adoption of the public interest standard. For example, it notes that the Partial Settlement Agreement does not resolve rate issues and, under section 5.c of the Settlement Agreement, Bridgeport will impose the cost-of-service resulting from the next phase of this proceeding for five years, while preserving its right to terminate the Settlement upon 30 days' notice. Therefore, Trial Staff argues, Bridgeport is guaranteed a cost-of-service if it perceives that market rates are too low. In contrast, if the market rates are high, Trial Staff notes, Bridgeport can abandon the RMR Agreement and enjoy the benefits of a robust unregulated energy market, and then, if it perceives at a later stage a market downshift, again seek RMR status up to its former rate level under the just and reasonable standard. Applying the just and reasonable standard to future eligibility challenges would limit opportunities for this type of whipsawing. 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.[16]

21. In its reply comments, Bridgeport argues that use of the public interest standard in most challenges to the Partial Settlement Agreement is necessary to preserve the benefits of the bargain between the Settling Parties and also maintains that precedent does not support the CMEEC's position that contracting parties cannot bind non-signatories to a public interest standard of review. Bridgeport remarks that the CMEEC's entire position

---

[15] Trial Staff Reply Comments on Partial Settlement Agreement at 4.

[16] *Id.* at 7.

rests on the single exception of *Carolina*,[17] which is inconsistent with Commission precedent.

22. Bridgeport further argues that the potential for "transition payments" under the then-pending LICAP/Forward Capacity Market (FCM) Settlement does not render use of the public interest standard unjust and unreasonable. It explains that the Partial Settlement Agreement would allow full cost-based rates through the end of the Transition Period with revenues collected by a combination of RMR payments and Transition Payments and those Transition Payments will be credited against monthly fixed cost charges under the RMR Agreement to ensure that total revenues never exceed full cost-based rates.

23. The CT DPUC and the CT OCC 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 commenters emphasize that the public interest standard for modifications is reciprocal in nature, *i.e.*, in return for applying the public interest standard to non-signatories and the Commission, Bridgeport 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. Thus, both parties assume some risk for changed conditions, they maintain. The CT DPUC and the CT OCC point out 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. In other words, beginning in 2008, ISO-NE may initiate an FPA section 206 proceeding seeking changes that will maintain the unit's performance; others may seek a revision in the cost-of-service to reflect a change in the unit's book value following a sale; and the Partial Settlement Agreement allows ISO-NE or any other party to initiate an FPA section 206 proceeding to terminate the RMR Agreement if the Facility is no longer needed for system reliability.

4. Initial Comments on the Defined COS Settlement Agreement

24. In its initial comments, Trial Staff states its support for the Defined COS Settlement Agreement, stating that the settlement represents a comprehensive resolution of all remaining cost-of-service issues. Trial Staff recommends that the Settlement Judge certify the Defined COS Settlement Agreement to the Commission and the Commission accept it as filed.

[17] *Supra* note 13.

25. The CMEEC filed comments in opposition to the Defined COS Settlement Agreement, reiterating its objection to the new requirement that all FPA section 206 complaints by non-signatories be subject to the public interest, rather than the just and reasonable, standard of review. The CMEEC asserts that this amendment would severely curtail the statutory rights of non-signatories, including the CMEEC, and requests that the Settlement Agreements be modified by the Commission to require the just and reasonable standard.

26. The CMEEC notes that several events since the submission of its initial comments on the Partial Settlement Agreement further support this position. First, the CMEEC notes that it raised comparable objections before the Presiding Judge in response to the Offer of Settlement in the *PSEG* proceeding and there, the Settlement Judge recommended that the Commission not approve the Offer of Settlement unless it were modified to permit non-signatories to retain their statutory rights.[18] Second, the CMEEC argues that the Commission has confirmed the ability to challenge a generator's continuing need (and thus eligibility) for an RMR agreement following its receipt of "transition payments" under the LICAP/FCM Settlement Agreement.[19] Third, the CMEEC cites the recently issued decision in *Williams Power Company, Inc*,[20] in which the Commission conditioned approval of an uncontested amendment to an RMR settlement agreement, as applicable precedent. Fourth, the CMEEC notes that two recent Ninth Circuit opinions regarding *Mobile-Sierra* doctrine cast doubt on newly proposed section 9.5.1's underlying assumption that the public interest standard should be "foisted upon and applied to non-signatories."[21] Fifth, the CMEEC argues that application of the just and reasonable, rather than the public interest standard is particularly appropriate here given the nature of the contract at issue in this case. The CMEEC argues that:

---

[18] CMEEC Initial Comments on Defined COS Settlement Agreement at 3-4 (citing *PSEG Power Connecticut, L.L.C.*, 115 FERC ¶ 63,071, at P 63 (2006)).

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

[20] 117 FERC ¶ 61,328 (2006) (*Williams*).

[21] CMEEC Initial Comments on Defined COS Settlement Agreement at 5-6 (citing *Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 471 F.3d 1053 (9th Cir. 2006) (*PUD v. FERC*); *Public Utils. Comm'n of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006) (*CPUC v. FERC*).

> 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 Section 206.[22]

5. Reply Comments on the Defined COS Settlement Agreement

27. In its reply comments, Bridgeport reiterates the arguments made in its reply comments as to the CMEEC's initial comments on the Partial Settlement Agreement, and defends the use of the public interest standard of review for the proposed RMR Agreement. Bridgeport reiterates that that Commission precedent allows parties to a settlement agreement to bind both the Commission and non-signatories to a public interest standard of review.[23] Bridgeport also notes that the instant proceeding is distinguishable from the Commission's decision in *Williams*. Bridgeport argues that, unlike in *Williams*, the Commission has made an affirmative finding that the New England market design is flawed and, unlike in *Williams*, Bridgeport here has shown why application of the public interest standard is appropriate. Bridgeport notes that the more relevant precedent is that of *Berkshire Power Company, LLC*.[24]

28. Bridgeport further states that the RMR Agreement is not open ended, but limited in duration, expiring in 2010. Bridgeport also argues that the scope of the standard of review provision is, itself, of limited application because there are a number of exceptions carved out from the public interest standard.

29. Moreover, Bridgeport notes that only the CMEEC has filed timely comments opposing the Defined COS Settlement Agreement and that the Defined COS Settlement Agreement reflects a wide range of interest and has been entered into by those state

---

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

[23] Bridgeport Reply Comments on Defined COS Settlement Agreement at 3-4.

[24] 116 FERC ¶ 61,311 (2006) (*Berkshire*).

agencies with principal responsibility for protecting the public interest regarding utility-related issues.

30. Bridgeport further argues that the CMEEC failed to justify rejection of the public interest standard. Bridgeport maintains the CMEEC is wrong that the public interest standard waives statutory rights of non-signatories, arguing that the public interest standard simply places a higher burden of proof on parties seeking modification to a contract which the Commission has approved as just and reasonable in the first instance.

31. Bridgeport argues that use of the public interest standard of review is consistent with the standard of review approved in the LICAP/FCM Settlement. Bridgeport maintains that the CMEEC is wrong in its assertion that the LICAP/FCM Settlement Agreement gives the CMMEC a continuing and unfettered right to seek changes to RMR agreements under FPA section 206.

32. Bridgeport further argues that the standard of review set forth in the Defined COS Settlement Agreement is not inconsistent with the recent decisions by the Ninth Circuit because neither of those cases address the question of whether the public interest standard can be applied to *future* complaints by non-signatories requesting changes to a contract which the Commission has approved as just and reasonable in the first instance.

33. Bridgeport maintains that the CMEEC's application of the just and reasonable standard to future challenges to the rates, terms and conditions of the RMR Agreement would allow it "gain the benefits of the Settlement Agreement now, while claiming a *carte blanche* right to 'cherry pick' the terms of the Settlement Agreement in later years."[25] Bridgeport asserts that the terms of the RMR Agreement fully protect ratepayers from excessive rates in the future, even if its market revenues increase because Bridgeport cannot recover more than the Defined COS, and any market revenues (including FCM Transition Payments) must be offset against the availability payments it receives.

34. Finally, Bridgeport reiterates its arguments that inclusion of the public interest standard in the standard of review provision is necessary to preserve the benefits of the settlement.

35. In their reply comments, the CT DPUC and the CT OCC reiterate the position they articulated in their reply comments on the Partial Settlement Agreement that the public

[25] Bridgeport Reply Comments on Defined COS Settlement Agreement at 16.

interest standard of review for modifications is reciprocal in nature and reflects a compromise that serves to preserve the terms of the Settling Parties' agreement.

36. In its reply comments, the CMEEC notes that Trial Staff's initial comments on the Defined COS Settlement Agreement are inconsistent with Trial Staff's reply comments on the Partial Settlement Agreement with respect to the standard of review. The CMEEC notes that Trial Staff fails to provide any explanation for this difference in its comments.

6. Certification of Contested Offer of Defined COS Settlement

37. In his Certification of the Defined COS Settlement Agreement, the Settlement Judge notes his certification to the Commission of the contested partial offer of settlement filed in the *PSEG* proceeding. There he recommended "that the Commission not accept the Offer of Settlement unless [it is] modified to permit non-parties to maintain their section 205 rights."[26] In that proceeding, the Settlement Judge took issue with Trial Staff's arguments in support of these provisions—the facts that the RMR agreements will only be in effect for a locked-in period and that the generators in question are old and would not operate without the RMR agreements, thus making it unlikely that they will switch back and forth between RMR coverage and the market. The Settlement Judge expressed concern that signatories to an offer of settlement could bind non-signatories to its terms despite the fact that non-signatories have not, voluntarily, given up the rights granted to them under the FPA.[27]

38. In the instant proceeding, the Settlement Judge reviews the precedent cited in his ruling in *PSEG* and cited by the CMEEC and Bridgeport and recommends that "the Commission accept the Offer only if it is modified to allow non-signatories to retain their statutory right to a just and reasonable standard."[28] The Settlement Judge also states that the Commission's order on the LICAP/FCM Settlement emphasized that parties retained

---

[26] *PSEG Power Connecticut, L.L.C.*, 115 FERC ¶ 63,071 at P 63, *referenced in*, Certification of Contested Offer of Defined COS Settlement, 118 FERC ¶ 63,018 at P 36.

[27] *PSEG Power Connecticut, L.L.C.*, 115 FERC ¶ 63,071 at P 61 (citing *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) (holding that FERC may not require utilities to cede their rights to seek rate changes under section 205)), *referenced in*, Certification of Contested Offer of Defined COS Settlement, 118 FERC ¶ 63,018 at P 36.

[28] Certification of Contested Offer of Defined COS Settlement, 118 FERC ¶ 63,018 at P 36.

their rights to challenge the continued need for RMR agreements. The Settlement Judge further finds that the Ninth Circuit's recent decision in the *PUD v. FERC* decision, as emphasized in the *CPUC v. FERC* decision, makes clear that there are three criteria for determining the appropriateness of applying the *Mobile-Sierra* standard:

> (1) the contract must not preclude application of the public interest standard; (2) the contract must allow for the Commission initially to review the contracted rates under a just and reasonable standard; and (3) the review "must permit consideration of the factors relevant to the propriety of the contract's formation."[29]

39. The Settlement Judge argues that the Defined COS Settlement fails the first and third of these criteria. As to the first factor, the Settlement Judge argues that the fact that the Defined COS Settlement Agreement permits several unilateral actions by Bridgeport and ISO-NE, citing in particular section 2.2 (termination provisions) and section 9.5.1 (the standard of review provisions), violates the first criteria set forth in the *PUD v. FERC* decision. The Settlement Judge maintains that the third criteria is also violated because the Commission must be able to make an initial just and reasonable determination, but is unable to review that determination, under the just and reasonable standard, should market conditions change.

7. Commission Determination

40. The Settlement Agreements provide that the just and reasonable standard is only applicable to certain filings made under specific sections of the RMR Agreement, and then only by parties to the contract. For all other filings or actions, the public interest standard would apply, including for: (1) all section 206 proceedings initiated by non-signatories; and (2) all section 206 proceedings initiated by parties that address "other" sections of the RMR Agreement that have not been specified as falling under the just and reasonable standard. The Settling Parties state that applying the public interest standard to the Commission and non-settling parties is appropriate because parties to the RMR Agreement (Bridgeport and ISO-NE) are prohibited from seeking amendments or modifications except pursuant to the specific, identified sections under which the just and reasonable standard applies.

41. 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

[29] *Id.* P 39.

the Commission declining to be so bound to such a standard.[30] RMR agreements are contracts between a generator and the ISO that commit a generator to provide reliability service in return for fixed monthly payments by load in the affected zone. The purpose of an RMR agreement is not simply to allow one party to buy electricity or capacity from another for resale but to ensure the reliable operation of the regional transmission grid for the benefit of users of the grid.[31] 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.[32] 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.[33] As a result of these factors, we have concluded that RMR agreements should be used as a last resort.[34]

---

[30] 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).

[31] *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").

[32] *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").

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

[34] 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

(continued)

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.

42. 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.[35]

C. Entitlement to and Eligibility for an RMR Agreement

1. Initial Comments on the Partial Settlement Agreement

43. In its initial comments on the Partial Settlement Agreement, the CT AG argues that Bridgeport is a new and efficient baseload generation facility that operates at a high capacity factor and, therefore, should not be entitled to RMR treatment. The CT AG argues that Bridgeport's financial condition is likely to improve as a result of the LICAP/FCM Settlement and, therefore, it would not meet the eligibility requirements under the Facilities Cost Test. The CT AG states that the Commission should not abdicate its obligation to review these new revenues.

44. The CT AG also asserts that the Partial Settlement Agreement would unfairly endorse, and insulate from subsequent appellate review, the July 19, 2005 Order, which improperly approved Bridgeport's eligibility for the RMR Agreement by deferring to ISO-NE's reliability determination, and improperly accepted Bridgeport's cost-of-service

---

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.

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

approach and recovery of all fixed and variable costs. The CT AG also states that the Partial Settlement Agreement 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.[36]

2. Reply Comments on the Partial Settlement Agreement

45. In its reply comments, Trial Staff states that, contrary to the CT AG's contentions, the Partial Settlement Agreement does not establish rates, but rather fixes the period in which Bridgeport's cost-of-service rates are to be in effect and, therefore, non-signatories are still able to contest the cost-of-service issues.

46. Trial Staff notes that the Commission earlier had addressed and rejected the CT AG's arguments regarding: (a) whether the Facility is needed for reliability, and (b) whether Bridgeport's rates should reflect its full cost-of-service or only its going forward costs. Trial Staff asserts that the Commission fulfilled its statutory responsibility by conditionally accepting the RMR Agreement for filing, suspending it, and setting it for hearing to ensure that the rates are just and reasonable.

47. Trial Staff also disagrees in part with the CT AG's argument that Commission approval of the Partial Settlement Agreement improperly predetermines the issue of whether Bridgeport is eligible for the RMR Agreement. According to Trial Staff, "[i]n actuality, the Commission specifically set this issue for hearing, so even though the Settlement purports to resolve the eligibility issue, CT AG and any other interested parties have the opportunity to contest the Settlement and litigate the eligibility issue on a factual basis if they so choose."[37] Nevertheless, Trial Staff recognizes that the use of the public interest standard may undermine the ability of non-signatories to litigate the eligibility issue. Specifically, if the public interest standard is retained, then parties wishing to challenge eligibility will be forced into litigation immediately so as to obtain review under the just and reasonable standard before the more exacting public interest

---

[36] CT AG Initial Comments on Partial Settlement Agreement at 4.

[37] Trial Staff Reply Comments on Partial Settlement Agreement at 10.

standard takes effect. Trial Staff notes that this would create an unintended incentive for affected parties to litigate, and thus is contrary to the Commission's policy of favoring settlement. Trial Staff proposes to resolve this incentive problem by applying the just and reasonable standard to future eligibility challenges.

48. In its reply comments, Bridgeport 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. Bridgeport further notes that the CT AG has no statutory or common law responsibility for the electric rates of consumers in the state of Connecticut.[38] Bridgeport asserts that the Partial Settlement Agreement resolves all issues in this proceeding except the full cost-of-service. In addition, Bridgeport argues that the Partial Settlement Agreement resolves the issue of how to treat RMR generators during the transition period until a locational capacity market is put in place in New England.

49. Bridgeport argues that the CT AG's challenges are impermissible collateral attacks on prior Commission determinations. In response to the CT AG's argument questioning whether Bridgeport is entitled to an RMR agreement, calling it a "highly efficient" baseload facility, Bridgeport notes that the Commission's July 19, 2005 Order found that RMR agreements are not reserved for older, inefficient peaking units.

50. Bridgeport maintains that the RMR Agreement does not create a shelter from the normal workings of a competitive market. Bridgeport cites the Commission's conclusions in related RMR proceedings, such as *Milford*, that existing market rates in New England are unjust, unreasonable, and non-compensatory, maintaining that the depressed revenues it faces do not result from a workably competitive market, but rather from a core design flaw.

51. Bridgeport agrees that the Partial Settlement Agreement provides for revenues that exceed Facility Costs, but denies that this is indicative of unjust or unreasonable ratemaking. Bridgeport explains 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.

52. In response to the CT AG's proposal that the Commission limit Bridgeport's cost recovery to forward costs or require levelized costs, Bridgeport notes the issue of forward

---

[38] Bridgeport Reply Comments on Partial Settlement Agreement at 3, n.9 (citing Conn. Gen. Stat. §16-6a; *Blumenthal v. Barnes*, 261 Conn. 434, at 463 (2002); *City of New Haven v. Connecticut Siting Counsel*, 2002 Conn. Super. LEXIS 2753 at *24).

costs limitation was summarily denied in the July 19, 2005 Order and again on rehearing in the December 22, 2005 Order. Similarly, Bridgeport notes that the July 19, 2005 Order set the issue of a levelized rate design for hearing, and urges the Commission to reject the CT AG's request to impose levelized rate design because it is not implicated by the Partial Settlement Agreement.

53. As for the CT AG's challenge to the propriety of the Commission's deferral to ISO-NE's reliability determinations, Bridgeport asserts that this issue was summarily decided in both the July 19, 2005 Order and the December 22, 2005 Order. Bridgeport characterizes the CT AG's challenge as "yet another collateral attack on the Commission's findings" that must be rejected.

54. In their joint reply comments, the CT DPUC and the CT OCC support the Partial Settlement Agreement. They argue that the Partial Settlement Agreement fully considers and accounts for the "changed circumstances" the CT AG cites through proper accounting of transition capacity payments under the proposed LICAP/FCM Settlement. Specifically, the CT DPUC and the CT OCC explain that the transition capacity payments fully offset customers' payments under the RMR Agreement. The commenters maintain that customers thus avoid paying for required capacity twice, as the RMR Agreement payments serve merely to supplement the market's capacity payments and do not duplicate them. Additionally, the CT DPUC and the CT OCC note that the infusion of additional capacity-based revenues may create an incentive for some RMR units to return to fully market-based operations. According to the commenters, if an RMR unit earns revenues from energy and ancillary services markets (including transition capacity payments) that exceed its costs, RMR agreements provide that the revenues are for the benefit of the RMR ratepayers; the RMR operation will only recover its locked-in return on equity, and additional revenues are credited to customers.

55. The CT DPUC and the CT OCC argue that the Commission already has determined many of the issues the CT AG raises in the July 19, 2005 and December 22, 2005 Orders. The commenters note that, although they 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."[39]

56. The CT DPUC and the CT OCC also argue that, taken as a whole, the Partial Settlement Agreement ultimately benefits customers. According to the CT DPUC and the CT OCC, the primary consumer benefits include:

[39] CT DPUC and CT OCC Reply Comments on Partial Settlement Agreement at 6.

> (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 Agreement with the terms of the proposed LICAP Settlement to preserve the most rigorous availability incentives; (3) shifting the risk to Bridgeport of increased operations and maintenance costs over the term of the RMR Agreement 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.[40]

57. The CT DPUC and the CT OCC conclude that these benefits are sufficient to justify foregoing the appeal issues that the CT AG has identified.

3. Commission Determination

58. We agree with Trial Staff and Bridgeport that the July 19, 2005 Order and December 22, 2005 Order resolved several of the issues the CT AG raises, including: whether Bridgeport, as a new and efficient baseload generation facility, is entitled to the RMR Agreement[41]; whether the Commission should have relied on ISO-NE's reliability determination[42]; and whether the Commission should have accepted Bridgeport's cost-of-service approach and recovery of all fixed and variable costs.[43] Accordingly, we reject these arguments as impermissible collateral attacks on prior Commission orders.

59. This is not true, however, for the financial eligibility issue. We have conditionally accepted several RMR agreements in New England (including the RMR Agreement at issue here) while requiring a demonstration in a subsequent hearing that the agreement is necessary for the generator to recover its Facility Costs. As Trial Staff acknowledges, the Commission specifically set this issue for hearing in the instant proceeding.[44] In the

---

[40] *Id.* at 7.

[41] July 19, 2005 Order, 112 FERC ¶ 61,077 at P 34.

[42] *Id.* at P 33, 40; December 22, 2005 Order, 113 FERC ¶ 61,311 at P 8-10.

[43] July 19, 2005 Order, 112 FERC ¶ 61,077 at P 46; December 22, 2005 Order, 113 FERC ¶ 61,311 at P 36.

[44] July 19, 2005 Order, 112 FERC ¶ 61,077 at P 41.

July 19, 2005 Order, the Commission stated that, if hearing procedures determined that the RMR Agreement was necessary for the generator to remain available to ISO-NE, then an RMR cost-of-service would be established in the hearing. The Commission stated:

> It is not obvious that Bridgeport's several years of significant positive returns followed by two years of "inadequate" cost recovery meet the Commission benchmark for granting RMR approval; *i.e.*, the concern that absent an RMR contract, the facility will be unable to continue operation. Bridgeport has been able historically to recover its facility costs in the market, even considering some stated costs that are not fully explained or supported.[45]

60. Further, the July 19, 2005 Order stated that, in a competitive market, the Commission is responsible for assuring that a generator is provided the *opportunity* to recover its costs and that the Commission's standard for RMR approval is the concern that, absent an RMR contract, the facility will be unable to continue operation.

61. As we stated in the July 19, 2005 order, the Commission has an obligation to examine the facts in each instance against the standard of section 205(a) of the FPA that all rates and charges demanded by any public utility for the sale of electric energy subject to the Commission's jurisdiction shall be just and reasonable. Specifically addressing RMR contracts, we noted that the Commission "consider[s] the *need* for these contracts, and the justness and reasonableness of the rates proposed therein, as they are filed."[46] We noted that the Commission employs the Facility Costs Test to assess the need for RMR contracts, contracts that the Commission will approve only when no other option exists. Applying this assessment to the RMR Agreement, the Commission found that it was likely that Bridgeport was provided the opportunity to recover its Facility Costs and that the RMR Agreement was likely unnecessary for Bridgeport. As such, the July 19, 2005 Order established hearing and settlement proceedings to address this threshold issue. The Partial Settlement Agreement states that it "resolves all disputes relating to the eligibility of Bridgeport for the RMR Agreement," among other issues.[47] But, the Partial

---

[45] *Id.* at P 39.

[46] *Devon Power LLC*, 107 FERC ¶ 61, 240, at P 72, *order on reh'g*, 109 FERC ¶ 61,154 (2004), *order on reh'g*, 110 FERC ¶ 61,315 (2005) (emphasis added).

[47] ISO New England Inc., *et al.*, Explanatory Statement in Support of Joint Offer of Partial Settlement and Motion for Expedited Consideration at 2 (Apr. 19, 2006).

Settlement Agreement provides no factual basis for determining resolution of Bridgeport's threshold eligibility for the RMR Agreement. Absent an evidentiary hearing, we will not have an adequate record upon which to make a determination on this issue. Accordingly, the Commission remands this issue to the Presiding Judge.

62. Moreover, the CT AG questions whether the Partial Settlement Agreement disposes of the eligibility issue in a just and reasonable manner. The CT AG highlights the "fundamentally changed" circumstances (specifically, the establishment of transition payments in the LICAP/FCM Settlement) as evidence that these RMR contracts are unnecessary. The CT AG raises the specific issue of whether Bridgeport meets the Facility Costs Test for eligibility for an RMR contract given that the LICAP/FCM Settlement "would provide for substantial additional payments to be made to all generators in New England."[48] The CT AG notes that, in addition to conflicting with the Commission's statements questioning Bridgeport's eligibility for the RMR Agreement, the Commission's approval of the Partial Settlement Agreement would prejudge that Bridgeport was eligible for RMR treatment without any consideration of the impact that an additional $19 to $26 million per year[49] in transition payments would have on Bridgeport's financial condition. As part of the analysis of Bridgeport's threshold eligibility for the RMR Agreement, we direct the Presiding Judge to examine this issue of continuing eligibility as well.[50]

63. We note that our conditional approval of the Defined COS Settlement Agreement does not make a pre-determination as to the issue of need for the RMR Agreement. If the hearing procedures establish that Bridgeport has not demonstrated sufficient need to be eligible for RMR cost-of-service rates, the underlying proposed RMR Agreement will be

[48] CT AG Initial Comments on Partial Settlement Agreement at 3.

[49] The LICAP/FCM Settlement establishes annually increasing transition payments for all generators in New England (payments start at $3.05 kW/month for December 1, 2006 to May 31, 2007 and are capped at $4.10 kW/month for June 1, 2009 to May 31, 2010). *LICAP/FCM Settlement Order*, 115 FERC ¶ 61,340 at P 30.

[50] Now that the Commission has approved the LICAP/FCM Settlement, transition payments must be credited against a generator's Monthly Fixed Cost Charge under an RMR agreement. *Mystic*, 116 FERC ¶ 61,168 at P 30. The Commission finds that from December 1, 2006 (the date that transition payments began being disbursed, *LICAP/FCM Settlement Order*, 115 FERC ¶ 61,340 at P 30) going forward, transition payments must be included in the Facility Costs Test that will be addressed in the hearing. *Mystic*, 116 FERC ¶ 61,168 at P 30.

rejected and the Defined COS Settlement (as with the Partial Settlement Agreement) will be moot.

D. RMR Agreement Termination Provisions

1. The Settlement Agreements

64. Section 5.f of the Partial Settlement Agreement would permit Bridgeport to unilaterally terminate the RMR Agreement prior to the end of the Term of the RMR Agreement, so long as the Facility remains available to ISO-NE as a "listed" capacity resource for the period covered by the Term. Specifically, section 2.2.3 of the RMR Agreement allows Bridgeport to unilaterally terminate the RMR Agreement prior to the end of the term upon 30 days' notice to ISO-NE. The original RMR Agreement only allows ISO-NE to unilaterally terminate the RMR Agreement (upon 120 days' notice).

2. Comments on Partial Settlement Agreement

65. In its comments, Trial Staff expresses concern that Bridgeport's ability to preserve its right to terminate the RMR Agreement upon 30 days' notice, coupled with the adoption of a public interest standard, would afford Bridgeport the benefits of whipsawing between a guaranteed cost-of-service and a market-based system.

3. Commission Determination

66. We agree with Trial Staff's concern that allowing the generator to cancel the contract upon 30 days' notice (with or without the use of the public interest standard for challenges to RMR eligibility) is unreasonable. Although generators operating under an RMR agreement receive monthly cost-of-service rate payments, those generators do not relinquish their market-based rate authority. And, should Bridgeport terminate the proposed RMR Agreement, it subsequently would be able to seek another RMR agreement if it was not content with its earnings in the market. It 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. Therefore, approval of this language would theoretically allow Bridgeport to toggle between RMR cost-of-service rates and market-based rates at will.[51] Addressing Bridgeport's rehearing request, ISO-NE refuted two specific

[51] In addressing this issue in our order on the CT AG's complaint against ISO-NE, we stated that: "the Complainants are incorrect in their allegation that 'owners of generation can opt into or out of RMR coverage, shifting investment risk fully to ratepayers.'" *Blumenthal v. ISO-NE*, 117 FERC ¶ 61,038 at P 69.

(continued)

implications that were inconsistent with the Commission's policy for RMR agreements: (1) that the Commission should always ensure that suppliers are guaranteed to recover their costs; and (2) that a generator should be guaranteed to receive the higher of market-based or cost-based rates, at the expense of properly functioning markets.[52] ISO-NE noted that if these premises are accepted, competitive markets will never develop and/or generators will be guaranteed to earn higher profits that they would under the traditional regulated model at the expense of ratepayers. We agree with ISO-NE's position. Accordingly, the Commission directs the Settling Parties to remove the language in the Settlement Agreements that would allow Bridgeport to unilaterally cancel the RMR Agreement upon 30 days' notice and directs the Settling Parties to make a compliance filing no later than 30 days after the issuance of this order to implement this change.

E. Contested Nature of the Settlement Agreements

1. Comments

67. In its comments, Bridgeport argues that neither the CMEEC nor the CT AG raises any genuine issues of material fact, and therefore, the Commission should approve the settlement. Bridgeport asserts that, even if the CT AG claims to have raised a genuine issue of material fact, the "CT AG has failed to adhere to the Commission's rules, which require a party contesting a settlement as to a particular genuine issue of material fact to provide an affidavit supporting such a claim" and, therefore, the Settlement Agreements should be treated as uncontested.

2. Commission Determination

68. As we discuss earlier in this order, the Settlement Agreements are indeed contested. Bridgeport 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

---

We note that, in the recent order on uncontested settlement for the *Berkshire* proceeding, the Commission accepted a 60-day unilateral opt-out provision. However, the acceptance of an uncontested settlement does not constitute Commission precedent. *Berkshire*, 116 FERC ¶ 61,311 at P 2.

[52] ISO-NE September 2, 2005 Answer at 4.

fact are in dispute.[53] 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 Bridgeport's request to treat the agreement as uncontested as moot.

IV. Disposition of Filing and Compliance Requirement

69. 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,[54] "without a determination on the merits that the rates approved are 'just and reasonable.'"[55] However, the Supreme Court has held that where a settlement is contested, the Commission must make an "independent finding supported by 'substantial evidence on the record as a whole,' that the proposal will establish 'just and reasonable' rates for the area."[56] 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. In addition, the Commission remands to the Presiding Judge the issue of whether Bridgeport meets the Facility Costs Test for eligibility for an RMR agreement, as discussed above.

---

[53] 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.

[54] 18 C.F.R. § 385.602(g)(3) (2006).

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

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

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

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) Issues relating to the financial eligibility for RMR treatment are remanded to the Presiding Judge as discussed in the body of this order.

(C) The Settling Parties are directed to submit, within 30 days 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.
(S E A L) Commissioner Wellinghoff concurring in part and
dissenting in part with a separate statement attached.

Philis J. Posey,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Bridgeport Energy, LLC Docket Nos. ER05-611-005
ER05-611-006

(Issued March 23, 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 Bridgeport. The parties to the settlements request that, when acting on challenges to Bridgeport's eligibility for the RMR Agreement, its entitlement to receive its Defined Cost of Service, or on modification to the Partial Settlement Agreement, whether on the Commission's own motion or on complaint by a non-signatory, the *Mobile-Sierra* "public interest" standard shall apply. As I have stated previously, in the absence of an affirmative showing by the parties and a reasoned analysis by the Commission regarding the appropriateness of approving the "public interest" standard of review to the extent future changes are sought by a non-party or the Commission acting *sua sponte*, I do not believe the Commission should approve such provisions.[1] Under the facts of this case, I do not think the parties have made an affirmative showing. In addition, I agree with the order's reasoning that it would be inconsistent with our duty under the Federal Power Act for the Commission to be bound to the higher "public interest" standard of review with respect to RMR agreements. Therefore, I support this order's rejection of the proposed "public interest" standard provisions. I am writing separately to elaborate further on my views on this order.

The order rejects the proposed "public interest" standard provisions based on the broad applicability of RMR agreements to markets and market participants. In this regard, I believe that RMR agreements' broad applicability to non-signatory market participants and the operations of the market as a whole differs from the bilateral contracts at issue in *Mobile*[2] and *Sierra*[3] and, therefore, the "just and reasonable" standard should apply. In addition, as stated

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

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

[3] *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*). As noted by the Presiding Judge in his certification of the offer of the Defined COS Settlement, the court in *Public Utility Dist. No. 1 of Snohomish County, Wash., et al. v. FERC*
(continued)

in the order, the purpose of an RMR agreement is not simply to allow one party to buy electricity or capacity from another, but to ensure the reliable operation of the regional transmission grid for the benefit of users of the grid. The order states that market participants that pay for the reliability services provided under the RMR agreements are broader in number than the single entity that executes the agreements (here, ISO-NE). Thus, the party that executes RMR agreements is not the party that will pay for the reliability service provided under those agreements. I would add that ISO-NE, as the system operator, clearly has an incentive to ensure that power is available to ensure grid stability and reliability, but it may not have the same incentive or ability as the purchaser in a wholesale power contract to bargain for low prices when contracting for reliability service.[4] Furthermore, the order finds that RMR agreements broadly impact the market by suppressing market-clearing prices and deterring investment in new generation, and should be used as a last resort for a generator. In sum, I agree that RMR agreements broadly impact market participants and the operation of the market as a whole and, therefore, allowing the "public interest" standard of review to apply to future modifications would not be appropriate. 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 impact non-party market participants and the operation of the market.[5]

Moreover, RMR agreements should remain in place only so long as both the reliability need and financial need for such an agreement persists. Accordingly, the fact that circumstances necessitating RMR agreements may change with respect to a unit's costs and eligibility is inconsistent with an expectation from parties of absolute certainty as to these agreements. In addition, applying the "public interest" standard of review to challenges to the

---

explained that *Sierra* did not alter the statutory standards, but only established that what is "unjust" or "unreasonable" may differ in the context of a *bilateral* contract. Certification of Contested Offer of Defined COS Settlement, 118 FERC ¶ 63,018 at P 33 (2007), citing 2006 U.S. App. LEXIS 31297 at p.*59 (December 19, 2006).

[4] *See NSTAR Electric & Gas Corp. v. FERC*, No. 05-1363 (D.C. Cir. March 9, 2007).

[5] *See, e.g., Southwest Power Pool, Inc.*, 117 FERC ¶ 61,207 (2006) (Comm'r Kelly, dissenting in part; Comm'r Wellinghoff, dissenting in part) (Commission majority approved 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).

continued eligibility of the generator for an RMR agreement appears inconsistent with the Commission's determinations in the *LICAP/FCM Settlement Order*.[6] In recommending against approval of the proposed "public interest" standard provisions, the Presiding Judge notes that, with regard to determinations as to whether RMR agreements should be terminated, the *LICAP/FCM Settlement Order* makes clear that "parties retained their rights to challenge the continued need for the contract."[7] Similarly, in *Blumenthal v. ISO-NE*, the Commission found that, "to the extent 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."[8]

Although I disagree with the characterization of the applicability of the *Mobile-Sierra* "public interest" standard in footnote 30 of the order, I agree with the order's rejection of the proposed "public interest" standard provisions. Accordingly, I concur.

_____
Suedeen G. Kelly

[6] *Devon Power LLC*, 115 FERC ¶ 61,340, *order on reh'g and clarification*, 117 FERC ¶ 61,133 (2006).

[7] Certification of Contested Offer of Defined COS Settlement, 118 FERC ¶ 63,018 at P 38, citing *Devon Power LLC*, 115 FERC ¶ 61,340 at P 169.

[8] 117 FERC ¶ 61,038 at P 71.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Bridgeport Energy, LLC — Docket Nos. ER05-611-005, ER05-611-006

(Issued March 23, 2007)

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

The Settling Parties in this case have asked the Commission to apply the "public interest" standard of review when it considers future changes to the Settlement Agreements that may be sought by any of the parties, a non-party, or the Commission acting *sua sponte*.

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

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

_____
Jon Wellinghoff
Commissioner

[1] 117 FERC ¶ 61,055 (2006).

[2] 117 FERC ¶ 61,149 (2006).