117 FERC ¶ 61,133
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.

Devon Power LLC Docket No. ER03-563-060

ORDER ON REHEARING AND CLARIFICATION

(Issued October 31, 2006)

1. In these proceedings, the Commission has been addressing a proposal by ISO New England, Inc. (ISO-NE) to establish a locational installed capacity (LICAP) mechanism. That proposal was made in response to Commission orders identifying flaws in New England's current capacity market, and was further developed through subsequent hearing procedures. As this proceeding has developed, additional evidence has been produced regarding the flaws in the current capacity market and the resulting impacts those flaws have had on New England's electric system infrastructure. As discussed in more detail below, the Commission established additional procedures to consider how the LICAP mechanism would address the deficiencies in the current capacity market and meet New England's projected need for new infrastructure in coming years. Those additional procedures also gave the parties an opportunity to discuss and develop potential alternatives to the LICAP mechanism.

2. On March 6, 2006, a broad group of the parties to this proceeding (collectively Settling Parties[1]) filed a proposed settlement (Settlement Agreement) that would resolve all issues in this matter. The Settlement Agreement contained an alternative to LICAP, called the Forward Capacity Market (FCM). The settlement was contested. In a June 16, 2006 Order,[2] we accepted the proposed Settlement Agreement, finding that as a package,

[1] Settling Parties are identified in Appendix A to this order.

[2] *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (June 16 Order).

it presents a just and reasonable outcome for this proceeding consistent with the public interest.

3. In this order, the Commission addresses requests for rehearing and clarification of the June 16 Order. As discussed in more detail below, the Commission will deny rehearing, and clarify that ISO-NE should model export constraints in the auction, consistent with the Settlement Agreement.

I. Background

A. Prior Proceedings

4. The Initial Decision contains a detailed history of this proceeding up to the point of its issuance, which will not be repeated here except as needed for clarity.[3] The June 16 Order also recounts certain key points in the prior proceedings.[4]

5. These proceedings began in response to the February 26, 2003 filing by Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC and NRG Power Marketing Inc. (collectively NRG) of four cost-of-service reliability-must-run (RMR) agreements covering 1,728 megawatts of generating capacity located within Connecticut and the constrained Southwest Connecticut area. In a series of orders addressing NRG's filing[5] as well as RMR agreements filed by other entities, [6] the Commission rejected the majority of the RMR agreements, out of concern about the effect of widespread use of such contracts could have on the competitive market. The Commission stated that ISO-NE, "rather than focusing on and using stand-alone RMR agreements, should incorporate the effect of those agreements into a market-type mechanism."[7] As a long-term solution to problems in the capacity market creating the need for RMR agreements, the Commission directed ISO-NE to file by March 1, 2004, for implementation by June 1, 2004, "a mechanism that implements location or deliverability requirements in the [installed capacity (ICAP)] or resource adequacy

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[3] *See Devon Power LLC*, 111 FERC ¶ 63,063 at P 2-36 (2005) (Initial Decision).

[4] *See* June 16 Order at P 3-14.

[5] *Devon Power LLC*, 102 FERC ¶ 61,314 (2003) (March 25 Order); *Devon Power LLC*, 103 FERC ¶ 61,082 (2003) (April 25 Order); *Devon Power Company*, 104 FERC ¶ 61,123 (July 24 Order).

[6] *PPL Wallingford Energy LLC*, 103 FERC ¶ 61,185 (2003); *PPL Wallingford Energy LLC*, 105 FERC ¶ 61,324 (2003).

[7] *See* April 25 Order at P 29.

market . . . so that capacity within [designated congestion areas] may be appropriately compensated for reliability."[8]

6. On March 1, 2004, ISO-NE made its filing in compliance with the April 25 Order. In the compliance filing, ISO-NE proposed a LICAP mechanism that would add a locational element to the current ICAP market, establishing four ICAP regions with separate ICAP requirements: Maine, Connecticut, Northeast Massachusetts/Boston (NEMA/Boston), and the remainder of New England (Rest of Pool). Under the proposal, capacity transfer limits would be established to limit the amount of ICAP that load serving entities in one region could purchase from another region. Additionally, ISO-NE proposed to use a downward sloping demand curve to establish the amount of ICAP that must be procured and the price for that capacity. Additionally, under the proposed LICAP mechanism, capacity transfer rights would be allocated to load or generators, depending on their location, to allow market participants to hedge against congestion costs. Under the proposal, holders of capacity transfer rights between two ICAP regions would receive the difference in ICAP prices between those regions.

7. In a June 2, 2004 Order,[9] the Commission established hearing procedures regarding ISO-NE's compliance filing, and delayed the implementation of the LICAP mechanism from the proposed June 1, 2004 date until January 1, 2006. The Commission stated that it agreed with two broad concepts in ISO-NE's proposal. First, the Commission found it appropriate to establish separate ICAP regions, but questioned whether the regions proposed by ISO-NE adequately reflected where infrastructure investment is needed most, specifically noting the constrained area of Southwest Connecticut. Second, the Commission agreed with the overarching concept of a demand curve, but found that more information was necessary to develop appropriate parameters for the curve. As a result of these findings, the Commission directed ISO-NE to submit a further filing addressing whether the Commission should revise the LICAP proposal to create a separate ICAP region for Southwest Connecticut. Additionally, the Commission established a separate investigation and paper hearing in Docket No. EL04-102-000 to determine whether a separate energy load zone should be created for Southwest Connecticut, and whether it should be implemented in advance of LICAP. Finally, the Commission established hearing procedures to determine the appropriate demand curve parameters, the proper method for calculating capacity transfer limits, the appropriate method for determining the amount of capacity transfer rights to be allocated, and the proper allocation of capacity transfer rights. In subsequent orders, the Commission

[8] *Id.* at P 37.

[9] *Devon Power LLC*, 107 FERC ¶ 61,240 (2004) (June 2 Order).

addressed ISO-NE's filing regarding the creation of a separate ICAP region for Southwest Connecticut, and denied rehearing and granted clarification in part of the June 2 Order.[10]

8. On June 15, 2005, the Presiding Judge issued an Initial Decision on the issues set for hearing in the June 2 Order.[11] The Initial Decision largely (with some variation) adopted the demand curve proposed by ISO-NE in its August 31, 2004 initial testimony, and also ruled on the appropriate allocation of capacity transfer rights and the appropriate methodology for calculating capacity transfer limits. Briefs on Exceptions to the Initial Decision were filed on July 15, 2005, and Briefs Opposing Exceptions were filed on August 4, 2005.

9. In section 1236 of the Energy Policy Act of 2005, signed into law on August 8, 2005, Congress noted the New England Governors' concerns that the LICAP proposal would not provide adequate capacity or reliability while imposing high costs on consumers.[12] Congress declared that the Commission should carefully consider the states' objections.

10. Several entities (mostly state entities and load representatives) requested oral argument before the Commission on the exceptions to the Initial Decision, pursuant to Rule 711(c) of the Commission's Rules of Practice and Procedure.[13] In an August 10, 2005 Order, the Commission granted these requests and scheduled oral argument for September 20, 2005.[14] Additionally, the Commission stated that, in light of its decision to hear oral arguments, "we have determined that the implementation of the LICAP mechanism, if it proceeds, will not be earlier than October 1, 2006."[15]

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[10] *See* June 2 Order, *order on reh'g and clarification, Devon Power LLC*, 109 FERC ¶ 61,154 (2004), *reh'g denied*, 110 FERC ¶ 61,315 (2005); *see also Devon Power LLC*, 109 FERC ¶ 61,156 (2004) (order on compliance filing directing establishment of Southwest Connecticut region), *order on reh'g and clarification*, 110 FERC ¶ 61,313 (2005).

[11] *See supra* note 3.

[12] Pub. L. No. 109-58, § 1236, 119 Stat. 961 (2005).

[13] 18 C.F.R. § 385.711(c) (2005).

[14] *Devon Power LLC*, 113 FERC ¶ 61,075 (2005).

[15] *Id.* at P 5.

11. The oral argument focused on whether the LICAP mechanism, as adopted in the Initial Decision, or any alternative approach would provide for just and reasonable wholesale power prices in New England, at levels that encourage needed generation additions and whether LICAP or any alternative approach would provide adequate assurance that necessary electric generation capacity or reliability will be provided. The Commission also asked the parties to address at oral argument what are the costs, benefits, and economic impacts of the proposal (or any alternative approach), compared to continued reliance on the status quo, such as the cost of RMR agreements. Both at the oral argument and in briefs filed prior to the oral argument, parties to the proceeding were given the opportunity to present alternatives to LICAP directly to the Commission.[16] Parties presented two alternatives to LICAP in their briefs and at oral argument: the New England Resource Adequacy Market and the New England Locational Resource Adequacy Market.

12. Following the oral argument, the Commission issued an order giving the parties an additional opportunity to pursue a settlement on an alternative to the LICAP mechanism.[17] In that order, the Commission stated that it remained concerned about the resource adequacy situation in New England (particularly in the congested areas of Southwest Connecticut and Northeastern Massachusetts), noting that "[t]he parties at the oral argument generally agreed that the status quo is failing and that generation resources are not being added at a rate necessary to maintain reliability and assure just and reasonable wholesale power prices."[18] The Commission directed the Chief Administrative Law Judge to appoint a settlement judge to guide the process of developing a proposed alternative to LICAP. Additionally, the Commission stated that it would continue to evaluate the Initial Decision, and directed ISO-NE to make a compliance filing to aid in its consideration of the Initial Decision.[19]

B. Settlement Agreement

13. On March 6, 2006, Settling Parties filed the Settlement Agreement, which they stated would resolve all issues in this matter. The Settlement Agreement introduces the FCM, which is an alternative to LICAP. In general, when fully implemented, the FCM will establish annual auctions for capacity. These auctions will procure capacity three-

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[16] *See* Notice Scheduling Oral Argument, Docket No. ER03-563-030 (August 25, 2005).

[17] *Devon Power LLC*, 113 FERC ¶ 61,075 (2005) (October 21 Order).

[18] *Id.* at P 5.

[19] *Id.* at P 10-14.

plus years in advance of the commitment period.[20] The first FCM auction will be held in the first quarter of 2008 for the commitment period of June 1, 2010 to May 31, 2011. The initial auction for the commitment period beginning June 1, 2011 will be held shortly thereafter. The Settlement Agreement also contains a transition period prior to the first commitment period of this FCM. During this transition period – which begins December 1, 2006 and ends June 1, 2010 – fixed payments will be made to all installed capacity resources. The Settling Parties asked that the Commission consider the Settlement Agreement as a package under the approaches outlined in *Trailblazer Pipeline Company*.[21] Further details concerning the Settlement Agreement and the design of the FCM and the transition period are included in our discussion below where relevant, and can also be found in the June 16 Order at P 15-37.

C. June 16 Order

14. In the June 16 Order, the Commission accepted the Settlement Agreement, concluding that as a package, it presented a just and reasonable outcome that is consistent with the public interest. Specifically, the Commission first found that under the standards announced in *Trailblazer*, the Settlement Agreement is consistent with the public interest.[22] Second, the Commission found that the overall result of the Settlement Agreement, considered as a package, is just and reasonable. To make this finding, the Commission utilized the second approach of *Trailblazer*, and concluded "that the parties objecting to the Settlement Agreement would "be in no worse position under the terms of the settlement than if the case were litigated," and that the Settlement Agreement, as a package, achieves an overall just and reasonable result within a zone of reasonableness.[23] The Commission also analyzed specific issues raised in comments and protests, including

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[20] The first auction will be held less than three years in advance, due to the software implementation schedule.

[21] 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999) (*Trailblazer*).

[22] June 16 Order at P 62-67.

[23] *Id.* at P 70, *citing Trailblazer*, 87 FERC ¶ 61,110 at 61,339. The four approaches laid out in *Trailblazer* are: (1) Commission renders a binding merits decision on each contested issue, (2) Commission approves the settlement based on a finding that the overall settlement as a package is just and reasonable, (3) Commission determines that the benefits of the settlement outweigh the nature of the objections, and the interests of the contesting party are too attenuated, and (4) Commission approves the settlement as uncontested for the consenting parties, and severs the contesting parties to allow them to litigate the issues raised.

issues regarding the transition mechanism and the design of the FCM itself. These portions of the June 16 Order are discussed below where relevant to the requests for rehearing and/or clarification.

II. Discussion

A. Procedural Matters

15. Requests for rehearing were filed by The Industrial Energy Consumers Group (IECG), Maine Public Utilities Commission and Maine Public Advocate (Maine Parties), and Objecting Parties.[24] Maine Parties also filed a motion for clarification.

16. Motions to answer and answers were filed by ISO-NE, the New England Power Pool Participants Committee (NEPOOL), and the Connecticut Department of Public Utility Control (CT DPUC). Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[25] prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We will accept the answers of ISO-NE, NEPOOL and CT DPUC because they have provided information that assisted us in our decision-making process.

17. On August 9, 2006, motions to intervene out-of-time were filed by Bridgeport Energy, LLC and Casco Bay Energy Company, LLC. 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.[26] Bridgeport Energy and Casco Bay have not met this higher burden of justifying their late intervention, and, therefore, their late intervention is denied.

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[24] The Objecting Parties are the Attorney General of the Commonwealth of Massachusetts; Richard Blumenthal, Attorney General for the State of Connecticut; Massachusetts Department of Telecommunications and Energy; The Energy Consortium; the NEPOOL Industrial Customer Coalition; and NSTAR Electric & Gas Corporation. The Massachusetts Department of Telecommunications and Energy was not a party to the comments of the Objecting Parties filed March 27 and April 5, 2006 in response to the Settlement Agreement.

[25] 18 C.F.R. § 385.213(a)(2) (2006).

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

B. Requests for Rehearing and/or Clarification and Commission Conclusions

1. Application of *Trailblazer* Standards, Sufficiency of Record Evidence, and Transition Period

18. In the June 16 Order, the Commission followed the *Trailblazer* precedent. In particular, the Commission first found that the Settlement Agreement is consistent with the public interest, noting that it resolves the deficiencies in New England's existing capacity market previously identified by the Commission, and provides necessary solutions to resolve the resulting impacts those deficiencies have had on New England's infrastructure.[27] To address the contested issues raised by the parties, the Commission employed the second approach of *Trailblazer*; under that approach, even if some individual aspects of a settlement may not be just and reasonable standing alone, the Commission may approve a contested settlement as a package if the overall result of the settlement is just and reasonable. The Commission found that the overall result of the Settlement Agreement is just and reasonable, for many of the same reasons that it found that the settlement is in the public interest.[28] Also, as required by the *Trailblazer* precedent, the Commission concluded that the parties opposing the Settlement Agreement would be no worse off under the settlement than through continued litigation.[29] The Commission went on to address the contested issues to ensure the overall justness and reasonableness of the settlement as a package.

19. Additionally, between December 1, 2006 and the beginning of the first FCM period (June 1, 2010), the Settlement Agreement provides for a transition period, during which fixed payments will be made to all installed capacity. Transition payments will be netted against RMR payments and will be considered capacity payments for the purposes of netting in the locational forward reserves market. Transition payments will be adjusted to account for unit availability. During the three and one-half year transition period, transition payments will be adjusted downward according to a modified equivalent demand forced outage rate (EFORd) measurement, which most heavily weights availability during times of greatest need.

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[27] June 16 Order at P 62-67.

[28] *Id.* at P 71.

[29] *Id.* at P 72.

20. In the June 16 Order, the Commission found that, while it may not consider the transition payments ideal as a single market design element, when considered as part of the larger Settlement Agreement (consistent with the second approach of *Trailblazer*), they serve as a reasonable transitory mechanism that enables the New England region to shift to the FCM. The Commission based this finding on several aspects of the transition payments. First, based on record evidence from the hearing, the transition payments fall within the reasonable range of capacity prices, and contesting parties are in no worse position under the Settlement Agreement than they would have been through continued litigation. Second, the transition payments, in the first years, are less than the cost of new entry. Third, the transition payments result in just and reasonable rates for existing generators.

Requests for Rehearing

21. IECG argues that the Commission may apply one of the four *Trailblazer* approaches only if the record contains substantial evidence that the proposal establishes just and reasonable rates. IECG argues, however, that there is no substantial record evidence that the Settlement Agreement produces just and reasonable rates for the services rendered and thus the Commission may not apply a *Trailblazer* approach. IECG argues that the Commission provides no reasoning or analysis to support its conclusion that substantial record evidence exists. Maine Parties assert that the record is insufficient to support approval of the proposed settlement and thus, under *Trailblazer*, the Commission cannot conclude that Maine Parties will be better off under the settlement than if the case were litigated.

22. With regard to the transition mechanism in particular, IECG contends that the evidence in the record has nothing to do with the market design, structure or product to be paid for during the transition period. IECG asserts that, unlike the product contemplated under the LICAP proposal, the transition payments have no locational component, perpetuate RMR agreements, will not provide an incentive for new entry and will not be adjusted for surplus or scarcity. IECG states that nothing in the record evidence supports transition payments as anything more than a cheaper option than LICAP payments, and argues that cheaper is insufficient to satisfy the just and reasonable standard. Maine Parties assert that the Commission cannot measure the transition payments against the projected cost of a proposal that was never adjudicated by the Commission.

23. IECG contends that there is no formula that justifies the transition rates. IECG asserts that it is the Settling Parties' obligation to demonstrate that there is a "rational methodology for determining a range of reasonableness for the particular product being

priced and that the particular rates set by the Settlement fall within it or may be derived by reference to it."[30] IECG argues that the Commission presents no methodology or evidence to support its assertion that "the transition payments are reasonable rates for existing generators until the FCM begins."[31] IECG argues that this assertion is not evidence, and the Commission cannot point to record evidence, that the transition payments fall within any range of reasonableness established by any methodology.

24. Maine Parties argue that comparing transition payments to LICAP rates because they had been accepted in an Initial Decision does not meet the *Trailblazer* standard. Maine Parties argue that reliance on LICAP rates as the likely outcome of litigation or setting the parameters of the range of reasonableness must be based on more than the administrative law judge's recommendation to adopt the proposal. Maine Parties state that there has not been an adjudication of all the underlying assumptions, factual determinations and conclusions of law embodied in the initial decision. Maine Parties assert that it is unreasonable and arbitrary to use load parties' demand curve proposals[32] to determine that the transition payments fall within the range of reasonableness, given that the Settlement Agreement does not include a demand curve. Maine Parties also contend that the transition payments approved in the FCM Order ignore location and thus cannot be reconciled with previous Commission determinations that it is essential to value capacity by location.

25. Objecting Parties assert that the Commission erred in approving transition payments that have no legitimate regulatory purpose. Objecting Parties assert that, in the June 2 Order on the ISO's March 1 Filing, the Commission rejected transition payments proposed by ISO-NE, on the basis that they were out-of-market arrangements.

26. Objecting Parties argue that no demand curve parameters were evaluated and ruled on by the Commission. Objecting Parties further argue that the Commission never determined that the demand curves used for price projections may be just and reasonable. Objecting Parties assert that the particular demand curves selected by the Commission to establish a range of price projections skew the determination of justness and reasonableness. Objecting Parties contend that to the extent another demand curve, other

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[30] IECG Request for Rehearing at 11.

[31] June 16 Order at P 102.

[32] Maine Parties note that while several load parties proposed demand curves, they did so under objection, as the scope of the hearing did not include the presentation of alternative mechanisms.

than ISO-NE's, was selected to establish the range of price projections, a different result would emerge.

27. Finally, Objecting Parties argue that transition payments are "pure largesse" to gain supplier sign-on to the Settlement Agreement.[33] Objecting Parties assert that generators that actually require additional financial support for reliability services have negotiated RMR agreements with ISO-NE. Objecting Parties assert further that certain suppliers that are currently recovering costs (without transition payments) will receive transition payments while avoiding having to demonstrate that they are needed for reliability purposes or are not recovering costs in the energy market. Objecting Parties conclude that the Settlement Agreement is an expensive compromise for New England consumers and that the Commission's rationale for approval of the transition payments fails to comply with the Commission's statutory mandate to protect the public interest from unjust and unreasonable rates.

Answers

28. In response to IECG's arguments that the transition payments cannot be compared to the LICAP capacity product, ISO-NE states that, whether purchased under LICAP or FCM, firm capacity is still capacity capable of producing energy when needed. ISO-NE asserts that the means of determining the price differs under each market design but does not alter the nature of the product itself. Additionally, it contends that the Commission correctly found that the transition payments are within the zone of reasonableness. ISO-NE states that reliance on the Maine/Vermont and ISO demand curves to provide a narrow range of rates that provide a reasonable basis for comparison to the transition payments is appropriate. ISO-NE argues that the Commission is entitled to apply its expertise to the extensive record before it, and to draw conclusions about the result the record would support with respect to transition pricing. ISO-NE concludes by asserting that the Commission's finding regarding the transition payments is supported by comparison to the cost of doing nothing. ISO-NE notes that the price of capacity has increased, with the deficiency charge clearing at $2.50/kW-month in the June ICAP auction and that "it is only a matter of time" before the prices in the capacity market hit the $6.66/kW-month cap, thus further supporting the transition charge both as to level and existence.[34]

29. The CT DPUC states that parties to the hearing developed an extensive record surrounding the estimated benchmark cost of capacity (EBCC), which was intended to

[33] Request for Rehearing of Objecting Parties at 18.

[34] Answer of ISO-NE at 11-12.

reflect the competitive cost of new entry for generating capacity over the long term. Thus, the CT DPUC asserts that the record contains substantial evidence establishing costs for generation capacity resources across New England. CT DPUC further argues that there has been broad agreement that the long-term cost of new entry reflects a reasonable capacity payment. The CT DPUC notes that numerous parties—ISO-NE, load representatives, generators, Commission Staff—provided analysis regarding the EBCC. The CT DPUC argues that using the lowest long-term cost of new entry[35] with a high peak energy rent (PER) offset[36], the record fully supports the finding that transition payments plus peak energy rents are less than the cost of new entry.

Commission Conclusion

30. The Commission denies these requests for rehearing. The June 16 Order addressed the Settlement Agreement in a manner fully consistent with the Commission's *Trailblazer* precedent, and employed relevant and substantial record evidence to determine that the Settlement Agreement achieves an overall just and reasonable result.

31. We reiterate the discussion in the June 16 Order that the Commission has broad authority and discretion under Rule 602(h) of its regulations to address contested settlements.[37] Courts have confirmed the Commission's authority to approve contested settlements, so long as the proposal will establish just and reasonable rates.[38] Under Rule 602(h), the Commission may decide the merits of the contested issues if the record contains substantial evidence on which to base a reasoned decision or if the Commission determines that there is no genuine issue of material fact. If the Commission finds that the record lacks substantial evidence or that the contesting parties or issues cannot be severed, the Commission may establish hearing procedures to supplement the record, or it may take other appropriate action.[39]

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[35] The EBCC applicable to Maine was $7.27 per kW-month.

[36] The CT DPUC argues that the Commission may use PER values of $0.58, $0.60, $0.83, $1.00 for the years 2006-2010.

[37] 18 C.F.R. § 385.602(h) (2006).

[38] *See New Orleans Public Service, Inc. v. FERC*, 659 F.2d 509, 511-12 (5th Cir. 1981), *citing Placid Oil Co. v. FPC*, 483 F.2d 880, 893 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-13 (1974).

[39] *See* 18 C.F.R. § 385.602(h)(1)(ii)(B) (2005). In *Arctic Slope Regional Corp. v. FERC*, 832 F.2d 158, 164 (D.C. Cir. 1987), the court observed that "the breadth of discretion trumpeted by Rule 602(h)(1)(ii)(B) is manifest."

32. In *Trailblazer*, the Commission explained and amplified its approach to addressing contested settlements under the broad authority and discretion described in Rule 602(h). In *Trailblazer*, the Commission explained four approaches it has taken for approving a contested settlement despite the objections of the contesting party. Under the first approach, if there is an adequate record, the Commission can address each of the contested issues on the merits, approving the settlement if the Commission finds that each of the contesting party's contentions lacks merit. This approach is appropriate where the issues are primarily policy issues or the parties have agreed that the record is sufficient to decide the issues on the merits.

33. However, as the Commission explained in *Trailblazer* and reiterated in the June 16 Order that, even where the settlement cannot be approved under the first approach, it may be approved under other approaches. Thus, under the second approach, even if some individual aspects of a settlement may not be just and reasonable standing alone, the Commission may approve a contested settlement as a package if the overall result of the settlement is just and reasonable. Under this approach, the Commission will not make a merits decision on whether each element of the settlement package is just and reasonable but will determine whether the overall package falls within a zone of reasonableness.[40] When the Commission takes this approach, it need not find that the settlement rate is exactly the rate the Commission would have found just and reasonable on the merits after litigation and need only find that the settlement rate falls within a zone of reasonableness. The Commission must also find under this approach that the contesting party would be in no worse position under the settlement than if the case were litigated.

34. The Commission employed this approach not only to honor the intent of the parties that the Settlement Agreement be considered as a package,[41] but also because the settlement contains several complex and interrelated features that make considering it as a package more appropriate than considering its individual parts.[42] The Commission went on to address each of the contested issues however, not to make a merits determination on each issue (which would be the first approach of *Trailblazer*), but to validate our conclusion that the settlement package is just and reasonable.

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[40] *See Trailblazer*, 85 FERC at 62,342; *order on reh'g*, 87 FERC at 61,440.

[41] *See Trailblazer*, *order on reh'g*, 87 FERC at 61,440 (when parties make clear that they want their settlement considered as a package, the Commission will try to honor parties' intent).

[42] June 16 Order at P 69.

35. Contrary to the arguments of IECG, the record contains substantial relevant evidence supporting the Commission's determination that the Settlement Agreement, and particularly the transition period, is just and reasonable. In particular, the record evidence in this proceeding, developed mostly during the year-long hearing on the LICAP demand curve mechanism, focuses on the cost of new entry (CONE), a key factor in determining appropriate rates for capacity.[43] This cost of new entry evidence[44] was central to the demand curves and resulting estimated prices presented at hearing and ultimately used to determine a reasonable range of prices in the June 16 Order.[45] This evidence of capacity costs is directly relevant to determining just and reasonable rates for capacity.

36. We disagree with the contentions of IECG that this evidence is irrelevant because it was developed in connection with the LICAP market design, which the Settlement Agreement abandoned in favor of FCM. ISO-NE is correct that while the market design used to determine the price may differ, both mechanisms provide a framework for purchasing the same product: capacity that is capable of producing energy when needed. As a result, the underlying evidence of the price of the capacity product is still relevant.

37. Maine Parties and Objecting Parties assert that the Commission cannot compare the transition rates under the Settlement Agreement to the rates that would result from the LICAP mechanism because the LICAP mechanism was adopted in an Initial Decision only and was not adjudicated by the Commission. In response, we note that Maine Parties (and others generally requesting rehearing of our application of *Trailblazer,* particularly to the transition period rates) appear to misstate the requirements of the second approach explained in *Trailblazer*. Under the second approach, the inquiry is whether the overall package of the settlement falls within "the broad ambit of various rates which may be just and reasonable."[46] This approach also requires that the Commission analyze whether those contesting the settlement would be in a worse position under the settlement than if the case were litigated; "this approach does not necessarily result in a binding merits determination on the individual issues in the

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[43] *See, e.g.,* Prepared Direct Testimony of John J. Reed, on behalf of ISO-NE, filed August 31, 2004 in Docket ER03-563-030.

[44] *See* Initial Decision at P 323-87.

[45] The price range used by the Commission covered a multi-year period, from 2007-2010, for different regions of New England. The lower and upper bounds of that range for 2007 were $1.91/kW-month and $7.63/kW-month respectively; lower and upper bounds of that range for 2010 were $2.53/kW-month and $16.16/kW-month.

[46] *Trailblazer*, 85 FERC at 62,343.

proceeding, but it may involve some analysis of the specific issues raised by the settlement in order to determine whether the result under the settlement is not worse for the contesting party than the *likely result* of continued litigation."[47] It is the *likely* result of litigation that is used as a measuring stick, not an exact merits finding the Commission would have made if litigation had continued. Therefore, it was not necessary that the Commission conclude in the June 16 Order that it would have adopted any particular demand curve, as some of those requesting rehearing suggest. The range of possible outcomes discussed in the June 16 Order adequately supported our determination that the transition rates are just and reasonable.

38. Moreover, IECG is incorrect when it asserts that the Commission presented no methodology, analysis or formula to support its conclusion that the transition mechanism is a just and reasonable component of the settlement. Quite the opposite, the Commission discussed the rates under the transition mechanism at length in the June 16 Order. Consistent with the second approach of *Trailblazer*, the Commission compared the rates under the transition mechanism with a range of likely outcomes of continued litigation. The Commission did not establish that range in a vacuum, and instead considered a range of rates that might have resulted from continued litigation on the LICAP mechanism. That range of rates was derived directly from substantial record evidence in the hearing, and from it, the Commission reached a conclusion under the second approach of *Trailblazer*; it found that those objecting to the settlement would be in no worse position under the settlement than if the case were litigated. Not only is this analytical approach fully consistent with *Trailblazer*, it also meets the Federal Power Act (FPA) requirement that rates must be just and reasonable. As we stated in the June 16 Order, "[a] just and reasonable rate is not a product of any single formula, but is instead a rate within a broad ambit of various rates which may be just and reasonable."[48]

39. As discussed below, we also deny requests for rehearing specifically addressing the transition mechanism and the rates under that mechanism, and reiterate our finding that, insofar as they are one component within a greater package of just and reasonable reforms, the transition payments serve as a reasonable bridge to the FCM.

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[47] *Trailblazer, order on reh'g*, 87 FERC at 61,440 (emphasis added).

[48] *See Belco Petroleum Corp. v. FERC*, 589 F.2d 680, 689 (D.C. Cir. 1979), *citing Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-86 (1942).

40. First, in response to arguments (particularly from Objecting Parties) that the transition payment rates are not justified, we note our discussion above regarding the application of substantial record evidence to the transition payments. As discussed there, in the June 16 Order, the Commission compared the transition payments to a range of potential rates that could result under the LICAP mechanism to determine, consistent with *Trailblazer*, that those opposing the Settlement Agreement would be in no worse position under the Settlement Agreement than they would have been through continued litigation. The Commission used estimated prices developed from substantial record evidence on the CONE developed at the hearing in this proceeding, and found that the transition payments were well within the "broad ambit" of just and reasonable rates.[49] Accordingly, the Commission justified the transition payments as one component of the overall just and reasonable package represented by the Settlement Agreement.

41. In a related argument, Objecting Parties assert that, if the Commission had selected different proposed demand curves upon which to base price projections, a different result would have emerged. The Commission finds that relying on price projections using Maine and Vermont's and ISO-NE's proposed demand curves establishes a reasonable range of capacity prices for comparison. The projections that established the upper bound of the range were developed by James Daly, witness for a coalition of parties, including the Attorney General of Massachusetts (AG Mass), NSTAR and The Energy Consortium, using the ISO-NE demand curve proposal.[50] Moreover, as we noted in the June 16 Order, Maine Parties relied upon those projections in their Initial and Reply briefs in the LICAP proceeding.[51] In establishing the lower range of price projections, the Commission selected price projections developed by ISO-NE, using the demand curve proposed by Maine and Vermont.[52] Record evidence contained an array of other demand curve proposals upon which to base price projections. Many of those from parties representing load would have shown prices lower than those produced using the Maine and Vermont curve and thus may have resulted in prices lower than the transition payments. Alternatively, those from suppliers would have shown prices much higher than the transition payments. If the Commission relied only upon demand curves proposed by parties representing load, the transition payments may have appeared excessive; relying only on demand curves proposed by suppliers would imply

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[49] *Id*.

[50] June 16 Order at P 94-99.

[51] *Id.* at P 97.

[52] Moreover, the Commission notes that these price projections were not adjusted to account for updated installed capacity requirement.

that the transition payments were inadequate. We conclude that relying on proposed demand curves from a single sector would have been unreasonable. As ISO-NE notes, the Commission may apply its expertise to the record before it and draw reasonable conclusions from that record in reaching a decision.

42. Objecting Parties note that the Commission previously rejected a transition mechanism proposed by ISO-NE. In the June 2 Order, the Commission deferred implementation of the initial LICAP proposal filed by ISO-NE. That initial LICAP proposal included a series of transition mechanisms; Objecting Parties' comparison of these earlier transition mechanisms with the transition mechanism established in the Settlement Agreement is unavailing. First, the initial LICAP proposal failed to win requisite support in the stakeholder process, garnering 58 percent of the NEPOOL Participant Committee vote. In contrast, the Settlement Agreement has far larger and broader support: only eight of 115 parties to the settlement proceedings formally opposed the Settlement Agreement. Moreover, the NEPOOL Participants Committee voted, with 78.46 percent to support the Settlement Agreement, with support from all six voting sectors.[53] As we noted in the June 16 Order, while the level of support for the Settlement Agreement is not dispositive, the Commission can give weight to the broad-based support the Settlement Agreement received.[54] Moreover, we stated in the June 16 Order that the settlement "resolves all of the outstanding issues in a difficult, contentious and lengthy matter."[55]

43. Second, in contrast to the settlement, the initial LICAP proposal did not imply a final resolution to resource adequacy issues in New England. In filing the initial LICAP proposal, ISO-NE indicated that discussions among regional stakeholders regarding a long-term resource adequacy mechanism were to continue and that "the filed proposal may be modified or replaced by a different long-term regional resource adequacy

[53] June 16 Order at P 15.

[54] *Id.* at P 73, *citing Laclede Gas Co. v. FERC*, 997 F.2d 936, 946 (D.C. Cir. 1993); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1164-65 (D.C. Cir. 1998).

[55] June 16 Order at P 66; *see also Laclede Gas Co.*, 997 F.2d at 947 (while not dispositive, Commission may "weigh the prospects for protracted litigation" when deciding whether a settlement should be approved), *citing. c.f., Towns of Concord, Norwood and Wellesley v. FERC*, 997 F.2d 67, 76 (D.C. Cir. 1992) (indicating that the Commission may consider the time and expense of reconstructing past overcharges when constructing a remedy).

mechanism."[56] The Commission noted that the lengthy stakeholder proceedings in 2003 and 2004 failed to produce consensus and stated that it would be inappropriate to direct ISO-NE and stakeholders to continue working to develop a modified LICAP proposal.[57]

44. Third, in addition to transition payments, the initial LICAP proposal contained other design components that led the Commission to the conclusion that the proposal, as filed, would not resolve reliability compensation issues in New England. The initial LICAP proposal had a transition mechanism that involved not only fixed payments but also a series of price caps in import-constrained regions.[58] Moreover, the Commission also found that the specific regions proposed "did not adequately reflect where infrastructure investment is needed."[59] Finally, the Commission stated that ISO-NE had proposed a methodology that "may understate the level of capacity that may be transferred between ICAP regions."[60] In contrast to the initial LICAP proposal, the FCM uses a different methodology for stating capacity between capacity zones (or regions)[61] and provides a market design that appropriately determines capacity zones based on the identification of binding transmission limits.

45. We concluded in the June 16 Order (pursuant to *Trailblazer*) that the transition payments were a just and reasonable component of the package embodied by the Settlement Agreement. Objecting Parties offer no persuasive support for their assertion that the transition payments serve no regulatory purpose and are only "pure largesse" intended only to gain supplier sign-on. Moreover, resources that receive transition payments must, in exchange, meet all of the obligations of a capacity resource, which

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[56] Compliance Filing of ISO-NE at 52, Docket No. ER03-563-030, filed March 1, 2004.

[57] June 2 Order at P 71.

[58] *Id.* at P 69.

[59] *Id.* at P 2.

[60] *Id.* at P 3.

[61] In the initial LICAP proposal, ISO-NE sought to measure transfer capacity across constrained ICAP regions using a methodology ("At Criteria") that may have underestimated actual amount of real-time electric flow the transmission interface is capable of accommodating. However, ISO-NE, in subsequent testimony changed its position, recommending the use of a methodology ("As-Is"), meaning that system would be modeled using all available capacity.

include the obligation to bid into the day-ahead and real-time markets and, whenever accepted in the markets, to forego the opportunity to sell into markets in other regions. As we note above, we concluded in the June 16 Order that the transition payments, while not ideal, are just and reasonable as a bridge to the full implementation of the FCM.

46. Moreover, Objecting Parties' argument that suppliers can receive transition payments without any limitation ignores the provisions of the Settlement Agreement, fully addressed in the June 16 Order, which adjust transition payments for availability during critical hours of need.[62] We address Objecting Parties' related arguments regarding the relationship between the transition payments and RMR agreements in the section that follows.

47. Finally, in response to Maine Parties' assertion that the lack of a locational element in the transition payments makes them irreconcilable with the Commission's prior determinations in this case, we emphasize that the transition mechanism is just that; a temporary mechanism to serve as a bridge until the FCM is fully implemented in 2010. In the June 16 Order, we concluded that the FCM itself appropriately recognizes location.[63] The lack of a location element in this temporary transition period does not invalidate our conclusion that the Settlement Agreement as a package, including the transition mechanism and the FCM, is just and reasonable.

2. Continuation of RMR Agreements

48. The currently applicable RMR agreements in New England are scheduled to terminate upon the implementation or effectiveness of a locational ICAP mechanism. The Settlement Agreement explicitly states that the beginning of the first commitment period (June 1, 2010) will be considered to be the implementation or effectiveness of a locational ICAP mechanism for purposes of these RMR agreements. The Settlement Agreement states that nothing prejudices the rights of any party to challenge, seek to terminate or support an RMR agreement on any other grounds or restrict any party's rights to seek, agree to or oppose any RMR modifications.

49. In the June 16 Order, the Commission approved the proposed timeline for the termination of RMR agreements. The Commission found that the June 2010 termination date of RMR agreements is consistent with the express terms of the RMR agreements and the Commission's intent that those contracts terminate when a capacity market

[62] June 16 Order at P 103.

[63] *Id.* at P 122.

mechanism is fully implemented. The Commission noted that the transition payments will be netted against RMR revenues, protecting against over-recovery. The Commission further noted that the Settlement Agreement explicitly states that participants do not waive rights to challenge the need for RMR contracts, based on, *e.g.*, changes in a generator's compensation or changes to system infrastructure.[64]

Requests for Rehearing

50. Objecting Parties assert that the Commission should not allow RMR agreements to remain in place until 2010, during the period when suppliers are receiving transition payments, and should impose a moratorium on the filing of new RMR agreements. Objecting Parties argue that the Commission appears willing to overlook the disruptive effect RMRs have on the wholesale markets while not acting to curb the filing of new RMR agreements. In approving the Settlement Agreement, Objecting Parties state that the Commission is allowing generators to choose between the higher of market or cost-based rates, a defect that the Commission sought to remedy when it ordered implementation of a market-based mechanism in this proceeding. Objecting Parties argue that generators should not be allowed to receive transition payments on top of cost-of-service rates, which Objecting Parties argue were granted without considering additional revenues from the locational forward reserves market and from transition payments. Objecting Parties argue that to the extent that the Commission allows the transition payment provisions to remain in the Settlement Agreement, it should modify the Settlement Agreement to provide that all existing RMR agreements will terminate upon the initiation of transition payments.

Answers

51. ISO-NE states that, insofar as RMR agreements terminate when a true market commences, the Commission's decision to approve the Settlement Agreement is consistent with the goals of reducing the need for RMR agreements and replacing them with a market-based mechanism. ISO-NE also argues that the Settlement Agreement contains express language, cited in the June 16 Order,[65] that participants do not waive their rights to challenge the need for RMR contracts, given changes in a generator's compensation or changes to system infrastructure.

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[64] *See* Settlement Agreement at section XIII.F.

[65] June 16 Order at P 166.

Commission Conclusion

52. The Commission notes that Objecting Parties requested identical relief in their comments in opposition to the Settlement Agreement.[66] The Commission will not grant rehearing on this issue. As we stated in the June 16 Order, the Commission has consistently accepted RMR agreements for a term that expires upon implementation of a locational mechanism, which the Settlement Agreement expressly provides as the beginning of the first FCA commitment period.[67] We reiterate here our finding that the FCM represents an appropriate locational capacity mechanism upon which to base the termination of existing RMR agreements. Until that time, existing RMR agreements will remain in effect.

53. The Commission again rejects arguments that generators will be able to receive both cost of service rates and transition payments. As the Settlement Agreement makes clear,[68] transition payments will be netted against RMR revenues, and thus there will be no opportunity for a generator to receive transition payments on top of the full cost of service rates under the RMR agreement. Thus any payment to an RMR generator that exceeds the transition payment level will only represent that generator's Commission-approved cost-of-service rate under the RMR agreement. Also, we again note that the Settlement Agreement explicitly states that participants do not waive their rights to challenge the need for RMR contracts, based on, *e.g.*, changes in a generator's compensation or changes to system infrastructure.[69] Finally, Objecting Parties' assertion that the Commission did not consider the impact of the locational forward reserves market is incorrect; the Commission fully addresses this issue in the June 16 Order.[70]

3. Determination of Separate Capacity Zones

54. Under the Settlement Agreement, before each auction, ISO-NE will determine capacity zones based on an identification of transmission limits that may bind. In instances where transmission limits are expected to bind (accounting for predicted

[66] See Comments in Opposition to Settlement Agreement of Objecting Parties at 25 (filed March 27, 2006).

[67] *See* section VIII.F of Settlement Agreement.

[68] *See* Settlement Agreement at section VIII.E.

[69] *See* Settlement Agreement at section XIII.F.

[70] June 16 Order at P 131.

upgrades that will be on-line by the commitment period), ISO-NE will designate separate capacity zones and hold separate but simultaneous auctions.

55. In the June 16 Order, the Commission accepted the locational feature of the FCM as contributing to the overall justness and reasonableness of the Settlement Agreement as a package and satisfying the directive in prior Commission orders that the capacity market take into account location. The Commission stated that transmission constraints may restrict the ability to deliver energy from some locations to others, and a market design for capacity should reflect transmission constraints to send correct price signals for investment. The Commission stated that it believed that the settlement provides for a way to recognize transmission constraints that is, on balance, reasonable.[71]

Requests for Rehearing

56. In comments opposing the Settlement Agreement, Maine Parties argue that the determination of whether binding constraints exist (which will then result in separate import constrained zones) is inferior to allowing actual price separation to occur as part of the auction process. The Commission rejected the Maine Parties' approach, stating that adopting the Maine Parties' proposal may provide sellers of capacity the incentive to withhold capacity to create price separation and separate capacity zones where they are not necessary. In such cases, the Commission concluded that such constraints would bind because of the exercise of market power, and not because of actual physical limitations arising from competitive market conditions.[72]

57. In their rehearing request, Maine Parties state that the Commission's market power rationale is flawed because it advocates the elimination of opportunities for market power abuse by simply eliminating the market (auction) approach. Maine Parties argue that by the Commission's logic, the fact that it might be easier to exercise market power in a locational energy market than in a non-locational market suggests that the locational energy market should be eliminated too. Maine Parties assert that the Commission's conclusion fails to explain the distinction between the potential problems of market abuse in the capacity market versus those in the energy market, where price separation is allowed to occur through a market approach (with vigilance and safeguards against the exercise of market power). Maine Parties assert that the settlement contains a number of features specifically designed to reduce or eliminate market power, and these may well be

[71] *Id.* at P 122.

[72] *Id.* at P 122-124.

adequate to reduce, if not eliminate, the impact of market power abuse in constrained areas.

Answers

58. ISO-NE asserts that the process for designating capacity zones in the Settlement Agreement is an alternative locational feature that should yield similar results to the process advocated by Maine Parties. ISO-NE contends that the approach in the Settlement Agreement has the added advantage of reducing the risk of the exercise of market power.

Commission Conclusion

59. We will deny the rehearing request of the Maine Parties on this issue. We have accepted pre-established zones in capacity markets elsewhere, such as New York,[73] and we will not modify the settlement provision that would determine capacity zones in advance of the auction. We disagree with Maine Parties' assertion that the order advocates elimination of the market, or the elimination of the locational feature of the market, in an effort to eliminate market power. To the contrary, the June 16 Order accepts the use of a forward capacity market and, as part of that, determining capacity zones before holding auctions based on transmission constraints created by competitive market conditions.

60. We are not persuaded at this time that it is necessary to establish capacity zones in areas where such zonal boundaries do not appear, in advance of the auction, to be justified. As we noted in the June 16 Order, if auction results were allowed to establish local capacity zones, sellers of capacity may have an incentive to withhold capacity (thereby creating separate capacity zones where they are not necessary) to increase the capacity price in the import zone. By establishing zones in advance as provided in the settlement, the financial advantage from withholding would be reduced or eliminated because the price on the import side of the zone could not rise above the price elsewhere in the zone.

61. We acknowledged in the June 16 Order that there may be advantages to the approach advocated by the Maine Parties. It is possible that additional transmission congestion not foreseen by ISO-NE may develop as a result of competitive conditions

[73] *See New York Independent System Operator, Inc.*, 90 FERC ¶ 61,319 (2000), and *New York Independent System Operator, Inc.*, 93 FERC ¶ 61,186 (2000).

during the FCA within the pre-established zones.[74] However, the settlement provides a mechanism to monitor for this possibility. Specifically, the settlement requires ISO-NE's Market Monitor to analyze the operations and effectiveness of the FCM no later than 180 days after the second FCA is conducted, as well as annually in its annual markets report. The reports will help evaluate whether the capacity zones established by ISO-NE in advance of the auctions turn out to contain significant transmission congestion within them. If the reports conclude that significant intrazonal congestion occurs, parties may file to change this feature of the settlement.

4. Issues Regarding Export Constraints to/from Maine

62. Maine Parties filed affidavits (prepared by Dr. Thomas Austin) with their comments on the Settlement Agreement, which, Maine Parties argue, offered evidence of various flaws in the settlement. Maine Parties assert that the evidence presented in Dr. Austin's testimony demonstrated that the Settlement Agreement cannot be found to be just and reasonable. Dr. Austin argued that: 1) data from energy markets congestion and ISO-NE's Regional System Plan show that Maine is export constrained; 2) there are plans for new generation to be developed in Maine; 3) generators like FPL Energy have experienced increased earnings so additional revenues from capacity payments are not needed to keep hydro and nuclear plants operational; 4) the transition payments do not contain a PER offset,[75] and the assumed PER in ISO-NE witness LaPlante's analysis is too low. In their request for rehearing, Maine Parties argue that the June 16 Order failed to address these arguments, thus rendering the Commission's decision arbitrary and capricious.

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[74] The Maine Parties incorrectly summarized the June 16 Order as stating that price separation in an auction mechanism would always be the result of the exercise of market power. The Maine Parties apparently base their conclusion on the sentence in Paragraph 123 of the order that reads: "These constraints would bind only because of the exercise of market power …." However, the phrase "these constraints" refers to the constraints that would arise from the situation described in the previous sentence, where "sellers of capacity would have the incentive to withhold capacity to create price separation and separate capacity zones where they are not necessary." That is, "these constraints" refers to constraints that arise when sellers withhold capacity. Thus, a correct summary of Paragraph 123 would be that constraints that arise when sellers withhold capacity would bind only because of the exercise of market power.

[75] The PER offset was designed to adjust the LICAP payments with the energy market profits from a benchmark unit to assure that the LICAP Payments did not double-count energy rents.

63. Contrary to Maine Parties' assertion, Dr. Austin provided data which showed that the congestion component of the Maine's LMP was negative 25.8 percent of the time in 2005 and during 42.9 percent of all real time hours in July 2005. Maine Parties further assert that the ISO-NE Regional System Plan shows that Maine is export constrained:

> The output of Maine generators is sometimes constrained by export limitations to the south and west. When constrained, the Orrington–South, Surowiec–South, Maine–New Hampshire, Northern New England–Scobie + 394 line, Seabrook–South, and North–South transmission interfaces are indicative of Maine export limitations. One or more of these interfaces was constrained about 10.5% of the real-time hours during 2005.[76]

64. Maine Parties assert that there has been no rebuttal of Dr. Austin's testimony that additional wind and other generation projects planned for Maine would further exacerbate Maine's export-constraint. Maine Parties state that there is currently 1,000 MW of new non-gas-fired generation capacity "under construction, in the permitting process or under serious consideration by developers,"[77] and that such projects have expected in-service dates between 2006 and 2009.

65. Maine Parties assert that, in not examining the costs and earnings of generators in Maine or valuing their products by location, the FCM Order cannot accomplish one of the Commission's stated goals in the proceeding—to ensure that existing generators are appropriately compensated. Maine Parties further assert that the FCM Order failed to address arguments that the windfall for existing power supplies will be exacerbated by the lack of a PER offset during the transition period. Maine Parties assert that without such an offset there will neither be a hedge against energy spikes nor any disincentive so as to prevent suppliers from raising energy prices during the transition period.

66. Maine Parties assert that genuine issues of material fact exist that cannot be resolved on the current record. Maine Parties argue that additional evidence is needed to determine the extent of the Maine export constraint, and how it would impact the auction and the prices paid by Maine. Given that assertion, Maine Parties request the opportunity to probe the underlying basis for ISO-NE's assertions regarding the frequency of the binding constraint between Maine and the Rest of Pool. Maine Parties suggest that options include: (1) conditional acceptance of the settlement; (2) severance of the contested issues and initiation of further procedures to resolve those issues; and (3) rejection of the entire settlement and initiation of a hearing.

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[76] Request for Rehearing of Maine Parties at 16.

[77] *Id.* at 17.

67. On September 8, 2006, Maine Parties filed a motion to lodge additional evidence, asking the Commission to consider specific sections of the recently-issued National Electric Transmission Congestion Study conducted by the Department of Energy. Maine Parties argue that this evidence is directly relevant to its argument on rehearing (discussed below) that the transition payments included in the Settlement Agreement should be lower for Maine since it is "generation-rich."

Answers

68. ISO-NE argues that Maine is not meaningfully export-constrained. First, ISO-NE argues that the LMP congestion component has no bearing on whether Maine is export-constrained. ISO-NE argues that a negative congestion component for Maine's LMP merely indicated that there was a binding transmission constraint somewhere in New England. ISO-NE also analyzed the degree to which the Maine-New Hampshire interface constraint was binding in 2005 and found it was binding during 74 real time energy market hours in 2005 (less than one percent of the time).

69. Finally, ISO-NE argues that there is a distinct difference between plans for new generation and actual installed generation. ISO-NE asserts that there is no record evidence: 1) to indicate that sufficient generation will come on-line during the transition period to make the Maine Parties' assertion of a binding export constraint reality; and 2) to identify specific projects and specific schedules.

70. ISO-NE asserts that the Maine Parties' pleading has no analysis of why some generators' profits should be considered to be greater than normal, what the source of those profits was, and what revenues are needed to keep various plants operational. ISO-NE further asserts that the hearing record demonstrates that many generators are earning insufficient revenues to continue operating or to support new investment. ISO-NE concludes by stating that generating companies will not be prompted to build new generation or to maintain unprofitable units on the basis of whether, in the aggregate, their generation portfolios are profitable.

Commission Conclusion

71. The Commission denies Maine Parties' request to modify the transition payments or to establish separate hearing procedures to address Maine Parties' contention that the state is export-constrained. Maine Parties' fundamental argument appears to be that Maine is export-constrained and, as such, should not be required to pay the full transition payment. Maine Parties have offered different options for resolving the issue: 1) modify

Maine's transition payment to 2.00/kW-month for all years,[78] 2) reject the Settlement in its entirety, with "the matter set for hearing,"[79] or 3) reject the Settlement Agreement as proposed and "initiate proceedings to gather the substantial evidence necessary to reach a reasoned decision."[80]

72. The Commission did consider arguments presented in Dr. Austin's affidavits in approving the Settlement Agreement. Maine Parties' witness Austin provided several arguments in filed affidavits, many of which were devoted to establishing Maine as an export-constrained zone. However, the issue of Maine being export-constrained is not the subject of this proceeding. The Commission's responsibility in approving the Settlement Agreement was not to determine whether or not Maine is export-constrained. Rather, the Commission's responsibility is to ensure that rates are just and reasonable.

73. The Commission found that the transition payments agreed to by parties to the Settlement Agreement, though "not ideal as a single market design element,"[81] represented one element of a just and reasonable package of reforms that was embodied in the Settlement Agreement. Relying on the second approach of *Trailblazer*, we determined that contesting parties would be in no worse position under the settlement than if the case were litigated.

74. The Commission will not initiate procedures to gather evidence and determine "appropriate capacity rates"[82] for the interim period, for Maine or any other states affected by the Settlement Agreement. The Commission reiterates that the transition rates are an essential element of a package that will establish a capacity procurement mechanism that resembles, quite closely, an alternative to the LICAP proposal presented by Maine Parties at Oral Argument. Second, Maine Parties' request here is an attempt to sever an issue from the proceeding. As the Commission stated in the June 16 Order, severance is inappropriate as the Settlement Agreement provides a capacity market construct (including a transition period) that will apply throughout New England.[83]

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[78] Comments in Opposition to Settlement Agreement of Maine Parties at 2 (filed March 27, 2006).

[79] *Id.* at 3.

[80] Request for Rehearing of Maine Parties at 2.

[81] June 16 Order at P 89.

[82] Request for Rehearing of Maine Parties at 23.

[83] June 16 Order at P 106.

75. Maine Parties assert that absent an offset for PER during the transition period, the windfall for existing power supplies will be exacerbated. The Commission disagrees. We found that the transition payments fell within a reasonable range of prices. In that range we included projections from ISO-NE witness David LaPlante that included a PER figure of $0.48/kW-month[84]: those projections, less the PER offset, were still higher than the transition payments.[85] The Commission finds this to be a reasonable estimate of PER, given that the "PER offset is driven by the times when prices exceed the price of the 22,000 heat rate unit."[86] Moreover, as we discussed in the June 16 Order, the transition payments will be adjusted to account for unit performance during periods of high demand.[87]

76. We deny Maine Parties motion to lodge. It would be inappropriate to accept evidence at this extremely late date in this proceeding (after a dispositive order has been issued), since it would effectively deny parties the opportunity to respond to the evidence. In any event, the new evidence relates to whether Maine is export constrained, which is not the subject of this proceeding.

5. Acceptance of Section 4C of the Settlement Agreement

77. Section 4.C of the Settlement Agreement provides:

> From the Effective Date, absent the agreement of all Settling Parties to the proposed change, the standard of review for: (i) challenges to the Capacity Clearing Prices derived through the FCA and prices resulting from reconfiguration auctions provided for in the Settlement Agreement and in the Market Rules addressing the terms of the Settlement Agreement that are approved or accepted by the FERC pursuant to section 3, and (ii) proposed changes to section 11, Part VIII below (Agreements Regarding Transition Period) and the Market Rules implementing that part, shall be the "public interest" standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (the "Mobile-Sierra" doctrine), whether the change is proposed by a Settling Party,

[84] *See* Attachment 6 to the Settlement Agreement, filed March 6, 2006.

[85] *See id.* at 5, note 6 (ISO-NE witness LaPlante setting forth projected LICAP clearing prices less PER offset).

[86] Answer of ISO-NE at 19.

[87] June 16 Order at P 103.

> a non-Settling Party, or the FERC acting *sua sponte*. This Settlement Agreement does not impose the Mobile-Sierra standard on any provision of this Settlement Agreement or the Market Rules that address the terms of the Settlement Agreement except as expressly provided in this section 4.C.

78. In the June 16 Order, the Commission rejected calls from opponents of the Settlement Agreement to reject or modify this provision. First, the Commission noted that under section 4.C, the *Mobile-Sierra* "public interest" standard applies only to (1) the final clearing prices in the FCA and any reconfiguration auctions permitted under the Market Rules, and (2) the transition mechanism.[88] Thus, the Commission concluded that concerns expressed by IECG that this provision would broadly eliminate the ability of non-parties and the Commission to exercise their rights under the FPA were misplaced.[89] Next, the Commission found that section 4.C is fully consistent with current Commission policy permitting the use of similar provisions (including in contested settlements), and that there is no Commission or court precedent allowing a non-signatory to unilaterally seek changes to a *Mobile-Sierra* "public interest" contract under the "just and reasonable" standard.[90] Further, the Commission found that the *Mobile-Sierra* provision is reasonable because of several additional protections available to non-parties. Specifically, the Commission noted that it retains significant authority to protect non-parties, given that "the most attractive case for affording additional protection . . . is where the protection is intended to safeguard the interests of third parties."[91] Moreover, the Commission recounted the procedural safeguards built into the Settlement Agreement; in particular, the Commission noted that ISO-NE is required under the agreement to make an informational filing before each FCA and a section 205 filing after each FCA containing the results, both of which are considered under the "just and reasonable" standard.[92] Finally, the Commission concluded that section 4.C "appropriately balances the need for rate stability and the interests of the diverse entities who will be subject to the FCM."[93]

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[88] June 16 Order at P 182.

[89] *Id.*

[90] *Id.* at P 183.

[91] *Id.* at P 184, *citing Northeast Utilities Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993) (*Northeast Utilities I*).

[92] *Id.* at P 185.

[93] *Id.* P 186.

Requests for Rehearing

79. IECG and Maine Parties seek rehearing of the Commission's refusal to modify or eliminate section 4.C of the Settlement Agreement. IECG first contends that the Commission reads this provision too narrowly, and that it will apply to the market rules filed to implement the transition mechanism, contrary to the Commission's statements in the June 16 Order.

80. Further, IECG argues that the generally-applicable market rules and rates identified in the Settlement Agreement as subject to the "public interest" standard are not contracts eligible for *Mobile-Sierra* protection. According to IECG, the principle underlying *Mobile-Sierra* is "that the parties to a contract should be held to the contract's terms," and thus the doctrine should not be used to prevent non-parties to a Settlement Agreement from challenging market rules or tariff rates that apply to everyone in a market, and consequently are not in and of themselves contracts.[94]

81. IECG also asserts that section 4.C represents an unlawful amendment to the NEPOOL governance structure. IECG states that under section 11.1.5 of the NEPOOL Participants Agreement, Governance Participants have the right to propose changes to the market rules and to have those proposed changes reviewed by the Commission under section 205 of the FPA, if there is support from a majority of the Governance Participants. IECG argues that section 4.C eliminates this right of Governance Participants without the necessary amendments to the Participants Agreement.[95]

82. IECG and Maine Parties argue that section 4.C unlawfully extinguishes their right under section 206 of the FPA to challenge rates as unjust and unreasonable, which the Settling Parties cannot do with their assent. IECG contends that such rights are statutory, and only Congress can abrogate those rights, not Settling Parties or the Commission.[96] Similarly, Maine Parties argue that while parties to a contract can voluntarily give up their rights under the FPA, the Commission cannot deprive a party of those rights.

83. IEGC also notes that it is not a party to the Settlement Agreement, and thus is not bound by its terms. Instead of seeking a unilateral change to the Settlement Agreement,

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[94] Request for Rehearing of IECG at 15.

[95] IECG states that Settling Parties did not follow the required procedures to amend the Participants Agreement, and that the Commission itself may not amend that agreement in the absence of substantial evidence in the record. *See id.* at 17-18.

[96] *Id.* at 18, *citing Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 9-11 (D.C. Cir. 2002).

as the Commission states in the June 16 Order, IECG explains that it only "seeks to disentangle itself from a contract" that would improperly amend the NEPOOL Participants Agreement and interfere with its rights under that agreement and section 206 of the FPA. IECG asserts that contrary to the Commission's conclusion, there is ample precedent supporting its position that a settlement agreement may not bind the Commission or third parties to the "public interest" standard.[97] While recognizing that the Commission has recently changed course, IECG contends that this more recent course is inconsistent with the "contract law foundations of *Mobile-Sierra*," including "the principle that a contract binds those who sign it and does not bind those who do not."[98] IECG urges the Commission to return to its earlier precedent.

84. Finally, IECG and Maine Parties both disagree with the Commission's conclusion that section 4.C does not operate to the detriment of non-settling parties, arguing that while the Commission may still retain authority to protect its interest, the "public interest" is still a more difficult standard to meet. Maine Parties note that no matter how limited the impact of the provision may be, the Commission may still not diminish the rights of non-signatories under the FPA. Moreover, IECG argues that the Commission acted irresponsibly by approving this *Mobile-Sierra* provision, given that it has no time limits and thus will bind the Commission in perpetuity to certain elements of an untested market design. Maine Parties state that Commission precedent indicates that it is appropriate to reject the application of the "public interest" standard where necessary to preserve the ability to protect broad market interests, and that preserving the ability to challenge all aspects of the capacity market is critical here because the market design is new and untested.

Answers

85. ISO-NE responds that current Commission policy allows application of the "public interest" standard to both the Commission and non-parties to a settlement. Additionally, it objects to IECG's argument that market rules and tariff rates of general applicability are not contracts to which *Mobile-Sierra* can be applied, stating that the Settlement Agreement is a contract governing the process for determining rates and market rules, and that the Commission has applied the *Mobile-Sierra* doctrine to

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[97] Request for Rehearing of IECG at 19-20, *citing Westar Generating, Inc.*, 100 FERC ¶ 61,255 at 61,917 (2002); *PJM Interconnection, LLC*, 96 FERC ¶ 61,206 at 61,878 (2001); *Cities of Anaheim and Riverside, California*, 90 FERC ¶ 61,236 at 61,754 (2000); *Montana Power Co.*, 88 FERC ¶ 61,019 at 61,051 (1999); *Carolina Power & Light Co.*, 67 FERC ¶ 61,074 at 61,205 (1994).

[98] *Id*. at 21.

contracts setting rates. NEPOOL also asserts that contrary to IECG's argument, established law and precedent hold that a tariff is a contract.[99] ISO-NE also notes that the Commission still "retains its indefeasible statutory right" to examine and require changes to the rates and market rules if required by the public interest.[100]

86. Moreover, ISO-NE and NEPOOL both argue that application of the "public interest" standard as set forth in section 4.C is appropriate, given: (i) that it applies narrowly to the final capacity clearing prices and transition mechanism once approved, (ii) that the Settlement Agreement includes certain procedures to review the FCA results under section 205 before they become final and to file the transition market rules under section 205, and (iii) because price certainty is critical in this instance to ensure that risks to investors and costs to consumers are kept low.

87. NEPOOL responds to IECG's argument that section 4.C has amended or limited the rights of participants under the NEPOOL Participants Agreement. First, NEPOOL notes that the Participants Agreement is among ISO-NE, NEPOOL and Governance Participants that have signed the agreement but have not joined NEPOOL, and that section 17.2 of that agreement expressly provides that it does not grant any separate rights or benefits to non-signatories such as IECG. Moreover, NEPOOL argues that section 11.1.5 of the Participants Agreement does not limit NEPOOL or any individual participant from entering into a settlement, and NEPOOL itself voted to approve the Settlement Agreement. Further, it contends that the Settlement Agreement does not provide for the adoption of market rules and procedures outside of the stakeholder process, as IECG contends, but instead provides that such rules will be developed within the stakeholder process, and that IECG and all other participants may consider and vote on those rules within that process. With regard to the filing of market rules governing the transition period, both NEPOOL and ISO-NE note that the Settlement Agreement provides that those rules will be filed under the just and reasonable standard of section 205 of the FPA.

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[99] Answer of NEPOOL at 3-4, *citing in part New York State Electric and Gas Corp. v. New York Independent System Operator, Inc.*, 168 F.Supp. 2d 23, 27 (N.D.N.Y 2001) (holding that New York ISO tariffs are contracts).

[100] Answer of ISO-NE at 30, *citing Midwest Independent Transmission System Operator, Inc.* 115 FERC ¶ 61,174 at P 40 (2006) (*citing Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 856 n.29 (D.C. Cir. 1979)).

Commission Conclusion

88. The Commission denies these requests for rehearing. IECG and Maine Parties have presented no new arguments that were not addressed in the June 16 Order, and have not persuaded us to revisit our conclusions in that order.

89. First, we disagree with IECG that the Commission read section 4.C of the Settlement Agreement too narrowly in the June 16 Order. Under that provision, the market rules developed and filed with the Commission under the Settlement Agreement will be reviewed under section 205 of the FPA. In an order issued contemporaneously with this order, the Commission rules on the market rules implementing the transition period under the "just and reasonable" standard of section 205.[101] While under the terms of section 4.C the "public interest" standard will attach to those market rules after they are finalized in that proceeding, we conclude that this limited application of *Mobile-Sierra* is reasonable, especially since those market rules will only be in place temporarily until the FCM begins.

90. We also reject IECG's contention that market rules and tariffs are not contracts to which *Mobile-Sierra* can apply. As NEPOOL points out, tariffs have been held to be analogous to contracts. Additionally, the Commission has on many occasions accepted the application of the "public interest" standard to settlement agreements and contracts setting forth rates.[102] Moreover, the *Mobile-Sierra* provision in this case applies to the Settlement Agreement and the rates resulting from that agreement. As noted above, the market rules implementing the settlement will be made under section 205 and considered by the Commission under the "just and reasonable" standard. As a result, the Settlement Agreement does not prevent non-parties from challenging the market rules that will implement the settlement.

91. Further, we reject IECG's assertion that section 4.C represents an improper amendment to the NEPOOL Participants Agreement. As NEPOOL points out, nothing in the sections of that agreement cited by IECG prevent NEPOOL from entering into a settlement. NEPOOL, as a body, approved the Settlement Agreement by stakeholder vote, as provided for in its governing documents. Additionally, the Settlement Agreement provides that further filings made to implement it (including market rules) will be developed in the stakeholder process and filed under section 205 of the FPA. It does not in any way amend the stakeholder procedures provided for in the Participants Agreement as IECG asserts.

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[101] [cite to companion order]

[102] *See, e.g., infra* note 104.

92. The Commission previously rejected arguments that section 4.C unlawfully limits the rights of non-parties to the Settlement Agreement under the FPA, and that the Commission and non-parties to a Settlement Agreement cannot be bound to the "public interest" standard. In the June 16 Order, we noted that the Commission has routinely permitted the use of similar provisions in settlement agreements, including contested settlements.[103] Moreover, we noted that the Commission has stated on several recent occasions, "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."[104] While IECG cites to earlier Commission cases supporting its position that a settlement agreement may not bind the Commission or third parties to the "public interest" standard, the Commission has more recently consistently accepted application of that standard to the Commission or third parties to a settlement agreement.[105] IECG and Maine Parties have raised no new arguments that persuade us to revisit our conclusions there.

93. Non-signatories to the Settlement Agreement are protected here, and as a result, we reject the notion that we have acted "irresponsibly" by accepting section 4.C. In the June 16 Order, we explained that the Settlement Agreement provides for thorough review of the final auction clearing prices by the Commission and any interested parties.[106] In particular, the Settlement Agreement provides that ISO-NE will make both an informational filing prior to the auction that includes information regarding the zones to be used and qualifying bids, and a section 205 filing following the auction containing the results. Because the limited *Mobile-Sierra* provision in section 4.C does not apply to

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[103] *See, e.g., Midwest Independent System Operator, Inc.*, 115 FERC ¶ 61,174 (2006); *Midwest Independent System Operator, Inc.*, 110 FERC ¶ 61,177 (2005); *Midwest Independent System Operator, Inc.*, 110 FERC ¶ 61,380 (2005); *Pennsylvania-New Jersey-Maryland Interconnection*, 105 FERC 61,294 (2003), *reh'g denied*, 108 FERC ¶ 61,032 (2004); *Vermont Electric Cooperative, Inc.*, 114 F.E.R.C. ¶ 61,220 (2006); *Calpine Construction Finance Company, L.P.*, 114 F.E.R.C. ¶ 61,217 (2006); *Hermiston Power Partnership*, 114 F.E.R.C. ¶ 61,204 (2006); *Central Maine Power Company*, 114 F.E.R.C. ¶ 61,184 (2006); *San Diego Gas & Electric Company*, 114 F.E.R.C. ¶ 61,158 (2006); *Wisconsin Power & Light Co.*, 106 FERC ¶ 61,112 (2004).

[104] *Pennsylvania-New Jersey-Maryland Interconnection*, 108 FERC ¶ 61,032 at P 7, *citing Public Utilities Commission of the State of California*, 105 FERC ¶ 61,182 at P 50 (2003).

[105] *See supra* notes 103-104.

[106] June 16 Order at P 185.

these filings, parties may challenge them under the "just and reasonable standard" and the Commission will address such challenges under that standard. These provisions also address concerns that the FCM market design is untested; these regular filings will reveal any unanticipated problems with that design, giving the parties an opportunity to address them under the just and reasonable standard.

94. Additionally, as we explained in the June 16 Order, even under the "public interest standard," the Commission retains significant authority to protect non-parties to the Settlement Agreement and the public;[107] as ISO-NE correctly states, we retain an "indefeasible right" under the FPA to examine the FCM and require changes if required by the public interest.[108]

95. Finally, as ISO-NE and NEPOOL point out in their answers, price certainty is important to ensure that the FCM achieves its goals of attracting and retaining generators needed for reliability. As we stated in the June 16 Order, stability is of particular importance in this case, given that these proceedings were initiated in part because of the unstable nature of ICAP revenues and the negative effect that it has had on New England's infrastructure.[109] Section 4.C achieves this stability while still allowing the Commission and the parties to thoroughly and regularly review and raise objections to the prices produced by the FCM.

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[107] *Id.* at P 184.

[108] *See Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 283 (D.C. Cir. 2006), *citing Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983).

[109] June 16 Order at P 186, *citing in part Potomac Electric Power Co. v. FERC*, 210 F.3d 403, 409 (D.C. Cir. 2000) ("The court has repeatedly emphasized the importance of contractual stability in a number of cases involving the *Mobile-Sierra* doctrine").

6. Other Issues

(i) Finding that the Existing ICAP Market is Unjust and Unreasonable

96. In the June 16 Order, the Commission noted that it had previously declared that the existing ICAP market is unjust and unreasonable under section 206 of the FPA.[110] The Commission stated that as explained in the June 2 Order, the April 25 Order directed revisions to the ISO-NE tariff "pursuant to section 206 of the [FPA]" to "implement . . . location or deliverability requirements in the ICAP or resource adequacy market . . . so that capacity within [designated congestion areas] may be appropriately compensated for reliability."[111] In the July 24 Order, the Commission further clarified that it was acting under section 206 of the FPA and formally stated that it "found that Market Rule 1 created an unjust and unreasonable result" because RMR agreements, and the need for such agreements, caused an extensive disruption to wholesale markets.[112] The Commission also concluded that the record contains substantial evidence regarding the inability of generators to earn sufficient revenues in the current market, both to continue operating or to support new investment. The Commission further noted that the increase in RMR agreements in New England provided further substantial evidence that generators are failing to recover their costs under the existing market design.

Requests for Rehearing

97. Objecting Parties state that in the FCM Order, the Commission asserts that it has found the existing ICAP market to be unjust and unreasonable. Objecting Parties argue that there is no basis for that finding. Objecting Parties assert the Commission's finding was limited to a discrete set of resources, *i.e.*, seldom-run units needed for locational reliability, not the entire ICAP market. Thus, Objecting Parties contend that at no time in the proceeding has there been any demonstration or finding by the Commission that all generation resources within NEPOOL need additional revenue through a revised capacity market. Objecting Parties argue that, in fact, record evidence is unequivocal: classes of generation, such as coal and nuclear are earning more than sufficient returns. Objecting Parties state that claims that the existing market is not working cannot be verified when there is an undisputed surplus of installed capacity in New England. Objecting Parties

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[110] *Id.* at P 203.

[111] *Id.*, *citing* June 2 Order at P 29 and April 25 Order at P 33, 37.

[112] *Id.* at P 203, *citing* June 2 Order at P 29 and July 24 Order at P 33.

assert that the pricing in the current ICAP market reflects oversupply conditions and that should such conditions change, prices will adjust appropriately.

Answers

98. ISO-NE asserts that the Commission determined the existing ICAP market to be unjust and unreasonable several years ago and that "the time has long since passed" to seek rehearing. ISO-NE argues that Objecting Parties are barred procedurally from seeking rehearing of the Commission's determination that the existing ICAP market is unjust and unreasonable. ISO-NE states that Objecting Parties do not claim that the Commission's finding was made in the June 16 Order, and that Objecting Parties acknowledge that the Commission made this finding in previous orders. ISO-NE argues that there also is ample record evidence supporting this determination, including, ISO-NE states, "almost complete consensus" among parties that some kind of action must be taken. ISO-NE also notes that since the finding on New England's capacity market, the Commission has made a similar finding with regard to PJM's capacity market.

Commission Conclusion

99. We deny this request for rehearing. As noted above, at several points in the proceeding, we have addressed this argument and have reiterated our findings that the existing ICAP market is unjust and unreasonable.[113] Objecting Parties focus too narrowly on the Commission's determinations with regard to certain specific facilities that have applied for RMR contracts. As we stated in the June 16 Order, 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. Moreover, we note that in the June 16 Order, we pointed to 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.[114] Objecting Parties do not contradict this evidence.

100. Objecting Parties claim that the existing ICAP market cannot be found unjust and unreasonable because there is currently a surplus of capacity, and because certain generators are earning sufficient revenues, are unavailing. Again, the Commission found the existing ICAP market unjust and unreasonable because it failed to sufficiently

[113] *Id.* at P 203, *citing* June 2 Order at P 29; April 25 Order at P 33, 37; July 24 Order at P 33.

[114] *Id.* at P 204.

compensate generating units needed for reliability, particularly in constrained areas. The presence of a surplus region-wide or the existence of a few generators earning adequate revenues do not contradict or invalidate the unjust and unreasonable finding. Moreover, load in New England is growing, and the existing surplus is projected to disappear.[115]

(ii) Commission Jurisdiction

101. The Commission concluded in the June 16 Order that it has ample jurisdiction to consider and approve the Settlement Agreement. In particular, the Commission stated that the settlement does not alter the method by which resource adequacy determinations (particularly to determination of the installed capacity requirement) are made or direct that a particular amount of capacity be installed.[116] Further, the Commission noted that the Settlement Agreement was "squarely within the Commission's jurisdiction under the FPA" because it establishes a mechanism and market structure for the purchase and sale of installed capacity at wholesale in interstate capacity and to determine the prices for such sales.[117] The Commission also pointed out that the Settlement Agreement permits parties to self-supply their capacity obligations.

Requests for Rehearing

102. Objecting Parties argue that the Settlement Agreement devises a scheme that is directed toward determining how much generation needs to be available to satisfy local load requirements and, as such, imposes a resources adequacy requirement upon utilities in the New England states, in contravention of the FPA. Objecting Parties assert that under the FPA the Commission has no legal authority to require that any utility purchase generation services or generation capacity, adding that section 201 of the FPA reserves to

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[115] According to ISO-NE's 2005 Annual Markets Report, "total system generation capacity did not change significantly during 2005, with a net increase of 11 MW." Peak demand has grown from 24,116 MW in 2004 to 28,127 MW in 2006.

[116] June 16 Order at P 201.

[117] *Id.* The Commission noted that courts have confirmed the Commission's jurisdiction over the price of capacity in wholesale markets. *Id.*, *citing Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978) (holding that the Commission had jurisdiction over the installed capability charge in New England, a precursor to ICAP); *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987) (holding that the Commission could exercise jurisdiction over the allocation of the costs of capacity among four utility operating companies of a holding company under "its undisputed authority over the wholesale rates of electric generating facilities in interstate commerce.").

the states plenary authority over generation, including the determination of how much generation individual utilities must own or control to reliably serve retail customers. Objecting Parties add that the June 16 Order did not discuss the recent Energy Policy Act of 2005, which further delineates the jurisdictional divide between FERC and the states with regard to electric system reliability. Objecting Parties argue that while Congress imposed requirements for a FERC-jurisdictional "reliability standard," the Act explicitly provides that this did not include requirements to enlarge facilities or to construct new transmission or generation capacity.

103. Objecting Parties also assert that the FPA does not confer upon the Commission the authority to approve prices for generation capacity. Objecting Parties reference certain Settlement Agreement provisions, including those governing the use of CONE, the collar mechanism and the payment schedule established to cover the transition period, arguing that these provisions will require participating load serving entities to pay dictated prices. Objecting Parties assert that the Settlement Agreement sets a specific payment schedule for all capacity in the transition. In reference to provisions that establish the beginning price for each FCA,[118] Objecting Parties state that the Settlement Agreement stipulates the price that will be paid to existing capacity and new capacity when the "collar" is triggered.[119]

104. Objecting Parties argue that participation in the FCM must be voluntary as the Commission lacks authority to mandate how a utility satisfies its reserve requirements. Objecting Parties contend that though a load-serving entity may choose to self-supply its capacity obligations this does not render the participation in the FCM voluntary. Objecting Parties further contend that the self-supply provision does not represent an "opt out" provision as resources designated as self-supply are subject to the same performance obligations and qualification requirements as other resources participating in the FCM and the Forward Capacity Auctions.

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[118] The beginning price of the FCA shall have a starting price of 2 times CONE, with CONE initially set at $7.50/kW-month (therefore, the initial starting price will be $15). See Settlement Agreement at Section III.F.

[119] Until there have been three successful auctions, the price for existing capacity will be set within a ceiling of 1.4 times CONE and a floor of 0.6 times CONE, which is referred to as the "collar mechanism."

Answers

105. NEPOOL asserts that the Commission has previously considered and rejected the jurisdictional arguments raised by the Objecting Parties, and that Objecting Parties offer no new legal or factual arguments that the Commission has not previously considered. In particular, NEPOOL notes that the Commission rejected similar jurisdictional arguments in a November 8, 2004 Order in this docket.[120]

106. NEPOOL contends that Objecting Parties' jurisdictional objections are related to responsibility for establishing the Installed Capacity Requirement (ICR).[121] NEPOOL states that, historically, establishment of the ICR level was the responsibility of NEPOOL, not any state regulator. With ISO-NE becoming a regional transmission organization, responsibility for determining ICR shifted to ISO-NE. ISO-NE's determination is presented to NEPOOL for an advisory vote prior to filing with the Commission. NEPOOL states that the Settlement Agreement does not modify tariff provisions that govern the process for determining ICR. Moreover, NEPOOL states that the Commission rejected the Objecting Parties' jurisdictional arguments when it approved the ISO-NE's proposed ICR values for the 2005/2006 Power Year.[122]

107. ISO-NE argues that the Commission correctly held that it has jurisdiction to approve the Settlement Agreement and states that no new arguments have been raised on rehearing. ISO-NE notes that this issue was extensively discussed in the LICAP proceeding and in Docket No. ER05-715-000.[123] Finally, ISO-NE states that the issue of the ISO's authority to file a proposed installed capacity requirement, as well as the Commission's jurisdiction to approve it, is currently before the United States Court of Appeals for the District of Columbia Circuit[124] and thus needs no further elaboration here.

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[120] *Devon Power LLC*, 109 FERC ¶ 61,154.

[121] The ICR is the level of capacity required to meet the reliability requirements defined for the New England control area; the ICR determines how much capacity will be bought through capacity auctions. ISO-NE calculates the ICR annually.

[122] *ISO New England, Inc.*, 111 FERC ¶ 61,185, *reh'g denied*, 112 FERC ¶ 61,254 (2005), *appeal docketed Connecticut Department of Public Utility Control v. FERC*, No. 05-1411 (D.C. Cir. filed Oct. 28, 2005).

[123] On March 21, 2005, ISO-NE filed materials, which identify the monthly Installed Capacity Requirements established by the ISO for the 2005/2006 power year.

[124] *See supra* note 122.

Commission Conclusion

108. The Commission denies Objecting Parties' request for rehearing with regard to jurisdiction. Objecting Parties have presented few new arguments that the Commission has not already addressed in this proceeding. As we concluded in the June 16 Order, courts have unequivocally confirmed that the Commission has jurisdiction under the FPA to regulate the charges for capacity in wholesale markets.[125] As we discussed in the June 16 Order, FCM only establishes a market design for determining capacity charges; it does not alter ICR or in any way determine the appropriate amount of capacity that must be available. As many of the parties here note, the issue of the Commission's jurisdiction over ICR is the subject of other proceedings and is outside the scope of this case.

109. The Commission's authority in EPAct 2005[126] over bulk electric system reliability is irrelevant in this proceeding. The Commission is not operating under that authority in this case, and as a result, there is no need to discuss it here.

110. Objecting Parties still do not explain why they believe the FCM system is mandatory when there is a self-supply option.[127] Furthermore, the performance obligations for capacity resources (including those self-supplied) noted by Objecting Parties have no bearing on whether the Commission, by approving FCM, is mandating the procurement of a certain level of generation capacity, the issue raised here. Those performance obligations are included in FCM to ensure that capacity resources are available when needed. They do not require that a specific level of generation be procured or infringe on the states' traditional role in determining resource adequacy requirements, as Objecting Parties suggest.

111. In approving CONE, the Commission is not approving prices for generation capacity. Prices for capacity will be established via descending clock auctions, and thus will ultimately be established via competitive bidding. CONE represents the estimated

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[125] June 16 Order at P 201, *citing Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978) (holding that the Commission had jurisdiction over the installed capability charge in New England, a precursor to ICAP); *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987) (holding that the Commission could exercise jurisdiction over the allocation of the costs of capacity among four utility operating companies of a holding company under "its undisputed authority over the wholesale rates of electric generating facilities in interstate commerce.").

[126] Energy Policy Act of 2005, Pub. L. No. 109-58, § 1236, 119 Stat. 961 (2005).

[127] June 16 Order at P 201.

cost of new entry ($7.50/kw-month) and serves as the basis for the beginning point for the first FCA. Settling Parties agreed on a beginning point for the first FCA: 2 times CONE. In order to hold an FCA, a beginning point must be determined. As the proponents of a New England Resource Adequacy Market (a similar design that was proposed at the oral argument in this proceeding) stated in pre-oral argument briefs:

> Under the descending clock auction, the auctioneer (*e.g*., ISO) will announce a price that is high enough to induce potential new entrants to participate. Potential entrants, existing generators, and load (for demand response mechanisms) would respond by offering to provide capacity at the specified price, assuming that the price is high enough to induce more supply than required.[128]

Commission approval of this reasonable beginning point for the FCAs does not constitute approval of generation prices. Moreover, we note that, following the first FCA, CONE will be "calculated using the clearing prices of previous auctions"[129] and thus will rely on competitive prices.

112. The collar mechanism will apply in a limited number of FCAs and will only apply to existing resources. The collar mechanism represents a tool designed to ensure that capacity resources materialize in the first FCAs, thereby minimizing the risk of auction failure and ensuring the long-term viability of the FCM. In this regard, it is a component of a just and reasonable package of reforms. Moreover, the Commission also notes that there is no guarantee that it will be triggered during the initial FCAs. Regardless, as discussed above and in the June 16 Order, the Commission has ample authority under the FPA to regulate the charges for capacity in the wholesale markets.[130]

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[128] Statement in Support of the New England Resource Adequacy Market of the NERAM Proponents, filed in Docket No. ER03-563-030 September 13, 2005.

[129] See Explanatory Statement of the Settling Parties in Support of the Settlement Agreement at 26, filed March 6, 2006.

[130] *See also* 16 U.S.C. § 824(b)(1) (2000) ("The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce.").

(iii) Incentive Rates

Requests for Rehearing

113. Objecting Parties assert that the Commission erred in providing incentive rates to existing generators. Objecting Parties assert that under the Settlement Agreement, all existing capacity resources would be paid capacity payments with no incentive to build new capacity. Objecting Parties contend that the Settlement Agreement fails to demonstrate a connection between paying incentive-based capacity payments to existing resources and increases in installed capacity. Objecting Parties contend that the just and reasonable standard historically has required that incentive rates be restricted to those responding to the incentive. Objecting Parties contend that owners of existing generation resources will have little incentive to add capacity because the new capacity will reduce revenues to their existing resources.

Answers

114. ISO-NE argues that capacity payments to existing generators are not incentive rates but are market rates missing from the current capacity market and that these missing revenues are the reason that the Commission ordered a market-based mechanism be implemented. ISO-NE further argues that this argument was already addressed and rejected by the United States Court of Appeals for the District of Columbia Circuit.[131] In that appeal, ISO-NE states that the court rejected ELCON's argument that a heightened standard of review should be applied as NYISO's ICAP market granted a windfall to existing capacity suppliers at the expense of load serving entities and their customers.

Commission Conclusion

115. We deny this request for rehearing as well. Previously in this proceeding, the Commission fully addressed and dismissed arguments that a capacity market mechanism provided "incentive rates" and thus required that the Commission use a different standard for approval. In particular, in a November 8, 2004 Order on Rehearing and Clarification,[132] the Commission addressed an argument by the NEPOOL Industrial Consumer Coalition (NICC) that federal case law regarding the Commission's incentive ratemaking authority applied to the Commission's consideration of the LICAP

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[131] *Electricity Consumers Resource Council*, 407 F.3d 1232 (D.C. Cir. 2005) (*ELCON*).

[132] *Devon Power LLC*, 109 FERC ¶ 61,154 at P 43-44 (2004).

mechanism. NICC argued that LICAP amounted to an incentive rate scheme, and as a result, the Commission was required under case law to demonstrate that it is "reasonably calculated to achieve a specific policy objective," and required the Commission to ensure that any rate increases used to achieve the policy goals of LICAP were "'in fact needed, and . . . no more than needed.'"[133] The Commission concluded that the LICAP mechanism was not an incentive ratemaking proposal because it was not a rate structure designed to provide direct incentives aimed at increasing energy supplies by increasing prices.[134] Instead, the Commission stated that the proposal (when finalized) would produce just and reasonable rates for capacity, and would reduce volatility of ICAP prices, which both would provide a natural incentive to build capacity where needed. The Commission held that this fact distinguished the LICAP mechanism from the incentive rate proposals approved by the Commission and considered by the courts in the cases holding that a different demonstration must be made to approve such proposals.[135]

116. While the Settlement Agreement adopts a different structure for the capacity market, our earlier conclusion holds. The FCM, like LICAP, is designed to establish just and reasonable rates for capacity and stabilize those rates over time. It does not, either through the transition payments or the FCAs, provide direct incentives aimed at increasing energy supplies by increasing prices. Since our earlier ruling on this issue, in *ELCON*, the court upheld New York's capacity market design against a challenge that it constituted incentive ratemaking for these same reasons.[136] While the FCM will, we believe, provide an incentive for the addition of significant new capacity, this incentive is the natural outgrowth of just and reasonable compensation for capacity resources, which has been missing from New England's capacity market for several years. Because FCM

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[133] *See* Request for Rehearing of NICC in Docket Nos. ER03-563-038 and EL04-102-001at 15-16, *citing Pub. Service Comm'n of the State of New York v. FERC*, 589 F.2d 542 (D.C. Cir. 1978) and *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955). NICC also cited the following cases: *City of Charlottesville v. FERC*, 661 F.2d 945 (D.C. Cir. 1981); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984); *Pub. Util. Comm'n of the State of California v. FERC*, 367 F.3d 925 (D.C. Cir. 2004). *See also ELCON*, *supra* note 131.

[134] *Devon Power LLC*, 109 FERC ¶ 61,154 at P 44.

[135] *Id.*, *citing Pub. Service Comm'n of the State of New York v. FERC*, 589 F.2d 542; *City of Charlottesville v. FERC*, 661 F.2d 945; *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486; *Pub. Util. Comm'n of the State of California v. FERC*, 367 F.3d 925.

[136] 407 F.3d at 1237-38.

does not provide any direct increased payments directed exclusively to increasing supplies, the incentive ratemaking cases are inapplicable here.

8. Motion for Clarification

117. Maine Parties ask that the Commission clarify that ISO-NE will account for export-constraints as part of the auction process. Section III.A.5 of the Settlement Agreement states that export-constrained zones are modeled in the forward capacity auctions. Maine Parties refer to reply comments filed by ISO-NE, which confirmed that export constraints will be modeled in the auction,[137] stating that the Commission noted the same comments in the FCM Order without requiring the ISO to model export constraints through the auction. Maine Parties believe that modeling exports through the auction is critical to the functions of the capacity markets and request that the Commission clarify that the ISO should model export constraints in the auction.

Answers

118. In response, ISO-NE states that it does not object to the requested clarification. ISO-NE asserts that it will model the constraints before the auction and that the auction itself will determine whether the constraints will bind so as to establish separate capacity zones.

Commission Conclusion

119. We grant Maine Parties' request for clarification that the ISO should model export constraints in the auction. Section III.A.5 of the settlement explicitly states: "Export-constrained zones are modeled in the FCA."

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

[137] Reply Comments Regarding Settlement Agreement of ISO-NE at 43 (filed April 5, 2006).

(B) The request for clarification is hereby granted, as discussed in the body of this order.

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

(S E A L)

Magalie R. Salas,
Secretary.

Appendix A – List of Settling Parties

American National Power, Inc.
Associated Industries of Massachusetts
Boston Generating, LLC
Calpine Eastern Corporation
Calpine Energy Services, L.P.
Cape Wind Associates, LLC
Central Vermont Public Service Corporation
Connecticut Department of Public Utility Control
The Connecticut Light and Power Company
Connecticut Municipal Electric Energy Cooperative
Connecticut Office of Consumer Counsel
Conservation Services Group
Consolidated Edison Energy, Inc.
Dominion Energy Marketing, Inc.
Dominion Nuclear Connecticut, Inc.
Dominion Resources, Inc.
Duke Energy North America, LLC
Energy Management, Inc.
EnerNOC, Inc.
Entergy Nuclear Generation Company
Entergy Nuclear Vermont Yankee, LLC
Exelon Generation Company, LLC
Exelon New England Holdings, LLC
Fitchburg Gas & Electric Light Company
FPL Energy, LLC
Granite Ridge Energy, LLC
HQ Energy Services (U.S.), Inc.
ISO New England, Inc.
Lake Road Generating Company, LP
Long Island Power Authority (LIPA)
MASSPOWER
Milford Power Company, LLC
Mirant Americas Energy Marketing, LP
Mirant Canal, LLC
Mirant Kendall, LLC
Mystic Development, LLC, Mystic I, LLC. and Fore River Development, LLC
National Grid USA (on behalf of itself and its subsidiaries that are intervenors in this proceeding)
NEPOOL Participants Committee

New Hampshire Electric Cooperative, Inc.
New Hampshire Office of Consumer Advocate
New Hampshire Public Utilities Commission
NRG (Devon Power, LLC. Middletown Power LLC, Montville Power LLC, Norwalk Harbor, LLC, and NRG Power Marketing)
Pinpoint Power
Public Service Company of New Hampshire
RI Division of Public Utilities and Carriers
RI Public Utilities Commission
Select Energy
Sempra Trading
TransCanada Power Marketing Limited
The United Illuminating Company
Vermont Department of Public Service
Vermont Public Power Supply Authority
Vermont Public Service Board

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Devon Power LLC Docket No. ER03-563-060

(Issued October 31, 2006)

KELLY, Commissioner, *concurring*:

I agree with Industrial Energy Consumers Group that the Commission should not apply the *Mobile-Sierra* "public interest" standard with respect to generally-applicable market rules and tariffs. For the reasons set forth in my concurring statement on the June 16, 2006 order in this proceeding, and as further explained below, I believe that the *Mobile-Sierra* "public interest" standard provision is acceptable in this case.

Section 4.C.i of the settlement applies the *Mobile-Sierra* "public interest" standard with respect to challenges to the final capacity clearing prices and prices resulting from reconfiguration auctions and the market rules related to this provision after they are approved by the Commission. As stated in this order, the Commission will review the final auction clearing prices before they are finalized. ISO-NE will need to make an informational filing prior to each auction that includes information about the zones to be used and qualifying bids, and then make a filing under FPA section 205 after each auction containing the results. These filings will be reviewed under the FPA's "just and reasonable" standard. In addition, these prices will be in place for a time-limited period, as they will be replaced each year by the subsequent FCM auctions.

In addition, Section 4.C.ii applies the *Mobile-Sierra* "public interest" standard with respect to the transition mechanism and the market rules implementing that mechanism. From December 1, 2006 until June 1, 2010, the settlement provides for a transition period during which fixed payments will be made to all installed capacity. These fixed payments are netted against RMR payments and reduced based on availability, and will terminate once the FCM is implemented.

As part of its rationale for accepting the *Mobile-Sierra* "public interest" provision in Section 4.C of the settlement, as it applies to the Commission acting *sua sponte* and on behalf of third parties, the order states that the Commission has "routinely" and "consistently" permitted the use of such provisions in recent orders. I wish to note that I have dissented from those orders on this point and continue to oppose the acceptance of such provisions, except in circumstances

where the parties show that the Commission should approve their request for the higher "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp*., 350 U.S. 332 (1956) (*Mobile*) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*). [1]

Therefore, although I disagree with some of the order's stated rationale for approving the *Mobile-Sierra* "public interest" standard provision specified in this settlement, I believe that the broad support among varied parties for the settlement and the constrained and time-limited application of the "public interest" standard in this case warrant approval of this order.

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Suedeen G. Kelly

[1] *See Entergy Services, Inc*., 117 FERC ¶ 61,055 (2006) (concurring statement).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Devon Power LLC Docket No. ER03-563-060

(Issued October 31, 2006)

WELLINGHOFF, Commissioner, concurring:

In Section 4.C of the instant Settlement Agreement, the Settling Parties have asked the Commission to apply the "public interest" standard of review in narrow circumstances. Because the facts of this case satisfy the standards that I identified in *Entergy Services, Inc.*,[1] I believe that it is appropriate for the Commission to grant the parties' request and agree to apply the "public interest" standard in those narrow circumstances to future changes sought by a party, a non-party, or the Commission acting *sua sponte*. I write separately to explain my conclusion with regard to this issue.

As I stated in *Entergy*, where the parties to an agreement ask the Commission to apply the "public interest" standard to future changes sought by non-parties or the Commission acting *sua sponte*, I would require the parties to demonstrate by substantial evidence that a factual and policy basis supports their request. Elaborating on that requirement, I stated that the Commission should only grant such requests in narrowly proscribed circumstances where substantial evidence affirmatively demonstrates that the agreement at issue has broad-based benefits to both parties and non-parties. In making this assessment, I would take into consideration, among other issues: (1) whether the agreement was negotiated through a stakeholder process reflecting a wide range of interests, (2) whether state commissions had meaningful opportunity to participate in the stakeholder process, (3) the extent of and justification for opposition to the request for the Commission to apply the "public interest" standard, and (4) whether granting the request is necessary to the resolution of the proceeding.

Applying these standards to the facts of this case, I believe that it is appropriate for the Commission to agree to apply the "public interest" standard in the narrow circumstances requested by the Settling Parties. First, substantial evidence in the record demonstrates that the Settlement Agreement has broad-based benefits to both parties and non-parties. The capacity problem in New England is well-documented, with flaws in the ICAP market first identified in 2000. Although a series of modifications to ISO-NE's

[1] 117 FERC ¶ 61,055 (2006) (*Entergy*).

ICAP mechanism were made over the ensuing years, capacity deficiency persisted and grew. For example, a total of 11 MW of regional electricity supply was added in New England in 2005. At the same time, peak demand rose by 2,700 MW.[2]

The Commission has repeatedly stated its concerns about this situation. In the order that initiated the negotiations that produced the Settlement Agreement, the Commission cited a general agreement among the parties that "the status quo is failing and that generation resources are not being added at a rate necessary to maintain reliability and assure just and reasonable wholesale power prices."[3] Similarly, in the order accepting the Settlement Agreement, the Commission found that while New England has sufficient capacity to meet reliability requirements today, additional infrastructure is needed soon to avoid violations of reliability criteria.[4] The Commission also found that the Settlement Agreement provides necessary solutions to resolve these severe problems related to New England's infrastructure.

Second, the parties that participated in the underlying negotiations reflected a wide range of interests. As the Commission stated in its order accepting the Settlement Agreement, from October 2005 until March 2006, over 175 representatives – including representatives from the region's state public utility regulatory agencies, transmission owners, generators, power traders and marketers, demand response and intermittent resource owners, consumer-owned utility systems, and end users – engaged in informal and formal settlement negotiations.[5] While the negotiations did not result in unanimous support for their product, the Settlement Agreement drew support from a significant majority of the participating parties, including four state public service commissions.

Third, two parties (IECG and Maine Parties) sought rehearing of the Commission's refusal to modify or eliminate the application of the "public interest" standard under Section 4.C of the Settlement Agreement. Among other concerns, those parties argue that the proposed application of the "public interest" standard may prevent the Commission from taking appropriate steps in the future with regard to problems that may arise with the new market design. The Settlement Agreement, however, provides that ISO-NE will make filings with the Commission following the forward capacity auctions that reflect their results. Particularly because non-parties will be able to

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[2] *See* Statement of Chairman Joseph T. Kelliher at June 15, 2006 Open Commission Meeting (Docket No. ER03-563-055).

[3] *Devon Power LLC*, 115 FERC ¶ 61,340 at P 14 (2006) (June 16, 2006 Order), citing *Devon Power LLC*, 113 FERC ¶ 61,075 (2005). I note that both of these orders issued prior to my becoming a Commissioner.

[4] June 16, 2006 Order at P 63.

[5] *Id*. at P 66.

challenge such filings under the "just and reasonable" standard, and the Commission will review such challenges under that same standard, I agree with the Commission that these required regular filings will reveal unanticipated problems with the new market design and provide an adequate opportunity to address them.

Another argument raised by parties seeking rehearing is that a settlement may not bind the Commission or non-parties to the "public interest" standard. As I stated in *Entergy* and *Enron Power Marketing, Inc.*,[6] the Commission has discretion to agree to apply the "public interest" standard to future changes sought by non-parties or the Commission acting *sua sponte*, and should exercise that discretion based on careful consideration of the interests of parties and non-parties. In light of the broad-based benefits to both parties and non-parties discussed above, and the other considerations discussed herein, I believe that it is appropriate for the Commission to agree to apply the "public interest" standard in the narrow circumstances requested by the Settling Parties.

For these reasons, I respectfully concur with the Commission's order.

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Jon Wellinghoff
Commissioner

[6] 117 FERC ¶ 61,109 (2006).