

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Devon Power LLC

Docket Nos. ER03-563-030
ER03-563-055

(Issued June 15, 2006)

KELLY, Commissioner, *concurring*:

Price mitigation in energy markets, coupled with capacity payments that did not recognize transmission limitations that prevent some generation from reaching some areas and lack of adequate transmission investment to address those limitations, ultimately led to increased proliferation of cost-based RMR agreements as generation that should have been permitted to retire had to be kept on for local reliability. The Commission issued orders finding the existing situation unjust and unreasonable and directing ISO-NE to propose a solution. In response, ISO-NE developed the LICAP proposal with its sloping demand curve and other features. The proposal stirred up great controversy and even Congress addressed it in the Energy Policy Act of 2005.

Following the ALJ's issuance of the LICAP initial decision, we granted requests to hold an oral argument on LICAP and on proposed alternatives and ultimately delayed issuance of an Opinion on the initial decision pending the outcome of settlement procedures among the parties.

To my surprise and delight the vast majority of the parties reached a settlement that they believe will meet their broad and varied interests in an acceptable manner. Moreover, my examination of their settlement proposal shows it to be a balanced and reasonable way to address the underlying problems the Commission identified in earlier orders.

For these reasons, I am pleased to be able to vote for this settlement despite the fact that it includes a limited application of the Mobile-Sierra public interest standard. For the reasons I have previously set forth in *Wisconsin Power & Light Co.*, 106 FERC ¶ 61,112 (2004), I do not generally believe that the Commission should depart from its precedent of not approving settlement provisions that preclude the Commission, acting *sua sponte* on behalf of a non-party, or pursuant to a complaint by a non-party, from investigating rates, terms and conditions under the "just and reasonable" standard of section 206 of the Federal Power Act at such times and under such circumstances as the Commission deems appropriate. Therefore, I have generally dissented in part from orders that accept for filing

settlements that provide that the Mobile-Sierra "public interest" standard of review will apply to Commission action pursuant to section 206. However, I believe that no such dissent is warranted here due to the settling parties' decision to apply the Mobile-Sierra public interest standard in a very constrained and time-limited manner; specifically, applying it only to the stated transition period prices and the annual prices generated each year by the FCM auctions. Customers are protected due to the time-limited nature of this application and the fact that everything else is covered by the just and reasonable standard.

Suedeem G. Kelly