UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

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| Pacific Gas and Electric Company | Docket No. EL06-53-000 |
| v. | |
| Delta Energy Center, LLC<br>Los Esteros Critical Energy Facility, LLC | Docket Nos. ER06-268-000,<br>ER06-268-001,<br>ER06-261-000, and<br>ER03-510-006 |

ORDER DISMISSING COMPLAINT

(Issued July 3, 2006)

1. At issue in this complaint is an allegation by Pacific Gas and Electric Company (PG&E) that two Calpine Corporation (Calpine)[1] affiliates violated Market Behavior Rule 3[2] by sending letters to the California Independent System Operator (CAISO) indicating that the affiliates were willing to provide reliability must run (RMR) service to

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[1] The Calpine affiliates are Delta Energy Center, LLC (Delta) and Los Esteros Critical Energy Facility, LLC (Los Esteros). Both are wholly-owned subsidiaries of Calpine.

[2] Market Behavior Rule 3 was issued on November 17, 2003, as one of several Market Behavior Rules. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003) (Market Behavior Rules Order), *reh'g denied*, 107 FERC ¶ 61,175 (2004). The Market Behavior Rules are currently on appeal. *Cinergy Marketing & Trading, L.P. v. FERC*, No. 04-1168 et al. (D.C. Cir. filed Apr. 28, 2004). Since then, the Commission codified Market Behavior Rule 3 but did not change the substance of Market Behavior Rule 3. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 (2006) (revising market-based rate tariffs and authorizations). Market Behavior Rule 3 requires market participants to "provide complete, accurate, and factual information, and not submit false or misleading information, or omit material information, in any communication with the Commission, market monitors, [RTOs, ISOs], or similar entities." For convenience, in this order we will refer to the regulation as Market Behavior Rule 3.

the CAISO for one price, and then later submitting a rate schedule with the Commission setting another price. In this order the Commission grants Calpine's motion for summary dismissal of PG&E's complaint, as discussed below.

## I. Background

2. This case involves two RMR agreements: one between CAISO and Delta, and one between CAISO and Los Esteros, to provide RMR service for the 2006 calendar year. The RMR agreements provide that Delta and Los Esteros will provide RMR service in exchange for certain variable cost payments from CAISO, in addition to a fixed cost payment, based on the fixed operating costs of the applicable generating facility. It is the fixed cost component of each of the RMR agreements that is at the heart of this complaint.

3. The parties all agree that there are two different rate methodologies that can be used to calculate the fixed cost component of the payment from CAISO to a generator under the RMR agreements. The first is known as the Annual Fixed Revenue Requirement (AFRR) methodology, while the second is known as the Annual Fixed Reliability Charge (AFRC) methodology.

4. Under the AFRR methodology, the rate an RMR unit owner is paid for its fixed costs associated with providing RMR service is a percentage of the owner's just and reasonable total annual fixed costs associated with the RMR unit. The percent of the AFRR paid to the unit owner is determined by a complex formula, known as the Fixed Option Payment Factor (FOPF), which reflects the amount of the unit's fixed costs incurred as a result of providing RMR service. The FOPF varies depending on whether a unit is designated by its owner as operating under "Condition 1" or "Condition 2." Condition 1 units may participate in market transactions, and the owner retains any revenues from such market transactions. Accordingly, the owner of an RMR unit operating under Condition 1 is reimbursed for only a portion of its fixed costs under its RMR agreement, and presumably recovers the remainder of its fixed costs from its participation in market transactions. Thus, the FOPF for a Condition 1 unit is less than one.

5. Conversely, Condition 2 units are prohibited from participating in market transactions, unless ordered to dispatch by the CAISO. When the CAISO does issue a dispatch notice, a Condition 2 unit must bid into the next available Energy and Ancillary Services market. However, any revenues associated with that transaction are not retained by the owner. Thus, the owner of a Condition 2 unit is not a traditional market participant, but operates its unit entirely at the discretion of the CAISO. Owners of Condition 2 units are paid 100 percent of their fixed costs under their RMR agreement. Thus, the FOPF for a Condition 2 unit is one. Section 3.2(a) of the RMR agreements

limits the right of RMR unit owners to switch from Condition 1 to Condition 2, or from Condition 2 to Condition 1.[3]

6. The AFRC methodology, in contrast, provides an annual payment for fixed costs to the RMR unit owner that is not dependent on the unit owner demonstrating its total fixed costs associated with the unit's operation. One consequence of using the AFRC methodology is that a unit owner cannot be designed as a Condition 2 unit, since there is no AFRR establishing all of the fixed costs for the unit.

7. The history of these two RMR agreements is also useful to understanding this complaint. The RMR agreement between Delta and CAISO was first entered into in 2003, while the RMR agreement between CAISO and Los Esteros was first entered into in 2004. The Delta RMR agreement was filed unexecuted with the Commission and set for hearing and settlement judge procedures. While Delta and CAISO were unable to agree to rates for the RMR service, they did reach a partial settlement, agreeing to use Delta's 2003 proposed rates, subject to refund, up through 2005.[4] The settlement restricted Delta to using AFRC, and thus effectively barred it from ever switching between Condition 1 and Condition 2. However, this partial settlement no longer binds the parties. The Los Esteros RMR agreement was initially filed as an unexecuted agreement in 2004, but the parties later agreed to specific rates and that the fixed costs would be determined under the AFRC rate methodology for contract years 2004 and 2005.[5]

8. The terms of the RMR agreement allow the CAISO to unilaterally renew the RMR contract annually, in this instance, the CAISO will use the terms and conditions, technical specifications, and costs in the existing RMR agreement for analysis, thus alleviating

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[3] In relevant part, section 3.2 of the RMR agreement between Delta and CAISO (filed in Docket No. ER03-510-000) reads:

Owner may, from time to time, transfer a Unit from one condition to the other Condition, provided that it may not do so without [CAISO's] consent unless, as of the transfer date, the Unit will have been subject to its existing condition for at least twelve months. If a transfer is to become effective at the beginning of a Contract Year, Owner shall provide [CAISO] at least 30 days prior notice of the transfer. For a transfer to become effective at any other time, Owner shall give [CAISO] notice at least 90 days prior to the transfer.

[4] *See Delta Energy Center, LLC*, 104 FERC ¶ 61,247 (2003). The parties never reached a complete settlement, and settlement proceedings are ongoing. *See, e.g.*, *Los Esteros Critical Energy Facility, LLC*, Docket No. ER06-268-000 *et al*. (Apr. 10, 2006) (unpublished letter order).

[5] *See Gilroy Energy Center, LLC*, 106 FERC ¶ 61,270 (2004).

existing RMR generators from making an informational filing to be considered for RMR renewal. However, in the event that an owner anticipates a change to its upcoming RMR contract, the owner of the designated RMR unit must file updates to the rates and terms of service. The annual update consists of two parts: (1) an informational package filed pursuant to Schedule F of the RMR Agreement (Schedule F filing); and (2) a rate filing made pursuant to section 205 that reflects, among other things, the revised AFRR contained in the Schedule F filing.

9. On July 5, 2005, Delta and Los Esteros sent separate letters to CAISO stating that they wished to continue providing RMR service for 2006. Included in the Delta letter (Delta's July 5 Letter)[6] was the following statement:

> Delta is willing to provide the ISO [RMR] services for 2006 at the rates, terms, conditions and technical specifications contained in the Must-Run Service Agreement between Delta and [CAISO] ("Delta RMR Agreement"). Because the rates, terms, conditions and technical specifications under which Delta currently provides RMR services are contained in the Delta RMR Agreement, Delta is only addressing proposed rates for 2006 RMR services in this response. Specifically, Delta offers to provide 2006 RMR services from the facility as a whole at a stated bid [AFRC] of $l4,740,960 and a stated bid Variable O&M rate of $1.01/MWh. These rates do not represent any change from the current rates in effect under the Delta RMR Agreement and the May 29, 2003 settlement agreement between Delta, [CAISO, and PG&E]. [Footnotes omitted.]

10. Los Esteros also submitted a similar letter (Los Esteros' July 5 Letter) to CAISO, stating:

> Los Esteros is willing to provide [CAISO] with [RMR] services for 2006 at the rates specified in this response and under the terms, conditions and technical specifications contained in the Must-Run Service Agreement between Los Esteros and the ISO ("Los Esteros RMR Agreement"). Because the rates, terms, conditions and technical specifications under which Los Esteros currently provides RMR services are contained in the Los Esteros RMR Ageement, Los Esteros is only addressing proposed rates for 2006 RMR services in this response.
>
> The current rates under which Los Esteros provides RMR services took into account that Los Esteros recovered a portion of its fixed costs through a

[6] The Delta and Los Esteros letters, as well as CAISO's responses, are included as Attachments 1 through 4 to PG&E's complaint.

> pre-existing contract that the California Department of Water Resources ("CDWR") has for capacity and energy from Los Esteros. This contract expires on March 7, 2006 and there are currently no plans to renew this contract. Consequently, Los Esteros' proposed rates for 2006 RMR services have been determined assuming that it will no longer recover a portion of its fixed costs from the CDWR contract after March 7, 2006. As a result, Los Esteros offers to provide 2006 RMR services from the facility as a whole at a stated bid [AFRC] of $7,000,000 and a stated bid Variable O&M rate of $4.00/MWh. [Footnote omitted.]

11. Aside from the increase described for the Los Esteros facility, the fixed costs indicated in the letters were substantially the same for 2006 as they had been previously in place, as calculated under the AFRC methodology. Neither Delta's nor Los Esteros' letters indicated that there would be any changes to the 2006 pricing methodology.

12. On September 23, 2005, CAISO sent separate notice letters (the September 23 Letters) to Delta and Los Esteros stating that it was extending the term of the two RMR agreements. The letters direct Delta and Los Esteros to "make appropriate filings with [the Commission] updating the rates and associated data for the 2006 Contract Year. . . . No later than fifteen days prior to these FERC filings, [Delta and Los Esteros] is obligated to provide the ISO with information necessary to determine the Contract Service Limits."

13. On November 30, 2005, Delta and Los Esteros each made limited section 205 filings to revise the existing RMR agreements and to change the pricing methodology for the 2006 year from AFRC to AFRR. For the Delta facility, operating under Condition 1, this means an increase from the price mentioned in its July 5 Letter of $14,740,960 (computed under AFRC) to $51,900,000 (computed under AFRR and using the filed FOPF percentage of 0.50). For the Los Esteros facility, operating under Condition 1, this means an increase from the price mentioned in its July 5 Letter of $7,000,000 (computed under AFRC) to $33,347,845 (computed under AFRR and using the filed FOPF percentage of 0.75). If Delta elects Condition 2 status, the AFRR charge would increase to $103,800,000. Likewise, Los Esteros' AFRR charge would increase to $44,400,000 if it elected Condition 2 status.

14. The Commission accepted the RMR agreements, consolidated them, suspended them for a nominal period, subject to refund, and set them for hearing, in a January 27, 2006 Order.[7]

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[7] *Los Esteros Critical Energy Facility, LLC*, 114 FERC ¶ 61,079 (2006) (January 27, 2006 Order).

## II. PG&E's Complaint

15. On February 28, 2006, PG&E filed a complaint alleging that Delta and Los Esteros misled CAISO when they sent their letter to CAISO offering to "bid" one price in their July 5 Letters, and then several months later, after CAISO extended their respective RMR agreements, filing rate schedules containing a significantly higher price. PG&E alleges that Delta's and Los Esteros' actions violate the Commission's Market Behavior Rule 3.[8] Market Behavior Rule 3 obligates a market-based rate seller to:

> Provide accurate and factual information and not submit false or misleading information, or omit material information in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators or jurisdictional transmission providers, unless Seller exercised due diligence to prevent such occurrences.

16. PG&E states that both Delta and Los Esteros are holders of market-based rate authority, and are thus subject to Market Behavior Rule 3. PG&E states that the RMR rates filed by Delta and Los Esteros are many times greater than the bids Delta and Los Esteros submitted to CAISO five months earlier in the July 5 Letters. PG&E notes that the issue is compounded since the rate schedules filed by Delta and Los Esteros in November allow the generators to operate under Condition 2 and charge the higher rates allowed Condition 2 units. PG&E also asserts that the information in the July 5 Letters was false or misleading in violation of Market Behavior Rule 3 and this is so regardless of whether or not CAISO actually relied upon the July 5 Letters in assigning RMR agreement renewals to Delta and Los Esteros for 2006.

17. PG&E states that CAISO uses a Local Area Reliability Service Request for Proposals (LARS RFP) process to determine which generators will provide the least-cost RMR service for the upcoming year. PG&E states that under the LARS RFP process, holders of existing RMR agreements, including Delta and Los Esteros, are required to "submit proposals with any information that is expected to change for the next Contract Year, including but not limited to operational values and the fixed cost values contained in Schedule B of their respective RMR agreement(s)."[9] PG&E argues that where, as here, a generator submits a bid price to CAISO to provide RMR service, CAISO should reasonably be able to rely upon that bid, without fear that the generator will later submit a different cost to this Commission. Otherwise, PG&E argues, CAISO's task of selecting least-cost providers of RMR services becomes impossible.

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[8] *See supra* note 2.

[9] PG&E Complaint at 18 (quoting the LARS RFP section 3.1).

18. PG&E suggests that the Commission should deny Delta and Los Esteros all the benefits of the alleged violation of Market Behavior Rule 3 and should cap Delta's and Los Esteros' RMR rates at the pre-2006 rates. Further, PG&E asserts that the Commission should require Delta and Los Esteros to use the AFRC pricing methodology, which would prevent Delta or Los Esteros from choosing Condition 2 status.

19. Finally, PG&E notes that the issue of whether Delta's and Los Esteros' proposed rates are just and reasonable is already subject to hearing in Docket No. ER03-510-006 *et al.*, subject to refund. According to PG&E, the violation of Market Behavior Rule 3 is a separate issue from whether the rates proposed by Delta and Los Esteros are just and reasonable, and should be accorded its own proceeding and remedy.

## III. Notice of Filing and Responsive Pleadings

20. Notice of PG&E's complaint was published in the *Federal Register*, 71 Fed. Reg. 11,602 (2006), with the answer to the complaint and interventions or comments due on or before March 20, 2006. In addition to those pleadings discussed in more detail below, PG&E filed answers to Delta and Los Esteros' joint motion to dismiss and answer on March 21, 2006, and March 31, 2006, respectively. On April 4, 2006, Delta and Los Esteros filed a joint answer to CAISO's motion to intervene and consolidate. Southern California Edison Company and the City of Santa Clara filed timely motions to intervene.

### A. Delta and Los Esteros' Joint Motion to Dismiss and Joint Answer of Delta and Los Esteros

21. On March 6, 2006, Delta and Los Esteros filed a joint motion to dismiss PG&E's complaint, and on March 20, 2006, filed a joint answer to the complaint. Delta and Los Esteros raise two threshold issues that they argue bar PG&E's complaint: (1) the complaint is an impermissible collateral attack on the January 27, 2006 Order; and (2) Market Behavior Rule 3 does not apply since the RMR agreements are cost-of-service rate schedules, and do not touch on Delta's or Los Esteros' market-based rate authority. Further, even if the complaint is not dismissed on those grounds, Delta and Los Esteros argue that they did not provide false or misleading information since they were simply following the tariff on file in making their November rate filings.

22. On the issue of whether the complaint is barred by the January 27, 2006 Order, Delta and Los Esteros note that the Commission accepted their 2006 RMR rates, subject to hearing and settlement judge procedures, and that the order in that proceeding addressed the same issues raised by PG&E in the instant complaint. Delta and Los Esteros argue that the instant complaint is an end-run around the January 27, 2006 Order and should be dismissed. Delta and Los Esteros argue that finding for PG&E on the merits of the complaint would require reversal of the January 27, 2006 Order setting the rates for hearing. Delta and Los Esteros further note that PG&E's complaint is based on

the premise that once Delta and Los Esteros placed bids, they were prohibited from filing rate schedules with different amounts. According to Delta and Los Esteros, the Commission rejected this argument in the January 27, 2006 Order when it stated that:

> We will deny PG&E's . . . motion to reject Los Esteros' and Delta's filings. Schedule B, Paragraph 8 of Delta's and Los Esteros' existing RMR [a]greements expressly authorizes use of Schedule F in their annual limited Section 205 filings. The RMR [a]greements do not condition these section 205 filings under any agreements based on LARS bids. Additionally, Delta's RMR [a]greement, in Schedule B, Paragraph 8, authorizes Delta's use of Schedule F in its annual limited section 205 filing for contract year 2006, upon expiration of the Settlement Agreement. We further find that Los Esteros' and Delta's filings substantially comply with the threshold filing requirements of section 35.13 of the Commission's regulations and, therefore, PG&E's . . . request for rejection of the filing is denied.[[10]]

23. In addressing the substance of PG&E's complaint, Delta and Los Esteros explain that the bids they submitted in the July 5 Letters reflected the rate design in effect in June 2005 when the bids were submitted. Delta and Los Esteros argue that the July 5 Letters merely conveyed bids, and that all parties knew that those bids were contingent upon negotiations between the various parties. Delta and Los Esteros explain that after CAISO selected Delta and Los Esteros to provide RMR service for 2006, the parties attempted to negotiate a specific rate. Delta and Los Esteros argue that once negotiations over the bids fell through in November 2005, Delta and Los Esteros were free to propose a different bid, as allowed by the RMR agreements. Delta and Los Esteros point to a statement by CAISO describing the LARS RFP process as a non-binding offer in a negotiating process:

> Because of the broad range of factors relevant to the CAISO's selection of RMR units, when it conditionally designates a unit as RMR in response to proposals it receives in the LARS [RFP] process, no contract arises and no firm commitment is made. The conditional designation merely initiates a negotiation process over the cost and terms of RMR service. The CAISO emphasized this point throughout its 2006 LARS RFP and related documents.[[11]]

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[10] Delta & Los Esteros Motion to Dismiss at 4 (quoting the January 27, 2006 Order, 114 FERC ¶ 61,079 at P 27).

[11] *Id.* (quoting CAISO Answer in Opposition to Motion to Intervene of MMC Energy North America, LLC, Docket No. ER06-426, at 9).

24. When Delta and Los Esteros subsequently filed unexecuted RMR agreements with the Commission, they elected to use the AFRR methodology instead of the AFRC methodology. This decision, Delta and Los Esteros argue, is explicitly allowed in RMR agreements.

25. Delta and Los Esteros note that the LARS RFP document states on its cover that "[n]o binding commitment shall arise between the [CAISO] and a winning respondent under this Request for Proposals until and unless the parties sign documents of agreement that become effective in accordance with their terms."[12] In fact, Delta and Los Esteros note, the CAISO's September 23 Letters specifically requested that Delta and Los Esteros file revised rates with the Commission and did not impose any limitations on those filings. Further, Schedule B, section 8 of the RMR agreements expressly authorizes, in the absence of any other agreement, the use of either the AFRR or AFRC rate methodologies. Thus, Delta and Los Esteros argue, they were not bound by the July 5 Letters when they made their November rate filings.[13]

26. Delta and Los Esteros also argue that Market Behavior Rule 3 does not apply in this matter, since the RMR rates involved are cost of service rates and that the RMR rates did not arise out of and were not related to wholesale transactions for which Delta and Los Esteros received market-based rate authority.[14] Delta and Los Esteros argue that the Market Behavior Rules were not adopted to impose conditions on RMR bids or to limit the filing rights of entities filing cost-of-service rate schedules. Any problems related to these filings should have been raised in the underlying section 205 proceeding.

27. Delta and Los Esteros also take issue with PG&E's proposed remedies, arguing that rescission of an RMR agreement is not an established remedy for violation of a Market Behavior Rule. Instead, they argue the Commission's authority for violations of Market Behavior Rules is premised on there being a violation of an entity's market-based rate tariff. Delta and Los Esteros argue that since there is no market-based rate tariff at issue in this proceeding, and since neither Delta's nor Los Esteros' RMR agreements contain the Market Behavior Rules, the relief PG&E seeks is not authorized.

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[12] Delta & Los Esteros Answer at 6 (quoting cover page of the LARS RFP).

[13] In this regard, we note that PG&E sent a letter dated February 24, 2004 to the CAISO's Director of Grid Planning (PG&E Letter) that noted that although "the [LARS RFP] process includes a request for pricing information in the request for proposals, the information is not used in the selection process." PG&E Letter, Attachment 1, at 4, *availaible at* Http://www.caiso.com/docs/2004/05/20/2004052010413523368.html.

[14] *Id.* at 8-9 (citing Market Behavior Rules Order, 105 FERC ¶ 61,218 at P 108 ("the information sought or provided hereunder [Market Behavior Rule 3] will be directly related to the wholesale transactions for which the [sellers] have received market-based rate authority")).

### B. CAISO's Motion to Intervene and Consolidate

28. On March 20, 2006, CAISO filed a motion to intervene, and requested that the matters raised in the complaint be consolidated with the underlying rate proceedings.[15] CAISO states that the complaint raises two important issues: (1) the extent to which the information provided in support of a bid during the LARS RFP process (apart from the bid itself) must be factually accurate; and (2) the extent to which Calpine in this case met such a standard. CAISO states that it places a great deal of reliance on the factual assertions made by LARS RFP participants, and requests that the Commission confirm that information submitted as part of, or in support of, a LARS RFP proposal is required to be accurate.

### C. Comments of California Electricity Oversight Board

29. The California Electricity Oversight Board (CEOB) states that it is concerned that Calpine's actions will nullify the intent of the LARS RFP process, which is supposed to provide some measure of consumer protection in the designation of RMR units. While some variation between a bid price and a contract price may be required, the Commission should ensure that this flexibility does not subvert the LARS RFP process. CEOB asserts that the Commission should apply "very close scrutiny to any upward revisions from the bids submitted" in connection with the LARS RFP. Finally, CEOB states that where multiple qualifying bidders participate in an RFP, the cost level of the first qualified bidder whose bid did not prevail should form a presumptive ceiling as to what constitutes a just and reasonable rate.

### D. Comments of California Public Utilities Commission

30. On March 23, 2006, the California Public Utilities Commission (CPUC) filed a motion to intervene out-of-time and comments. According to the CPUC, PG&E's complaint appears to be a reasonable vehicle to address the allegation of illegal behavior by Delta and Los Esteros. However, CPUC urges the Commission to address the broader issues of whether RMR generators, bidding into the LARS RFP, are allowed to bid anticipated costs of providing RMR services at levels that are much lower than the costs that such generators subsequently provide to the Commission in their annual informational filings.

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[15] CAISO notes that it is the Commission's practice to consolidate proceedings that raise common issues of fact and law. CAISO Motion to Consolidate at 5 (citing *Southern California Edison Co. v. Enron Generating Facilities*, 101 FERC ¶ 61,313 (2003)).

31. CPUC asserts that the Commission should use the opportunity provided by PG&E's complaint not only to address the specific concerns relating to Delta and Los Esteros that PG&E has raised, but also to set forth policy of more general applicability that would prospectively prohibit misleading behavior by generators bidding into CAISO's LARS RFP process. LARS RFP bids may not be legally binding on either the generator or on CAISO, but there needs to be a binding presumption that such LARS RFP bids are to serve as the basis for subsequent informational filings, and that any significant deviation from the LARS RFP bid in such filings would be a violation of the Commission's Market Behavior Rules.

## IV. Discussion

### A. Procedural Matters

32. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serves to make Southern California Edison Company and the City of Santa Clara parties to this proceeding. We also grant the CPUC's motion to intervene out-of-time.

33. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept PG&E's March 21, 2006 and March 31, 2006 answers, as well as Delta and Los Esteros' joint April 4, 2006 answer, because they have provided information that assisted us in our decision-making process.

### B. Substantive Matters

34. Delta and Los Esteros raise two threshold issues in their motion to dismiss and their answer. First, Delta and Los Esteros contend that PG&E's complaint is an impermissible collateral attack on the January 27, 2006 Order. They state that PG&E's complaint is "nothing other than an end run around the January 27[, 2006] Order and the Commission's finding that Owner's [sic] November 30, 2005 rate filings were expressly authorized in their tariffs and under [Federal Power Act (FPA)] Section 205 and were not conditioned or limited to either the rate design or rate levels in the earlier LARS bids."[16] Delta and Los Esteros argue that the January 27, 2006 Order found that they properly based their 2006 rates on the AFRRs calculated at the time of filing, notwithstanding that they had previously submitted LARS bids based on then applicable AFRCs.[17] PG&E admits that,

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[16] Delta & Los Esteros Motion to Dismiss at 6 (footnote omitted).

[17] *Id.* at 4.

> [a]ccording to the January 27 Rate Order, the RMR Agreements permitted Delta and Los Esteros to use a formula rate in their Section 205 rate filings that relied on a statement of annual fixed costs instead of the single-value [AFRC] they had used exclusively until those filings, and their RMR Agreements did not require their Section 205 filings to conform to the terms of their LARS bids.[[18]]

PG&E contends, however, that the January 27 Rate Order did not address the issue before the Commission here; namely, whether Delta's and Los Esteros' communications with the CAISO during the LARS RFP process were false or misleading. As elaborated below, the Commission agrees with Delta and Los Esteros that PG&E's complaint is a collateral attack on the January 27, 2006 Order and the rate proceeding established in that Order.

35. In this docket, PG&E has used a behavioral rule complaint as a vehicle for seeking a rate level determination. The remedies available for a violation of Market Behavior Rule 3 include disgorgement of profits and payment of penalties (as appropriate), but do not include the establishment of a rate other than through the rate setting process under sections 205 and 206 of the FPA.[19] PG&E requests as a remedy in its complaint that the Commission set Delta's and Los Esteros' rates at a level no higher than the rates set forth in the July 5 Letters. Establishing just and reasonable rates, whether at a level higher or lower than the July 5 Letters,[20] is the very issue addressed in the January 27, 2006 Order and being addressed in the proceeding established by that order. Thus, regardless of whether PG&E's claim presents a new issue (*i.e.*, the alleged Market Behavior Rule 3 violation), the remedy sought by PG&E would yield a result no different from the rate resolution already being addressed in the ongoing section 205 proceeding. PG&E's complaint is thus no more than a collateral attack on, and circumvention of, the ongoing rate proceeding.[21]

36. In addition, the Commission already found in the January 27, 2006 Order that the RMR agreements expressly authorized Delta and Los Esteros to change the cost methodology and also found that the rate filings were not conditioned on the LARS bids.[22] Thus, the Commission already determined that Delta and Los Esteros were within

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[18] PG&E March 21, 2006 Answer at 4 (footnote omitted).

[19] *See* PG&E March 21, 2006 Answer at 6; PG&E March 31, 2006 Answer at 4.

[20] PG&E Complaint at 2-3, 22.

[21] While that ongoing rate proceeding has not yet reached a conclusion, the Commission sees no reason to consider the just and reasonable rate in both this proceeding and that one.

[22] January 27, 2006 Order, 114 FERC ¶ 61,079 at P 27.

their rights to make the change in their rate filings. PG&E's complaint is no more than a collateral attack on that determination. For these reasons, the Commission denies PG&E's complaint and grants Delta and Los Esteros' joint motion to dismiss.[23]

37. CAISO and other interveners express concern that that CAISO relies on information provided by generators in evaluating proposals and selecting RMR resources and that such generators should be limited in their ability to change their prices once they have submitted bids. To the extent that CAISO believes its RMR selection process allows unacceptable bid flexibility and would be improved by requiring that LARS RFP bids be binding on the parties submitting such bids, CAISO should seek to amend its Tariff and other LARS RFP rules to provide such clarification and file any amended Tariff provisions with the Commission for approval.

38. We will deny Delta and Los Esteros' joint motion to dismiss and CAISO's motion to consolidate, as they have been rendered moot by our denial of the underlying complaint.

The Commission orders:

(A) PG&E's complaint is hereby dismissed, as discussed in the body of this order.

(B) Delta's and Los Esteros' motion to dismiss is hereby granted, as discussed in the body of this order.

(C) CAISO's motion to consolidate Docket No. EL06-53-000 with the ongoing hearing in Docket Nos. ER06-268-000, ER06-268-001, ER06-261-000, and ER03-510-006 is hereby denied as moot, as discussed in the body of this order.

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

( S E A L )

Magalie R. Salas,
Secretary.

[23] The Commission need not rule on the second threshold issue, Delta's and Los Esteros' contention that Market Behavior Rule 3 does not apply to communications made in connection with RMR agreements since they are cost-based transactions, given the finding above.

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(Issued July 3, 2006)

KELLY, Commissioner, *dissenting*:

I dissent from the majority's decision to dismiss this complaint. I disagree that this complaint, which involves allegations of behavior rule violations, represents an impermissible collateral attack on the January Order that accepted the respondents' cost-based RMR agreements. The issues in these two proceedings are separate and distinct.

The majority's decision appears to hinge greatly on the fact that PG&E is seeking a rate-based remedy rather than disgorgement or some other more typical behavior rule remedy. Because the requested remedies are rate-based and the January Order also dealt with rate issues, the majority essentially argues that the merits of the complaint become irrelevant and need not be addressed. However, in addressing the merits of a complaint we remain free to craft an appropriate remedy irrespective of what remedy the complainant seeks. Accordingly, alleged infirmities with the requested remedy do not permit us to avoid addressing the complaint.

Moreover, the January Order's approval only reflects the fact that a variety of just and reasonable rates exist for RMR units in California based on each unit's choice between the cost recovery and operational options that are available; in other words, between AFRC and AFRR and between conditions 1 and 2. It is a completely separate matter whether the "market" outcome of the LARS RFP process, the bid-based process used to help choose which units will be designated as RMR, was inappropriately manipulated. If the respondents had submitted accurate information as to their proposed rates, they might not have been designated as RMR units because Section 5.2.6 of the CAISO Tariff requires it to choose the least cost option where options are available. In turn, if these units were not designated as RMR, then CAISO would be under no obligation to purchase from them under the RMR contracts approved by the January Order. The fact that the rates in these contracts can be set at just and reasonable levels does not impact the question of whether such contracts would have been awarded in the

first place. The latter is the complainant's issue, an issue not addressed by the January Order, and that separate issue remains outstanding despite any infirmities in complainant's proposed remedy.

As to the subject of the complaint itself, the record is clear that the respondents bid low and then, after being chosen, quadrupled their rates from the bid level. The fact that these proposed rates may be cost-justified is irrelevant if the respondents were only able to enter these contracts because they initially provided misleading information as to their proposed rates. While RMR sellers are clearly permitted to choose between AFRC and AFRR and between conditions 1 and 2, the business practices for the LARS RFP also have clear language requiring that the LARS bid reflect whatever choices the seller plans to make.[24] The two bids at issue clearly did not accurately reflect the choices the units ultimately made. While more information would be needed to determine whether the units knowingly provided inaccurate information, the fact remains that the market outcome of the LARS RFP process may have been altered to their advantage by the inaccurate information they provided. If this was done intentionally, it would be precisely the type of activity that the Behavior Rules were meant to address.

While I recognize that the Commission's Behavior Rules were tied to sellers' market-based rate tariffs at the time the complained-of behavior occurred and that the sellers' LARS RFP submittals were not made under their market-based rate tariffs, CAISO's tariff has its own version of Behavior Rule 3 contained in Enforcement Protocol 5.1(a). That CAISO Tariff protocol was broad enough to apply here since the LARS RFP process exists only to support the CAISO Tariff requirements in Section 5.2.6. Accordingly, the complainant's issue can be addressed under the Enforcement Protocol if subsequent hearing procedures determine that the units intentionally provided inaccurate information.

Respondents' argument that the terms of the LARS RFP process permit their submittals to contain inaccurate information as to their proposed rates, terms and conditions is not a strong one. Respondents note that the LARS RFP document states on its cover that "[n]o binding commitment shall arise between the [CAISO] and a winning respondent under this Request for Proposals until and unless the parties sign documents of agreement that become effective in accordance with their terms." I do not see why this language means anything more than that the offers made in the submittals will be void if the parties ultimately fail to sign a contract. I see no justification for an interpretation that would permit the submittal of rate information bearing no relationship

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[24] For example, the LARS RFP documents include the following instruction:

"The ISO requires that owners of existing RMR Units submit proposals with any information that is expected to change for the next Contract Year, including but not limited to operational values and the fixed cost values contained in Schedule B of their respective RMR Agreement(s)."

to the actual rates proposed to be charged. To give such a meaning to this statement would undermine the entire cost-minimization purpose of the RFP process and render it an exercise in futility.

While not directly addressing this argument, the order states that if CAISO believes its RFP process contains too much bid flexibility it may seek to amend its tariff accordingly. If I decided that the tariff and associated business practices read as the respondents argue, I would advocate a 206 proceeding to close this loophole that can result in unjust, unreasonable and unduly discriminatory rates, terms and conditions.

In summary, rather than dismiss this complaint I would have granted it in part to find that the existing tariff language and LARS RFP business practices do require would-be RMR units to submit accurate information in their LARS RFP submittals. Since it is possible that the respondents believed their submittals were accurate at the time they made them, I would also have initiated a hearing to determine whether any such mitigating factors exist and if not, to determine the appropriate remedy. The level of any such remedy would depend in part on whether more accurate RFP submittals by the respondents would have resulted in a different outcome; for example, in the respondents not being designated as RMR units. Also, any intentional submittal of inaccurate information in the RFP process would merit some penalty under the Enforcement Protocol, which the hearing would be required to determine as appropriate.

Because this order fails to take these actions, I must respectfully dissent.

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Suedeen G. Kelly