

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Los Esteros Critical Energy Facility, LLC

Docket Nos. ER06-268-000
ER06-268-001
ER06-261-000
ER03-510-006
EL03-22-002
EL02-15-003

ORDER CONDITIONALLY APPROVING UNCONTESTED SETTLEMENT

(Issued December 28, 2006)

1. On October 19, 2006, Delta Energy Center, LLC (Delta), Los Esteros Critical Energy Facility, LLC (Los Esteros), Geysers Power Company, LLC (Geysers), Creed Energy Center, LLC, Gilroy Energy Center, LLC, Goose Haven Energy Center, LLC, Los Medanos Energy Center, LLC (Los Medanos), Metcalf Energy Center, LLC (Metcalf) (collectively referred as the Calpine Entities), Pacific Gas and Electric Company (PG&E), the California Independent System Operator Corporation (CAISO), and the California Electricity Oversight Board (CEOB), (collectively referred to as the Settling Parties), jointly submitted an Offer of Settlement and a Settlement and Release of Claims Agreement (Settlement) that resolves issues in the captioned dockets.¹ As part of the Settlement, designated Calpine Entities will provide capacity to PG&E under one-year and multi-year resource adequacy contracts that will meet California requirements

¹ The Parties state that, in addition to resolving all of the issues in Docket Nos. ER06-268-000, ER06-268-001, ER06-261-000 and ER03-510-006, the settlement resolves as to Geysers any matters that were or may have been raised regarding the basis for Geysers' RMR rates in Docket Nos. EL02-15 and EL03-22. Parties state that these latter two proceedings are pending at the Commission upon a voluntary remand from the United States Court of Appeals for the District of Columbia Circuit, but that the matters pending in those dockets with respect to Geysers shall be terminated by this settlement.

and lessen the need for designation of reliability must-run (RMR) units in California, and Geysers will provide power from its renewable resources to PG&E under a multi-year power contract. The Settlement provides in pertinent part:

This Agreement may be modified only if in writing and signed by each of the Parties. No waiver of any provision of this Agreement or departure from any term of this agreement shall be effective unless in writing and signed by all Parties to this Agreement. No modification will be effective if it were to require FERC approval, absent such approval. The Parties intend that any other modification of this Agreement, whether at the initiative of FERC or a non-Party, shall be subject to the Mobile-Sierra "public interest" standard.

Settlement at § 7.9.

2. On November 1, 2006, the Public Utilities Commission of the State of California filed comments in support of the Settlement. No other comments were filed. On November 17, 2006, the Chief Judge certified the Settlement to the Commission as uncontested.²

3. The Settlement, as revised as discussed below, is fair and reasonable and in the public interest and is hereby conditionally approved. The Commission's conditional approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. While the parties agree to a Mobile-Sierra "public interest" standard, we believe that RMR agreements like the one at issue here are the kinds of agreements that warrant the Commission declining to be so bound to such a standard.³ Accordingly, we will conditionally approve the Settlement on the parties filing revisions, within 30 days, to provide that the Commission will be bound to the "just and reasonable" standard and not the "public interest" standard.

4. The rate schedule sheets submitted as part of the Settlement are in compliance with Order 614. *See Designation of Electric Rate Schedule Sheets*, Order No. 614,

² *Los Esteros Critical Energy Facility, LLC*, 117 FERC ¶ 63,040 (2006).

³ As a general matter, parties may bind the Commission to the public interest standard. *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993). Under limited circumstances, such as when the agreement has broad applicability, the Commission has the discretion to decline to be so bound. *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir 2006).

65 Fed. Reg. 18,221, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,096 (2000). The rate schedules are hereby conditionally accepted for filing and made effective as specified in the Settlement.

5. This order terminates Docket Nos. ER06-268-000, ER06-268-001, ER06-261-000, ER03-510-000, ER03-510-006, EL02-15-003, and EL03-22-002. New sub-dockets will be assigned upon receipt of the refund report.

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

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Los Esteros Critical Energy Facility, LLC

Docket Nos. ER06-268-000
ER06-268-001
ER06-261-000
ER03-510-006
EL03-22-002
EL02-15-003

(Issued December 28, 2006)

KELLY, Commissioner, *concurring*:

The settling parties have requested that the Commission apply the *Mobile-Sierra* “public interest” standard of review to any future changes to this settlement, whether proposed by a party, non-party or the Commission acting *sua sponte*. As I have previously explained,¹ I do not believe the Commission should approve provisions that would apply the “public interest” standard of review to future changes that may be sought by a non-party or the Commission acting *sua sponte*, absent an affirmative showing by the parties and reasoned analysis by the Commission. In this case, there is no affirmative showing or reasoned analysis. Therefore, I think the order’s rejection of the “public interest” standard of review provision is appropriate.

The majority concludes that the proposed provision should be rejected because “RMR agreements like the one at issue here are the kinds of agreements that warrant the Commission declining to be so bound to such a standard.” I am puzzled by this conclusion because the order offers no analysis or rationale for it. Nevertheless, I agree with the order’s rejection of the proposed provision.

For these reasons, I respectfully concur.

Suedeen G. Kelly

¹ See, e.g., *Transcontinental Gas Pipe Line Corporation*, 117 FERC ¶ 61,232 (2006).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Los Esteros Critical Energy Facility, LLC

Docket Nos. ER06-268-000
ER06-268-001
ER06-261-000
ER03-510-006
EL03-22-002
EL02-15-003

(Issued December 28, 2006)

WELLINGHOFF, Commissioner, dissenting in part:

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

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

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

Jon Wellinghoff
Commissioner

¹ 117 FERC ¶ 61,055 (2006).

² 117 FERC ¶ 61,149 (2006).