

124 FERC ¶ 61,216
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.

California Department of Water Resources

Docket No. EL07-103-001

ORDER DENYING REHEARING

(Issued September 2, 2008)

1. On November 19, 2007, the Commission issued a declaratory order finding that it does not have exclusive jurisdiction over a contractual dispute pending in arbitration between California Department of Water Resources (CDWR) and Sempra Generation (Sempra) and determining that the Commission would not, in the circumstances presented, exercise primary jurisdiction over the claims in that action.¹ In this order, the Commission denies Sempra's request for rehearing and clarification.

I. Background

2. CDWR brought arbitration claims alleging that Sempra failed to perform as required under the parties' long-term Energy Purchase Agreement (Agreement). An American Arbitration Association panel (Panel) issued an order (AAA Order)² finding that the Commission has exclusive jurisdiction over CDWR's claims. The Panel premised its jurisdictional findings on its conclusion that there was a conflict between CDWR's claims and the California Independent System Operator Corporation (CAISO) Tariff. In the event that the Commission did not agree that it had exclusive jurisdiction over these claims, the Panel stayed the proceeding until the proceedings before the Commission became final. CDWR filed a petition for declaratory order finding that the Commission does not have exclusive jurisdiction over the parties' contractual dispute

¹ *California Dep't. of Water Resources*, 121 FERC ¶ 61,191 (2007) (November 19 Order).

² Order Re Sempra's Motion to Dismiss Based on FERC Preemption, AAA Case No. 74 198 Y 0196 06 (July 12, 2007).

and, that if the Commission had concurrent jurisdiction, it would not exercise primary jurisdiction over the claims.

3. In the November 19 Order the Commission emphasized that it was not making a finding as to the validity of CDWR's interpretation of the Agreement. The Commission stated that arbitration is an appropriate method for resolving the parties' disputes and that it interpreted the Panel's stay of the arbitration proceeding as allowing the Commission to provide guidance on whether the Commission believes it has exclusive jurisdiction or would assert primary jurisdiction over the dispute. CDWR did not seek to reverse or overturn the Panel's decision nor did the Commission.³ Again, in its closing paragraph the Commission "emphasize[d] that this declaratory order does not reflect any position by the Commission regarding the merits of the parties' contractual dispute in the arbitration proceeding."⁴

4. In the November 19 Order, the Commission first considered whether there was a conflict between CDWR's claims and the CAISO Tariff that would trigger its exclusive jurisdiction over the dispute.⁵ The Commission determined that CDWR's interpretation of the Agreement, i.e., that Sempra may not knowingly schedule energy deliveries to CDWR at congested points, does not conflict with the CAISO Tariff or CAISO Tariff Amendment No. 50. The Commission found that the CAISO Tariff does not preclude a generator from considering potential congestion when scheduling energy. The Commission noted that if a generator schedules less than its full output by anticipating intra-zonal congestion, it would still be able to offer unscheduled available capacity to the CAISO by an adjustment and/or supplemental energy bids.

5. The Commission also determined in the November 19 Order that the parties' contractual dispute is not about the proper rate for service, but is about what, if any, adjustment is contemplated under the Agreement in the alleged circumstances. The Commission concluded that such relief does not implicate setting a new rate under the Agreement and thus, the dispute does not fall within the Commission's exclusive jurisdiction.

6. Second, the Commission analyzed whether it would assert primary jurisdiction over the contractual dispute, considering its three factor test for exercising concurrent

³ November 19 Order, 121 FERC ¶ 61,191 at P 32.

⁴ *Id.* P 46.

⁵ *Id.* P. 33-34, 40 ("Having made the declaration above that CDWR's interpretation of the Agreement is not in conflict with the CAISO Tariff or Amendment No. 50, we now address the jurisdictional questions posed by CDWR's petition.").

jurisdiction.⁶ The three factors are: (1) whether the Commission possesses some special expertise that makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission. The Commission found that it would not expect to assert primary jurisdiction if presented with this dispute because this type of question is unique to the parties, the resolution of the dispute is not important to the regulatory responsibilities of the Commission, the Commission has no special expertise in ascertaining how the parties intended to address the issue under the Agreement, and there is no need for industry-wide uniformity of interpretation of the questions that the dispute raises.⁷

II. Sempra's Rehearing Request

7. Sempra contends that the Commission erred in contradicting the Panel's findings and that the Commission should have dismissed CDWR's petition as an improper attack on the AAA Order. Sempra asserts that the AAA Order is binding under the terms of the Agreement,⁸ and is not subject to review under California law,⁹ the Federal Arbitration Act,¹⁰ or Commission precedent.¹¹

8. Sempra states that the Commission erred in holding that it does not have exclusive jurisdiction when CDWR asserted that Sempra breached the Agreement by allegedly gaming and manipulating the intra-zonal congestion management system administered by CAISO. Sempra states that any legal determination concerning this breach of contract

⁶ *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*).

⁷ November 19 Order, 121 FERC ¶ 61,191 at P 44-45.

⁸ *Citing* Agreement § 7.02(d).

⁹ *Citing* Cal. Code Civ. Proc. §§ 1285, 1286; *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, (Cal. 1992).

¹⁰ *Citing* 9 U.S.C. §§ 10, 11; *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1086 (2d Cir. 1993).

¹¹ *Citing* *S. Cal. Edison Co. v. FERC*, 502 F.3d 176, 181-82 (D.C. Cir. 2007); *Joseph M. Keating*, 60 FERC ¶ 61,243, at 61,815 (1992).

claim could only be made by the Commission acting under its exclusive jurisdiction to address manipulation of wholesale power markets.¹²

9. Sempra states the Commission's November 19 Order is arbitrary and capricious because it fails to meaningfully respond to these two arguments.¹³ Sempra also asserts that the November 19 Order is not reasoned decision making because it varies from previous Commission orders addressing CAISO's intra-zonal congestion management procedures.¹⁴

10. Alternatively, Sempra requests that the Commission clarify that the November 19 Order is not binding on the Panel, that the Commission did not intend to direct the Panel to alter the AAA Order and that the Panel is free to maintain its Order. Sempra also argues that the Commission should clarify that in its November 19 Order, it accepted CDWR's allegations as true and did not resolve any merits of CDWR's underlying claims.¹⁵ Sempra states that the Commission did not have a full record before it to make a reasoned decision on the merits of the dispute.¹⁶ Lastly, Sempra cites the filed rate doctrine and argues that the Commission should clarify that the Panel is bound by the terms of the Agreement.¹⁷

¹² Citing *Calif. ex rel. Lockyer v. Dynergy, Inc.*, 375 F.3d 831, 852 (2004); *Pub. Util. Dist. No. 1 of Snohomish County v. Dynergy Power Mktg., Inc.*, 384 F.3d 756, 761-62 (9th Cir. 2004) *cert. denied*, 545 U.S. 1149 (2005).

¹³ Citing *Port of Seattle v. FERC*, 499 F.3d 1016, 1035 (9th Cir. 2007); *Pub. Serv. Comm'n of Kentucky v. FERC*, 397 F.3d 1005, 1008 (D.C. Cir. 2005).

¹⁴ Citing *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 329 (D.C. Cir. 2006); *Cal. Indep. Sys. Operator Corp.*, 108 FERC ¶ 61,193, at P 37 (2004).

¹⁵ Citing *Swab Fin., L.L.C. v. E*Trade Sec., L.L.C.*, 150 Cal. App. 4th 1181, 1200 (Cal. Ct. App. 2007).

¹⁶ Citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁷ Citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-80, 582 (1981); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982).

III. Discussion

11. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing,¹⁸ unless otherwise ordered by the decisional authority. We reject CDWR's answer to the rehearing request and Sempra's answer to CDWR's answer.

12. Sempra argues that the Commission erred in reviewing the AAA Order. We disagree. In the November 19 Order the Commission did not undertake a review of the AAA Order, but rather conducted a limited analysis of the jurisdictional declarations requested in CDWR's petition. The Commission has the authority to determine whether it has jurisdiction in a particular case,¹⁹ and accordingly denies rehearing on this issue.

13. Sempra also argues that the Commission erred by failing to address CDWR's allegation that Sempra gamed and manipulated the intra-zonal congestion market and by finding that the Commission does not have exclusive jurisdiction. We disagree. The November 19 Order responded to CDWR's Petition by making jurisdictional findings to inform the parties as to whether the Commission believes it has jurisdiction over this proceeding. Sempra quotes CDWR's arguments from pleadings before the Panel including statements from CDWR's Demand for Arbitration.²⁰ However, the November 19 Order only addressed the particular jurisdictional questions presented in CDWR's petition. Because CDWR did not specifically seek a ruling from the Commission on gaming and manipulation in its petition for the declaratory order, we find that Sempra's

¹⁸ 18 C.F.R. § 385.713(d)(1) (2008).

¹⁹ *Entergy Nuclear Operations, Inc. v. Consol. Edison Co. of New York, Inc.*, 112 FERC ¶ 61,118, at P 23 & n. 27 (2005) ("We have in the first instance the authority to determine the scope of our jurisdiction and to determine, specifically, whether any jurisdictional activities are occurring." (footnote omitted)), *appeal denied*, *Consol. Edison Co. of New York, Inc. v. FERC*, No. 05-1372 (D.C. Cir. May 6, 2008) available at <http://www.ferc.gov/legal/court-cases/opinions/2008/05-1372.pdf>; *New York Power Auth. v. Consol. Edison Co. of New York, Inc.*, 116 FERC ¶ 61,240, at P 26 & n. 33 (2006) ("Further, the Supreme Court has affirmed that it is the Commission . . . that must make the factual and legal determinations to define the scope of its own jurisdiction" (footnote omitted)); *El Paso Natural Gas Co.*, 59 F.P.C. 1209, 1212 (1977) ("The Commission has the authority to determine the reach of its own jurisdiction as a primary responsibility.").

²⁰ Sempra Rehearing Request at p. 16-17 ("In its Demand, CDWR also alleged that Sempra Generation manipulated the market . . .").

rehearing request is outside the scope of this proceeding. Accordingly, we deny Sempra's request.

14. Sempra cites previous Commission orders addressing potential gaming of CAISO's intra-zonal congestion management procedures and states that because the Commission has already addressed potential gaming, issue preemption bars the Panel from granting CDWR's requested relief. In the November 19 Order the Commission did not change its policy on CAISO's intra-zonal congestion management practices,²¹ but made only the limited declaration that the CAISO Tariff did not conflict with the Agreement and thus the Commission does not have exclusive jurisdiction over the contractual dispute. Because the November 19 Order adequately addressed and rejected Sempra's arguments, we find that rehearing or clarification is unnecessary.

15. Sempra requests that the Commission clarify that the November 19 Order is not binding on the Panel, that the November 19 Order did not direct the Panel to alter the AAA Order or rule in any particular way, and that the Panel is free to maintain its Order including its finding on its own jurisdiction. Under Rule 207 a party may petition for "a declaratory order or rule to terminate a controversy or remove uncertainty."²² In the November 19 Order the Commission stated:

We interpret the Panel's stay of the arbitration proceeding as intended to allow CDWR to seek guidance that may inform the Panel's consideration of the arbitration dispute with respect to whether the Commission believes it would have exclusive jurisdiction over the parties' or, if the Commission believes it has concurrent jurisdiction, whether the Commission would nevertheless assert primary jurisdiction over the dispute if it were raised before us.²³

The Commission finds that the November 19 Order removed the uncertainty that had arisen with respect to the Commission's jurisdiction over this contractual dispute. As stated, the Commission's jurisdictional findings in the November 19 Order may inform the AAA Panel. The Commission finds that its November 19 finding on jurisdiction is sufficiently clear. Sempra's request for clarification that the November 19 Order is not

²¹ November 19 Order, 121 FERC ¶ 61,191 at P 34 ("We continue to believe that this is the right approach to managing intra-zonal congestion in the CAISO until the implementation of MRTU and use of locational marginal prices.").

²² 18 C.F.R. § 385.207(a)(2) (2008).

²³ November 19 Order, 121 FERC ¶ 61,191 at P 32.

binding on the Panel is an attempt to make the November 19 Order a meaningless exercise. Therefore, we reject Sempra's request.

16. Sempra also requested clarification that the November 19 Order does not direct the Panel how to rule regarding whether the contract interpretation argued by CDWR is in conflict with the CAISO Tariff. Again, we emphasize that the only issue before us is the Commission's jurisdiction over this contractual dispute. The November 19 Order clearly states the Commission's finding that CDWR's interpretation of the Agreement does not conflict with the CAISO Tariff because the CAISO Tariff is silent about payments between a buyer and seller under a bilateral contract and because the congestion management procedures in the CAISO Tariff do not preclude a generator from considering congestion.²⁴ The Commission considered this issue because it is a necessary basis for the determination of the Commission's exclusive jurisdiction. We reject Sempra's request for further clarification. Sempra's additional arguments on the meaning of the disputed provisions of the Agreement and the foreseeability of intra-zonal congestion go to the merits of the underlying contractual dispute and therefore we reject them as outside the scope of this proceeding.

17. Sempra also requests clarification that the Commission accepted CDWR's allegations as true and did not intend to resolve any issue related to the merits of CDWR's claims, citing arguments on the impact and applicability of disputed provisions of the Agreement. The Commission stated throughout the November 19 Order that it was not taking a position on the merits of the underlying dispute. The Commission specifically stated, "we emphasize that in this order we do not make a finding as to the validity of CDWR's interpretation of the Agreement, i.e., that Sempra may not knowingly schedule energy deliveries to CDWR at congested points."²⁵ Sempra's request for additional clarification goes to the merits of the contractual dispute. Accordingly, we deny Sempra's request.

18. Lastly, Sempra requests clarification that federal preemption and the filed rate doctrine require the Agreement be enforced and that the Panel is barred from modifying the Agreement. The Commission finds that it sufficiently addressed these arguments in the November 19 Order. The Commission concluded that the parties' contractual dispute is not about the proper rate for service but is about what, if any, adjustment is contemplated by the parties under the Agreement.²⁶ The Commission clearly found

²⁴ *Id.* P 33-34.

²⁵ *Id.* P 32. *See also* P 46 ("Finally, we again emphasize that this declaratory order does not reflect any position by the Commission regarding the merits of the parties' contractual dispute in the arbitration proceeding.").

²⁶ *Id.* P 40.

CDWR's requested relief does not involve setting a new rate and, "[t]hus, the parties' contractual dispute does not fall within the Commission's exclusive jurisdiction."²⁷ Sempra requests additional clarification on issues that go to the merits of the underlying dispute. The Commission declines to make such findings and, therefore, denies Sempra's request.

19. In sum, the Commission concludes that it does not have exclusive jurisdiction over the Parties' contractual dispute and Sempra's Rehearing Request does not persuade the Commission to change or clarify its findings from the November 19 Order.

The Commission orders:

Sempra's request for rehearing and/or clarification is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁷ *Id.*