

121 FERC ¶ 61,191  
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. EL07-103-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued November 19, 2007)

1. On September 18, 2007, the California Department of Water Resources (CDWR) filed a petition for a declaratory order finding that the Commission does not have exclusive jurisdiction over a contractual dispute pending in arbitration between 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. As explained below, we grant the request for a declaratory order.

**I. Background**

2. CDWR's petition relates to an adverse arbitration determination in which an arbitration panel (Panel) dismissed CDWR's breach of contract claim against Sempra. In February 2006, pursuant to a mandatory arbitration clause, CDWR brought arbitration claims based on Sempra's failure to perform as required under the parties' long-term Energy Purchase Agreement (Agreement).<sup>1</sup>

3. Section 2.04(c) (Response to Transmission Curtailment or Interruption) of the Agreement provides that Sempra shall make commercially reasonable efforts to provide or cause to be provided for the delivery of energy at delivery points that prevent and/or alleviate existing or potential transmission curtailments or interruptions. It spells out steps that Sempra and CDWR agree on to prevent and/or alleviate existing or potential transmission curtailments or interruptions. Section 2.04(c) further provides:

In the event and to the extent the foregoing measures are insufficient to prevent transmission curtailments or interruptions affecting the delivery of the Energy to a

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<sup>1</sup> See Petition, Exh.A.

Delivery Point and/or transmission of such Energy by [CDWR] from the Delivery Point to a point elsewhere within the Associated Cal ISO Delivery Zone, Seller's obligation to deliver the affected portion of the scheduled Energy to the Delivery Point, and [CDWR's] obligation to make payment for that portion of the scheduled Energy, shall be reduced accordingly.

4. In its arbitration demand, CDWR alleged that Sempra's practices for delivering electricity to CDWR since 2001 violate the Agreement and the implied covenant of good faith and fair dealing. CDWR alleged that Sempra has violated the Agreement (particularly section 2.04(c)) by intentionally forwarding estimates from its Mexicali generation project that it knows will probably result in congestion and thus deliberately and intentionally getting itself "dec'd"<sup>2</sup> or by violating the covenant of good faith and fair dealing by not taking appropriate steps to avoid congestion and avoid getting dec'd. CDWR claimed that this alleged practice by Sempra harmed CDWR and California ratepayers, amounting to over \$100 million in overcharges, including interest. CDWR sought to recover all monies paid by it to Sempra resulting from the alleged breach.

5. In December 2006, Sempra moved to dismiss CDWR's claims on the ground that they were barred by "federal preemption principles" and the filed rate doctrine. Sempra argues that CDWR was seeking to recover a refund of the price in the Agreement or substitute a different price than that set out in the filed rate. It also argues that CDWR was challenging the CAISO's intra-zonal congestion management regime by seeking to recover damages resulting from Sempra's compliance with the CAISO's rules and procedures.

6. In July 2007, the Panel granted Sempra's motion to dismiss and concluded that the Commission has exclusive jurisdiction over CDWR's claims, precluding CDWR from pursuing those claims in arbitration and requiring dismissal of the case. The Panel premised its decision on its conclusion that there is a conflict between CDWR's claims and the California Independent System Operator ("CAISO") Tariff. The Panel noted that under case law more commonly referred to as the filed rate doctrine, agreements between generators and customers cannot change the rates or terms or conditions of the filed tariff.

7. The Panel concluded that Amendment No. 50 to the CAISO Tariff contained a detailed way of dealing with the rights and obligations of those generators and customers in situations in which a generator is dec'd. The Panel found that the Agreement conflicts

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<sup>2</sup> The CAISO has referred to the "dec game" as cases where generators anticipate that a specific transmission line will be congested and schedule their units(s) far beyond the limited local transfer capability in the forward markets, thereby forcing the CAISO to use generators' decremental or "dec" bids in real-time to mitigate the resulting congestion. *See California Independent System Operator Corp.*, 103 FERC ¶ 61,265, at P 3 (2003) (Order on Amendment No. 50).

with the rights and obligations of generators like Sempra when they are dec'd in that it seeks to impose different terms on dec'd generators depending on causation and would result in different payments to such generators than those set by the CAISO Tariff. That is, under the Agreement, the Panel found that under CDWR's interpretation of the Agreement, "if improperly dec'd, Sempra would pay for the energy pursuant to the Tariff terms but would not receive payment for the energy which is different than the Tariff terms call for. In short, an entire[ly] different result under the contract than under the Tariff – a clear conflict between the two."<sup>3</sup> Thus, the Panel found that CDWR sought to vary and enlarge the Tariff terms and conditions. The Panel also noted that the Commission deemed Amendment No. 50 to be a remedy for the CAISO to employ to stop the practice of generators getting themselves deliberately dec'd. The Panel concluded that the Commission had exclusive jurisdiction over such claims and that CDWR must pursue any such claims before the Commission.

8. To avoid any issues about the statute of limitations on the claims and to avoid costs and time to select a new panel "in the event that the Commission does not accept jurisdiction of these claims," the Panel stayed the proceedings "until proceedings before the Commission become final."

## **II. CDWR's Petition**

9. CDWR contends that the Panel erroneously concluded that there is a conflict between CDWR's claims and the CAISO Tariff and erred regarding the Commission's intent in approving Amendment No. 50. CDWR characterizes the Panel's stay of the arbitration proceeding as, in part, intended to permit CDWR to seek the Commission's review of the Panel's dismissal ruling. CDWR states that it does not seek a determination by the Commission regarding the merits of its arbitration Demand, but only a declaration that both the Panel's conclusion that the Commission has exclusive jurisdiction and the basis for that conclusion (i.e., that there was a conflict between the Agreement and the CAISO Tariff) were erroneous. It argues that finding such a conflict would nullify the effect of the arbitration clause in the Agreement and that the Commission could be overwhelmed by a deluge of similar cases.

10. According to CDWR, the CAISO Tariff, both before and after Amendment No. 50, addresses only how the CAISO will manage intra-zonal congestion. It says nothing about how a supplier with a bilateral contract should decide from which of its multiple resources it will supply energy as required by the contract. Likewise, it contends that the CAISO Tariff does not speak to whether parties may agree upon a contractual requirement that the supplier select sources of energy for delivery in a manner that, based on existing and knowable facts, attempts to avoid congested intra-zonal points in the first place. Nor does the CAISO Tariff specify the rates or terms at which energy will be sold

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<sup>3</sup> 2007 AAA Panel Order at 10-11.

between a generator (such as Sempra) and a wholesale customer (such as CDWR), under any circumstances.

11. Based on its arguments above, and to remove uncertainty, CDWR requests a declaratory order, limited to the jurisdictional issues presented, that declares that:

1. There is no conflict between any part of the CAISO Tariff and the obligations (i) set out in section 2.04(e) of the Agreement or (ii) imposed by the covenant of good faith and fair dealing. The CAISO Tariff does not require a buyer under a bilateral contract with a generator to pay any particular price when the CAISO directs the generator to decrement generation otherwise scheduled for delivery under the contract.
2. The Commission did not, in approving CAISO Tariff Amendment No. 50 or otherwise, intend to limit CDWR's ability to enforce the Agreement.
3. The Commission does not have exclusive jurisdiction over the contract dispute alleged in CDWR's Demand.
4. The Commission will not exercise primary jurisdiction over the dispute.

### **III. Notice of Filing and Responsive Pleadings**

12. Notice of CDWR's petition was published in the *Federal Register*,<sup>4</sup> with motions to intervene and protests due on or before October 9, 2007. On October 9, 2007, the Public Utilities Commission of the State of California (California Commission) filed a notice of intervention, raising no substantive issues.

13. On October 9, 2007, Sempra filed a motion to intervene and protest. As discussed more fully below, Sempra contends that the Panel's decision was correct and that CDWR's petition is an inappropriate challenge to the Panel's decision.

14. On October 15, 2007, Southern California Edison Company (SCE) filed a motion to intervene out of time and comments. SCE contends that the petition should be granted so that the parties may resolve their payment differences through arbitration. SCE argues that Sempra's compliance with the CAISO Tariff has no bearing on whether Sempra has fulfilled its contractual obligations to CDWR under the Agreement and is entitled to contractual payments.

15. On October 17, 2007, CDWR filed a motion for permission to answer and answer to Sempra's protest.

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<sup>4</sup> 72 Fed. Reg. 57,313 (2007).

16. On October 30, 2007, Sempra filed a protest of SCE's motion to intervene out of time and a motion to answer and answer to CDWR's October 17 answer.

17. On November 6, 2007, CDWR filed a motion for permission to answer and answer to Sempra's October 30 answer.

#### **IV. Discussion**

##### **A. Procedural Matters**

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>5</sup> the California Commission's notice of intervention and Sempra's timely, unopposed motion to intervene serve to make them parties to this proceeding.

19. Sempra opposes SCE's late intervention, arguing that SCE is CDWR's agent for purposes of administering the Agreement and, thus, should not have needed additional time to review the petition. We will grant SCE's late intervention given the early stage of this proceeding, its interest in this proceeding, and the absence of any undue prejudice or delay.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,<sup>6</sup> prohibits an answer to a protest unless otherwise ordered by the decisional authority. We reject the answer to the protest and the answers to answers.

##### **B. Substantive Matters**

###### **1. Declarations 1 and 2**

21. CDWR requests that the Commission make two related findings. First, that there is no conflict between any part of the CAISO Tariff and the obligations set out in section 2.04(c) of the Agreement or imposed by the covenant of good faith and fair dealing, and that the CAISO Tariff does not require a buyer to pay any specified price when the CAISO dec's Sempra's scheduled generation. Second, CDWR requests that the Commission find that it did not, in approving CAISO Tariff Amendment No. 50 or otherwise, limit CDWR's ability to enforce the Agreement.

22. CDWR argues that the Agreement provides that Sempra may not knowingly schedule – and thus charge for – energy deliveries to CDWR at congested points. It claims that the Agreement provides further that if Sempra does not take into

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<sup>5</sup> 18 C.F.R. § 385.214 (2007).

<sup>6</sup> 18 C.F.R. § 385.213(a)(2) (2007).

consideration likely congestion or curtailments when it makes decisions about the sources of its energy deliveries to CDWR, CDWR is relieved of its obligation to pay.<sup>7</sup>

23. CDWR contends that the Panel incorrectly concluded that the CAISO Tariff section 27.1.1.1.6 specifies that a buyer of energy under a long-term contract must pay the generator the purchase price under its contract price when the CAISO dec's the generator's scheduled generation. CDWR quotes the following from the Panel's decision:

The CDWR-Sempra contract conflicts with the Tariff, as under the contract terms, if improperly "dec'd," Sempra would pay for the energy pursuant to the Tariff terms but would not receive payment for the energy which is different than what the Tariff terms call for. In short, an entire[ly] different result under the contract than under the Tariff – a clear conflict between the two.<sup>8</sup>

24. According to CDWR, the CAISO Tariff does not address whether CDWR has any obligation to pay Sempra under the Agreement. CDWR submits that the CAISO's congestion management protocols in the tariff only dictate the terms of payment between generators and the CAISO, but do not speak to the rates that may be charged under bilateral agreements between generators and wholesale buyers.

25. CDWR contends that the Panel incorrectly found that CDWR's claims conflict with the regulatory scheme reflected in the CAISO Tariff and the Commission-approved amendments to it, especially Amendment No. 50.<sup>9</sup> CDWR argues there is no evidence establishing that, in approving Amendment No. 50 or any other part of the CAISO Tariff, the Commission intended to preclude enforcement of the parties' Agreement. CDWR cites to the Panel's finding:

The Amendment No. 50 Order considered the very same problem that CDWR complains of, i.e., generators improperly causing confusion so as to have themselves deliberately "dec'd". The Tariff also includes, in FERC's words, a remedy for CAISO to employ to put a stop to the complained of conduct. This is further evidence that the contracted terms [CDWR] seeks to enforce conflict with the terms and objectives of the Cal ISO Tariff.<sup>10</sup>

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<sup>7</sup> CDWR Petition at 22, *citing* Agreement section 2.04(c)

<sup>8</sup> CDWR Petition at 21, *citing* July 17, 2007 AAA Panel Order at 10-11.

<sup>9</sup> *Citing California Independent System Operator Corp.*, 108 FERC ¶ 61,193 (2004) (Amendment No. 50 Order).

<sup>10</sup> CDWR Petition at 29, *citing* July 17, 2007 AAA Panel Order at 13.

26. CDWR submits that the fact that the Commission has pointed out flaws in the CAISO's congestion management process does not lead to the conclusion that parties are precluded from entering into contracts containing terms intended to avoid congestion.

27. CDWR also argues that it was irrelevant when the Panel noted that all generators, including Mexicali, have open and non-discriminatory access to the grid regardless of the location of their connections, and that the Commission issued an order accepting the interconnection agreements allowing the Mexicali facility to connect to the CAISO grid.<sup>11</sup> CDWR argues that its claims have nothing to do with the manner in which Sempra accesses the electrical grid, but rather whether Sempra complied with the obligations under the Agreement.

28. Sempra responds that the Panel correctly held that CDWR's interpretation of the Agreement would result in a conflict with the intra-zonal congestion management procedures in the CAISO Tariff and the Commission's underlying orders. Sempra submits that the Commission has worked to ensure that generators are not unduly penalized as a result of the CAISO's intra-zonal congestion management procedures, finding that "holding market participants responsible for a flawed congestion management system that lacks appropriate price signals is not an equitable result and, therefore, is not just and reasonable."<sup>12</sup>

29. Sempra argues the Panel correctly relied on the Commission's finding that, under the CAISO's intra-zonal congestion management practices, "each generator would be indifferent to operating and incurring its running cost, or not operating and paying the [CAISO] an amount equal to its running cost."<sup>13</sup> Sempra submits that in contrast, CDWR's interpretation of the Agreement would result in Sempra not being indifferent when dec'd, in that Sempra would pay the CAISO for replacement energy that was delivered to CDWR, but not receive any payment in return under the Agreement.

30. Sempra maintains that the relief sought by CDWR would result in Sempra being unable to schedule any deliveries from the Mexicali Project. Sempra contends that such a result would be inconsistent with the Commission's recognition that energy from the Mexicali Project was required to meet California's energy needs, the Commission's

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<sup>11</sup> CDWR Petition at 30, *citing* 2007 AAA Panel Order at 15, n.2.

<sup>12</sup> Sempra Protest at 30, *citing California Independent System Operator Corp.*, 112 FERC ¶ 61,136, at P 36 (2005); *California Independent System Operator Corp.*, 98 FERC ¶ 61,327, at 62,280 (2002); *California Independent System Operator Corp.*, 108 FERC ¶ 61,193, at P 3, n.2 (2004).

<sup>13</sup> *Id.* at 29-30, *citing California Independent System Operator Corp.*, 90 FERC ¶ 61,006, at 61,012 (2000).

open-access requirements, the Commission's approval of the interconnection agreement allowing the Mexicali Project to be interconnected to the CAISO grid, and the must-offer requirements imposed by the Commission. Sempra contends that CDWR unfairly seeks, in conflict with the CAISO Tariff, to place more, if not all, the burden of resolving intra-zonal congestion on one generation facility rather than on all generation facilities that contribute to such congestion.

31. Finally, Sempra argues that section 2.4(a) of the Agreement provides that Sempra shall schedule its deliveries to CDWR from the Mexicali Project in accordance with CAISO practices. Sempra concludes that CDWR thus cannot argue that application of the CAISO's intra-zonal management procedures to deliveries from the Mexicali Project violates the Agreement.

### **Commission Determination**

32. As an initial matter, 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. Both parties have agreed to binding arbitration to resolve their disputes regarding the Agreement and we believe this is appropriate. CDWR states that it does not, by the instant petition, seek to reverse or overturn the Panel's decision, nor is it the Commission's intent to purport to do so in this order. 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.

33. We find that CDWR's interpretation of the Agreement – that Sempra may not knowingly schedule energy deliveries to CDWR at congested points – is not in conflict with the CAISO tariff or amendment 50. The intra-zonal congestion management procedures in the CAISO tariff do not preclude a generator from considering potential congestion when scheduling energy. A generator that schedules less than its full output by anticipating intra-zonal congestion (if that is required by its bilateral contractual obligations), would still be able to offer any unscheduled available capacity to the CAISO by submitting adjustment and/or supplemental energy bids. We acknowledge that the CAISO tariff does not contain any provisions that contemplate a generator considering intra-zonal congestion. We find that no provision within the CAISO tariff prohibits an

individual generator from attempting to anticipate intra-zonal congestion when scheduling energy.<sup>14</sup>

34. Sempra cites in support several Commission orders on prior amendments to the CAISO Tariff that address intra-zonal congestion management. In one such order, the Commission found that under the CAISO's intra-zonal congestion management practices, each generator would be indifferent to operating and incurring its running cost, or not operating and paying the CAISO an amount equal to its running cost. 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. However, this construct, and the payments under this construct, are only applicable to the relationship between the generator and the CAISO. The CAISO Tariff is silent as to the payment and interaction between buyer and seller under a bilateral contract, because this is more appropriately addressed within the contract.

35. We are not persuaded by Sempra's arguments that the relief sought by CDWR would result in Sempra being unable to schedule any deliveries from the Mexicali Project. Under CDWR's interpretation, Sempra is only restricted from using the Mexicali Project to meet the terms of the Agreement, but may otherwise use the Mexicali Project to schedule energy into the CAISO control area and offer any unused capacity as required under the Commission's must-offer obligation.

### **3. Declaration 3**

36. CDWR requests a declaration that the Commission does not have exclusive jurisdiction over the contract dispute alleged in CDWR's Demand before the Panel.

37. CDWR argues that nothing about its claims, or the Agreement, is in any way inconsistent with the CAISO Tariff. The Tariff does not speak to, or conflict with, the respective obligations of CDWR and Sempra under the Agreement. Moreover, CDWR states that it does not challenge the rates, terms or conditions of the Agreement or the way in which they were set: rather, CDWR seeks to enforce those terms in the manner and forum mandated by the Agreement, and to hold Sempra to the obligations it voluntarily assumed under the Agreement. CDWR argues that the Commission's prior decisions make clear that it does not claim exclusive jurisdiction over straightforward

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<sup>14</sup> We note that this situation is different than what was considered in the Amendment No. 50 Order. There, the Commission responded to a proposal by the CAISO to publish allowable output for a group of generating units anticipated to be constrained by the same intra-zonal interface and then allow generators to submit schedules to conform to the CAISO's published limits. The Commission rejected this proposal on the basis of potential collusion. *See* Amendment No. 50 Order, 103 FERC ¶ 61,265 at P 4, 48.

breach of contract cases like this one, and that it insists such claims be pursued in arbitration (especially where, as here, the parties' contract contains a mandatory AAA arbitration clause).

38. CDWR argues that the Commission asserts exclusive jurisdiction notwithstanding a binding arbitration in only two situations: (1) to ensure that the rates are just and reasonable; and (2) to ensure that rates are not unduly discriminatory. It argues that the dispute is over Sempra's compliance with the terms of the Agreement and that it is not seeking to change the Agreement or change the rate under the Agreement and that it is not attacking any CAISO Tariff provisions. Thus, it argues, no exclusive Commission jurisdiction preempts the contract interpretation from proceeding in a non-Commission forum, i.e., the agreed-upon arbitration proceeding.

39. Sempra argues that CDWR asks the Commission to reverse and overturn the decision of the Panel, including the Panel's determination that the contract interpretation sought by CDWR conflicts with the terms of the CAISO Tariff. According to Sempra, there is no authority for the Commission to reverse the decision of the Panel, nor has CDWR cited any. Further, Sempra contends that under the filed rate doctrine, any claims by CDWR to modify or alter the Commission-approved rates must be made exclusively before the Commission.

### **Commission Determination**

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. The Commission's exclusive jurisdiction covers matters that are clearly and solely within the Commission's statutory grant of authority. The parties' contractual dispute is not about the proper rate for service by Sempra to CDWR. Rather, it is about what, if any, adjustment is contemplated by the parties under their Agreement regarding CDWR's obligation for deliveries under the alleged circumstances. Such relief does not implicate the setting of a new just and reasonable rate under the Agreement or the CAISO Tariff. Thus, the parties' contractual dispute does not fall within the Commission's exclusive jurisdiction.<sup>15</sup>

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<sup>15</sup> See, e.g., *Water and Power Dept. of the City of Glendale, California v. Portland General Electric Co.*, 113 FERC ¶ 61,285, at P 16 & n.11 (2005) (citing *Kentucky Utilities Co.*, 110 FERC ¶ 61,285 at P 11 (2005); *Portland General Electric Co.*, 72 FERC ¶ 61,009 (1995)), *reh'g denied*, 115 FERC ¶ 61,231, at P 8-11 (2006) (*Glendale*). By contrast, the Commission has found exclusive jurisdiction, notwithstanding an arbitration clause in a disputed contract, where the dispute clearly involved a rate issue and the complainant sought to modify the contract. See *PacifiCorp v. Reliant Energy Services, Inc.*, 99 FERC ¶ 61,381, at P 24-25 (2002).

#### **4. Declaration 4**

41. CDWR requests that the Commission state that it will not exercise primary jurisdiction over the dispute between CDWR and Sempra.

42. CDWR argues that there is no reason for the Commission to exercise its concurrent jurisdiction over this case. Application of the Commission's longstanding test for exercising its concurrent jurisdiction, as discussed more fully *infra*, confirms that this is not the type of case over which the Commission invokes such jurisdiction: this contract dispute regarding the parties' rights and obligations under the Agreement (1) does not implicate any special expertise possessed by the Commission, (2) does not create any need for uniformity of interpretation, and (3) involves no issue important to the Commission's regulatory responsibilities. Instead, CDWR contends that in this type of breach of contract action, the Commission routinely and consistently declines to exercise jurisdiction.

43. Sempra argues that even if the Commission does not find exclusive jurisdiction, it would exercise primary jurisdiction (and, thus, the dispute should not be decided on the merits by the Panel), because: (1) CDWR's Demand raises issues that fall within the Commission's expertise and knowledge relating to the intra-zonal congestion management procedures specified in the CAISO Tariff; (2) CDWR's requested Declarations 1 and 2 requires an analysis of the effect and underlying intent of the intra-zonal congestion management procedures of the CAISO Tariff; and (3) the Demand implicates the rates, terms and conditions for transmission service and wholesale sales, which are matters that lie at the core of the Commission's regulatory responsibilities.<sup>16</sup>

#### **Commission Determination**

44. The dispute between CDWR and Sempra presents a question of contract interpretation, which we determined above is not within the Commission's exclusive jurisdiction. The decision whether to exercise the Commission's concurrent jurisdiction is within the Commission's discretion.<sup>17</sup> As the Commission has discussed in prior orders,<sup>18</sup> in deciding whether to entertain such a case, the Commission usually considers the following three factors: (a) whether the Commission possesses some special expertise that makes the case peculiarly appropriate for Commission decision; (b)

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<sup>16</sup> Sempra cites *Arkansas Louisiana Gas Company v. Hall*, 7 FERC ¶ 61,175 at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*).

<sup>17</sup> E.g., *Glendale*, 115 FERC ¶ 61,231 at P 17.

<sup>18</sup> E.g., *Entergy Arkansas, Inc.*, 112 FERC ¶ 61,306, at P 25 (2005), citing *Arkla; Glendale*, 115 FERC ¶ 61,231 at P 17.

whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (c) whether the case is important in relation to the regulatory responsibilities of the Commission. As discussed below, based on these three factors, we would not expect to assert primary jurisdiction over such a dispute.

45. The facts in dispute are unique to the parties. The resolution of this dispute is not important to the regulatory responsibilities of this Commission. The Commission has no special expertise in interpreting the Agreement or in divining how CDWR and Sempra intended to address dec'd generation. The ascertainment of parties' intent when they execute a contract is a matter of case-by-case adjudication that does not involve the considerations of uniformity or technical expertise that, in other circumstances, might call for the assertion of this Commission's jurisdiction. Further, the Commission's consistent policy has been to encourage arbitration when appropriate.<sup>19</sup> The Panel can determine the parties' intentions on entering into their contract as well as can this Commission. The type of question that arises here is unique to these parties and there is no need for industry-wide interpretation of the questions that the dispute raises.

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.

The Commission orders:

CDWR's petition for a declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>19</sup> See, e.g., *Indiana Michigan Power Co. and Ohio Power Co.*, 64 FERC ¶ 61,184 (1993).