

125 FERC ¶ 61,176  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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| Coral Power L.L.C.               | Docket Nos. | EL03-151-004<br>EL03-186-005 |
| Dynegy Power Marketing, Inc.     |             | EL03-153-004                 |
| Sempra Energy Trading Corp.      |             | EL03-173-004<br>EL03-201-006 |
| City of Glendale, California     |             | EL03-147-004<br>EL03-182-006 |
| Northern California Power Agency |             | EL03-196-005                 |

ORDER DENYING REHEARING

(Issued November 14, 2008)

1. In this order, the Commission denies requests for rehearing of five orders that approved settlement agreements (collectively, the August Settlement Orders) in the captioned proceedings for City of Glendale, California (City of Glendale);<sup>1</sup> Coral Power L.L.C. (Coral);<sup>2</sup> Sempra Energy Trading Corp. (Sempra);<sup>3</sup> Northern California Power Agency (NCPA);<sup>4</sup> and Dynegy Power Marketing, Inc. (Dynegy).<sup>5</sup> These settlement agreements (whose named settling parties are collectively referred to as Settling Parties) resolve disputes that arose as a result of events in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) energy and

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<sup>1</sup> *City of Glendale*, 108 FERC ¶ 61,111 (2004).

<sup>2</sup> *Coral Power L.L.C.*, 108 FERC ¶ 61,115 (2004).

<sup>3</sup> *Sempra Energy Trading Corp.*, 108 FERC ¶ 61,114 (2004).

<sup>4</sup> *Northern California Power Agency*, 108 FERC ¶ 61,112 (2004) (*NCPA*).

<sup>5</sup> *Dynegy Power Marketing, Inc.*, 108 FERC ¶ 61,145 (2004).

ancillary services markets during the period from January 1, 2000, through June 1, 2001, as they relate to City of Glendale, Coral, Sempra, NCPA, and Dynegy. Although each settlement agreement is slightly different, the basic elements are nearly the same. Thus, for the sake of administrative efficiency, the Commission will address this group of requests for rehearing together in the instant order. We will deny the requests for rehearing for the reasons discussed below.

## **I. Background**

2. Following alleged market abuses in the Western energy markets in 2000 and 2001, the Commission issued two show cause orders directing certain entities to explain why they should not be found to have engaged in gaming and/or anomalous market behavior in violation of the CAISO and CalPX tariffs.<sup>6</sup> Commission Trial Staff subsequently entered into settlement agreements with several of the entities named in those Show Cause Orders.

3. All five of the settlement agreements at issue in this proceeding involve common settling parties, *viz.*, Commission Trial Staff and City of Glendale, Coral, Sempra, NCPA, and Dynegy, respectively. Moreover, just as these settlement agreements involve common parties, comments on the settlement agreements and, ultimately, on rehearing raise similar concerns and objections.

## **II. Requests for Rehearing**

4. On September 1, 2004, California Parties<sup>7</sup> filed a single request for rehearing of the Commission's orders approving the City of Glendale, Coral, Sempra, and NCPA, settlement agreements. On the same date, Certain Pacific Northwest Parties (Certain Parties)<sup>8</sup> filed a request for rehearing of the Commission's orders involving the Coral, Dynegy, and Sempra settlement agreements.

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<sup>6</sup> *American Electric Power Service Corporation, et al.*, 103 FERC ¶ 61,345 (2003) (Gaming Order); *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Order) (collectively, Show Cause Orders).

<sup>7</sup> California Parties include the following entities: People of the State of California, *ex rel.* Bill Lockyer, Attorney General; the California Electricity Oversight Board; the California Public Utilities Commission; Pacific Gas and Electric Company; and Southern California Edison Company.

<sup>8</sup> Certain Parties include the following entities: Public Utility District No. 1 of Snohomish County, Washington; the City of Tacoma, Washington; and the Port of Seattle, Washington.

5. California Parties first state that the August Settlement Orders impermissibly deviate from the Commission's policy for approving contested settlement agreements, which is governed by the four-pronged approach that was articulated in *Trailblazer Pipeline Company*.<sup>9</sup> California Parties contend that the Commission could not approve the settlement agreements at issue here under the *Trailblazer* approaches.<sup>10</sup> Next, California Parties contend that the Commission ignored the genuine issues of material fact raised by the California Parties' comments opposing the City of Glendale, Coral, Sempra, and NCPA settlement agreements. They dispute the Commission's conclusion that the issues go to the scope of the proceedings addressed by the Gaming and/or Partnership Orders (and therefore are beyond the scope of this proceeding).<sup>11</sup>

6. California Parties next contend that the Commission erred in not requiring an admission of wrongdoing in the City of Glendale, NCPA, Coral, and Sempra settlement agreements. According to California Parties, the Commission impermissibly precluded the development of an evidentiary record—the commencement of discovery and evidentiary procedures—prior to approving the City of Glendale, NCPA, Coral, and Sempra settlement agreements.

7. California Parties posit that any fair evaluation of whether the City of Glendale, NCPA, Coral, and Sempra settlement agreements should be approved must take into account the fact that City of Glendale, NCPA, Coral, and Sempra never provided the "Paragraph 47" materials relating to their partnerships, alliances, or other arrangements, which include correspondence, e-mails, memoranda, tapes, phone logs, transaction data, billing statements, and agreements.<sup>12</sup> California Parties aver that it is entirely possible that, if these sellers were required to submit all of the Paragraph 47 materials, Trial Staff would have reached different determinations concerning whether, and for what amount, the charges against these sellers should be settled.

8. California Parties next challenge the Commission's choice of remedies in the approved settlement agreements (i.e., profit disgorgement) as being inadequate, providing only "cents on the dollar" relief. According to California Parties, the alleged profit calculations in these settlement agreements are only a tiny fraction of the actual profits earned by these sellers; that is to say, the monetary remedies do not match the actual

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<sup>9</sup> 85 FERC ¶ 61,345 (1998), *reh'g denied*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

<sup>10</sup> California Parties Request for Rehearing at 7-11.

<sup>11</sup> *Id.* at 13-20 (addressing each settlement agreement).

<sup>12</sup> At paragraph 47 of the Partnership Order, the Commission required that such materials be provided. Partnership Order, 103 FERC ¶ 61,346 at P 47.

profits earned from the tariff violations. Moreover, California Parties contend that the Commission ignored their comments as well as the Gaming and Partnership Orders with respect to its failure to consider non-monetary remedies. California Parties also contend that the Commission also erred in not eliminating the general release provision from the Coral, Sempra, and NCPA settlement agreements.

9. California Parties maintain that the Commission acted *ultra vires* in opening the proceedings associated with the Partnership and Gaming Orders and other proceedings. California Parties explain that the Ninth Circuit Court of Appeals directed the Commission to allow the California Parties to introduce evidence concerning sellers' market manipulation; they cite section 313(b) of the Federal Power Act, which provides that the Commission "may modify its findings ... [and] file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order."<sup>13</sup> California Parties state that the Commission must consider all of the issues they raise and report to the Court.

10. Finally, California Parties address the explicit or implicit *Mobile-Sierra* public interest standard governing changes to the City of Glendale, Coral, Sempra, and NCPA settlement agreements.<sup>14</sup> They state that, in approving a settlement containing a *Mobile-Sierra* public interest standard, the Commission cannot limit the rights of third parties with such a standard. Further, they remark that the Commission adopted the *Mobile-Sierra* standard in these settlement agreements without explanation for its deviation from prior practice.<sup>15</sup>

11. In their request for rehearing, Certain Parties contend that the Commission should reject the overly broad release language contained in the Coral, Sempra, and Dynegy settlement agreements. They point out that Commission Trial Staff recognized that the Commission has no authority to address issues outside those specifically raised in the Show Cause Orders and that Trial Staff's concurrence to the settlement agreements is with that reservation.<sup>16</sup>

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<sup>13</sup> 16 U.S.C. § 313(b) (2006).

<sup>14</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

<sup>15</sup> California Parties Request for Rehearing at 34-35.

<sup>16</sup> Certain Parties Request for Rehearing at 6-7 (citing Coral Agreement and Stipulation § 4.8; Dynegy Stipulation and Agreement § 4.5; Sempra Agreement and Stipulation § 4.8).

### III. Discussion

12. The Commission has exclusive authority to enforce the Federal Power Act, and its decisions as to the scope of the issues it will pursue in an enforcement proceeding are non-reviewable.<sup>17</sup> The Commission has broad discretion in managing its proceedings.<sup>18</sup> The Commission, rather than intervenors in its proceedings, determines what issues shall be the subject of enforcement proceedings and whether the balance of concessions and assumptions in settlement agreements produces a just and reasonable result.<sup>19</sup> The Commission's broad discretion extends, among other things, to the decision whether to initiate an enforcement proceeding,<sup>20</sup> as well as the conduct of the proceeding and any settlement efforts.<sup>21</sup>

13. Certain issues discussed by California Parties--such as opportunity for discovery and choice of remedies—are appropriately addressed, if at all, in requests for rehearing of the Show Cause Orders,<sup>22</sup> and not in the context of these individual proceedings, with

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<sup>17</sup> *Coral Power, L.L.C.*, 107 FERC ¶ 63,002, at P 83 (2004); *Sempra Energy Trading Corp.*, 106 FERC ¶ 63,032, at P 54 (2004); *N. Cal. Power Agency*, 106 FERC ¶ 63,022 (2004); *see also infra* note 29 and accompanying text.

<sup>18</sup> *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case); *Woolen Mill Assoc. v. FERC*, 917 F. 2d 589, 592 (D.C. Cir. 1990) (the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion).

<sup>19</sup> *Ex Parte Contacts and Separation of Functions*, Order No. 718, 125 FERC ¶ 61,063 at P 9 (2008) (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (agency decisions regarding conduct of enforcement actions are presumptively unreviewable by the courts)).

<sup>20</sup> *Id.* (citing *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) (“agency’s decision not to exercise its enforcement authority, or to use it in a particular way, is committed to its absolute discretion”)).

<sup>21</sup> *Id.* (citing *Baltimore Gas*, 252 F.3d at 458 (decision to settle is committed to FERC’s non-reviewable discretion)).

<sup>22</sup> *City of Glendale*, 108 FERC ¶ 61,111 at P 4; *Coral Power, L.L.C.*, 108 FERC ¶ 61,115 at P 4; *Sempra Energy Trading Corporation*, 108 FERC ¶ 61,114 at P 4; *Northern California Power Agency*, 108 FERC ¶ 61,112 at P 4; *Dynegy Power Marketing, Inc.*, 108 FERC ¶ 61,145 at P 4.

limited exception as discussed below. California Parties' challenges here are an impermissible collateral attack on these prior orders.<sup>23</sup> Collateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.<sup>24</sup>

14. A few arguments, however, are properly put before the Commission on rehearing, as they raise issues with the settlement agreements themselves and not the underlying proceedings that led to the settlements. For example, California Parties express dissatisfaction that the settlement agreements do not require an admission of wrongdoing, and California Parties and Certain Parties contend that the general release provisions are too broad. The Commission will address these issues in turn.

15. In its evaluation of a contested settlement agreement, the Commission must be able to make an independent determination based on substantial record evidence that the settlement agreement will result in just and reasonable rates,<sup>25</sup> or in the context of the proceeding, will produce an acceptable outcome.<sup>26</sup> *Trailblazer* outlines four circumstances under which the Commission may approve a contested settlement: (1) the Commission may make a merits determination on each contested issue; (2) even if some aspects of a settlement are problematic, the Commission nevertheless may approve a contested settlement as a package upon determining that the overall result of the settlement is just and reasonable; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections and the contesting parties' interest is too attenuated; or (4) the Commission may sever the contesting parties, approving the settlement agreement as uncontested as to the settling parties only and leaving the contesting parties free to pursue their claims through continued litigation. Further, if a party's interests are not immediately and irreparably affected by approval of a settlement

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<sup>23</sup> Collateral estoppel prohibits a party from bringing a different claim on an issue that has already been decided (Restatement (Second) of Judgments §§ 17(c), 27), provided the issue was actually litigated and determined, and the determination was essential to that judgment. *Norfolk and Western Ry. Co. v. United States*, 768 F.2d 373 (D.C. Cir. 1985).

<sup>24</sup> See, e.g., *Pac. Gas & Elec. Co.*, 121 FERC ¶ 61,065, at P 38 (2007); *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 107 FERC ¶ 61,142, at P 22 (2004); *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003), *order on reh'g*, 110 FERC ¶ 61,033, at P 56 (2005) (Commission "will not allow relitigation of our station power precedent"), *affirmed sub nom. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006).

<sup>25</sup> *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

<sup>26</sup> *Trailblazer*, 85 FERC ¶ 61,345 at 62,342.

agreement in a consolidated docket, that party's opposition to a settlement agreement does not create a genuine, material issue.<sup>27</sup> In the absence of any genuine, material issue, the Commission can dispose of the matter before it in a summary fashion.

16. Notwithstanding the release provisions, the Commission does not abdicate its statutory duty to investigate complaints as argued by Certain Parties, because the Commission finds the release provisions of these settlement agreements to apply only within the context of the proceedings specifically named in the settlement agreements. There is ample precedent for parties to proceedings set for trial-type evidentiary hearings to work with Trial Staff, as in this case, to resolve disputes through settlement agreements.<sup>28</sup> Parties enter such settlement agreements to resolve specific disputes. It is not uncommon to draft the release provisions broadly in anticipation of future disputes related to the matters addressed in the settlement agreement that inevitably will arise. In this case, the agreed upon release provisions in the settlement agreements are delimited by the issues within the scope of the investigation and enforcement proceedings that resulted in the Commission's issuance of the Gaming and Partnership Orders. Further, the Commission's release of Settling Parties with respect to the matters addressed in the settlement proceedings via settlement agreements is an act within the Commission's discretion to enforce or to settle.<sup>29</sup>

17. On balance, the approval of these settlement agreements would provide significant benefits, including certainty and finality on major issues, to the Settling Parties. In addition, the settlement agreements would not adversely affect the interests of those parties that continue to litigate their claims. Accordingly, under the second *Trailblazer* approach, the Commission approved these settlement agreements as packages that produce overall just and reasonable results. In the same vein, under the third approach, the Commission finds that the benefit of these settlement agreements outweighs the nature of the objections of those opposing the settlement agreements. As the Commission reasoned in the orders below, a principal benefit of these settlement packages is that the Settling Parties will return the total revenues from their participation in the alleged gaming practices, not merely the profits, and a settlement that will return total revenues as opposed to profits alone may be more than would be achieved through litigation.<sup>30</sup> The broad release provisions in the settlement agreements and any lack of an

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<sup>27</sup> *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983).

<sup>28</sup> *See, e.g.*, Gaming Order, 103 FERC ¶ 61,345 at P 73.

<sup>29</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (enforcement discretion); *Burlington Res. Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008) (same).

<sup>30</sup> Gaming Order, 103 FERC ¶ 61,345 at P 1, 2, 72; Partnership Order, 103 FERC ¶ 61,346 at P 2, 3, 48.

admission of wrongdoing, for example, are part of the balance of risks and rewards—or losses and gains—assumed by the Settling Parties and found by the Commission to be acceptable outcomes of the contested issues. Further, we agree with the presiding judges that intervenors have not raised any contested genuine issues of material fact. Therefore, the Commission properly approved the settlement agreements in accord with Rule 602.<sup>31</sup>

18. With respect to whether the Commission acted *ultra vires*, section 313(b) of the Federal Power Act, quoted above, provides that the Commission “may modify” its findings and file modified or new findings with the court. It is within the Commission’s discretion, however, to enforce or to settle.<sup>32</sup> As discussed above, the Commission has elected to endorse the parties’ settlements in these proceedings because the settlement agreements, on balance, provide significant benefits and produce overall just and reasonable results. Moreover, there is ample precedent for parties to proceedings set for trial-type evidentiary hearings to work with Trial Staff to resolve disputes through settlement agreements.<sup>33</sup>

19. Lastly, with respect to the *Mobile-Sierra* public interest standard, we agree that a settlement agreement cannot limit the rights of third parties with such a standard. In light of *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 477-78 (D.C. Cir. 2008), the Commission may not accept the standards of review as currently written. As such, the settlement agreements (that bind non-contracting parties to the public interest standard) must be revised to reflect standards of review applicable to non-settling third parties. An acceptable substitute provision applicable to non-settling third parties would be the “most stringent standard permissible under applicable law.”

The Commission orders:

(A) The requests for rehearing are hereby denied as discussed in the body of this order.

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<sup>31</sup> 18 C.F.R. § 385.602(h)(1)(i) (2008).

<sup>32</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (enforcement discretion); *Burlington Res. Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008) (same).

<sup>33</sup> *See, e.g.*, Gaming Order, 103 FERC ¶ 61,345 at P 73.

(B) The Settling Parties are directed to revise the standards of review governing their settlement agreements, as discussed in the body of this order, and to make a compliance filing within 30 days of the issuance date of this order.

By the Commission. Commissioners Wellinghoff and Kelly concurring in part with a separate joint statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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FEDERAL ENERGY REGULATORY COMMISSION

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(Issued November 14, 2008)

WELLINGHOFF and KELLY, Commissioners, *concurring in part*:

This order states that the subject settlement agreements bind non-contracting parties to the “public interest” standard of review. This order further states that in light of the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *Maine Public Utilities Commission v. FERC*,<sup>1</sup> the Commission may not accept the standards of review as written in the subject settlements. In addition, this order states that an acceptable substitute provision applicable to future changes sought by non-settling third parties would be the “most stringent standard permissible under applicable law.”

The U.S. Supreme Court has held that whenever the Commission reviews certain types of contracts, the Federal Power Act (FPA) requires it to apply the presumption that the contract meets the “just and reasonable” requirement imposed by the FPA.<sup>2</sup> The contracts that are accorded this special application of the “just and reasonable” standard are those “freely negotiated wholesale-energy

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<sup>1</sup> 520 F.3d 464, 478, *petition for reh’g denied*, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008) (*Maine PUC*).

<sup>2</sup> *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

contracts” that were given a unique role in the FPA.<sup>3</sup> In contrast, the D.C. Circuit determined that the proper standard of review for a different type of agreement, with regard to changes proposed by non-contracting third parties, was the “‘just and reasonable’ standard in section 206 of the Federal Power Act.”<sup>4</sup> The agreement at issue in *Maine PUC* was a multilateral settlement negotiated in a Commission adjudication of a utility’s proposal to revise its tariff substantially to enable it to establish and operate a locational installed electricity capacity market.

Our review of the agreements in question here – which arose from the Commission’s issuance of two show cause orders directing certain entities to explain why they should not be found to have engaged in gaming and/or anomalous market behavior in violation of the California Independent System Operator Corporation’s and the California Power Exchange’s tariffs – indicates that they more closely resemble the *Maine PUC* adjudicatory settlement than the *Morgan Stanley* wholesale-energy sales contracts, which, for example, were freely negotiated outside the regulatory process. Therefore, the “most stringent standard permissible under applicable law” as applied here to changes proposed by non-parties means the “just and reasonable” standard of review.

For these reasons, we concur in part.

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Jon Wellinghoff  
Commissioner

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Sudeen G. Kelly  
Commissioner

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<sup>3</sup> *Id.*

<sup>4</sup> *Maine PUC*, 520 F.3d at 478.