

133 FERC ¶ 61,245  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Public Utilities Commission of the State of  
California

v.

Docket Nos. EL02-60-009

Sellers of Long-Term Contracts to the California  
Department of Water Resources

California Electricity Oversight Board

v.

EL02-62-008

Sellers of Long-Term Contracts to the California  
Department of Water Resources

(Consolidated)

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued December 21, 2010)

1. In this order, the Commission approves an uncontested settlement filed on October 18, 2010 between, on one hand, Sempra Generation (Sempra) and, on the other hand, the California Department of Water Resources (CDWR), an agency of the State of California, and the California Public Utilities Commission (CPUC) (collectively, the Parties). The Parties submitted a Joint Explanatory Statement, a Joint Offer of Settlement, and the Long-Term Contract Settlement Agreement (Settlement) that resolves all claims in the above captioned proceedings, as well as other disputes outside these proceedings, arising from the May 4, 2001 Energy Purchase Agreement (Agreement) between CDWR and Sempra.<sup>1</sup>

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<sup>1</sup> The Parties note that a separate Joint Offer of Settlement was filed concurrently by Sempra affiliates and the California Parties (Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, the CPUC, the People of State of California *ex rel.* Edmund G. Brown Jr., Attorney General, and

(continued...)

## I. Background

2. The background of this long and complex proceeding has previously been described at length.<sup>2</sup> Thus, only the relevant background details are described briefly here.

3. On February 25, 2002, the California Electricity Oversight Board (CEOB) and CPUC filed separate, but virtually identical, complaints alleging that the rates, terms and conditions of certain long-term contracts, including the Agreement, were unjust and unreasonable, and seeking abrogation or modification of such contracts. On April 25, 2002, the Commission ordered a limited evidentiary hearing to determine “whether the dysfunctional California spot markets adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue is warranted.”<sup>3</sup> In addition, the Commission determined that it needed more information to determine the applicable standard of review for those contracts, including the Agreement, that did not contain explicit *Mobile-Sierra*<sup>4</sup> language.<sup>5</sup> After an evidentiary hearing, the presiding Administrative Law Judge (ALJ) concluded that the applicable standard of review intended by the parties for the contracts at issue was the *Mobile-Sierra* public interest standard.<sup>6</sup>

4. The Commission affirmed the ALJ’s finding that the *Mobile-Sierra* standard of review applied to all the contracts at issue and found that the complainants had not met their burden of proof under that standard to justify the modification or abrogation of the contracts. Thus, the Commission denied the complaints, noting that the evidentiary record in this proceeding, as well the findings of the Commission in two related

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CDWR) in Docket No. EL00-95-251, *et al.*, to resolve certain claims relating to “short-term” energy transactions during the period from January 1, 2000, through June 20, 2001. The Commission is concurrently issuing an order on the “short-term” settlement in Docket No. EL00-95-251, *et al.*

<sup>2</sup> See, e.g., *Pub. Utils. Comm’n. of Cal. v. Sellers of Long Term Contracts to the Cal. Dept. of Water Resources*, 103 FERC ¶ 61,354 (2003) (June 26, 2003 Order).

<sup>3</sup> *Pub. Utils. Comm’n. of Cal. v. Sellers of Long Term Contracts*, 99 FERC ¶ 61,087, at 61,384 (2002) (April 25, 2002 Order).

<sup>4</sup> See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

<sup>5</sup> April 25, 2002 Order, 99 FERC ¶ 61,087 at 61,383.

<sup>6</sup> *Pub. Utils. Comm’n. of Cal. v. Sellers of Long Term Contracts*, 102 FERC ¶ 63,013 (2003).

proceedings, did not support modification of the contracts at issue.<sup>7</sup> The Commission denied rehearing and upheld its decision to reject the complaints.<sup>8</sup>

5. On appeal, the United States Court of Appeals for the Ninth Circuit remanded the case to the Commission, stating that it found flaws in the Commission's analysis.<sup>9</sup> On review of the Ninth Circuit's decision, the United States Supreme Court remanded the case for further consideration in light of the Court's decision in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County*.<sup>10</sup> In *Morgan Stanley*, the Court remanded similar long-term contract matters to the Commission to "amplify or clarify" its findings on two points. First, the Court stated that the Commission's analysis should not be limited to whether consumers' rates increased immediately upon the relevant contracts going into effect, but rather should determine whether the contracts at issue imposed an excessive burden "down the line," relative to the rates consumers could have obtained (but for the contracts) after elimination of the dysfunctional spot market.<sup>11</sup> Second, the Court found that it was unclear from the Commission's orders whether the Commission found the evidence inadequate to support the claim that individual sellers' alleged unlawful activities affected the contracts at issue.

6. On December 19, 2008, Sempra filed a motion requesting that the Commission: (1) provide for remand procedures to resolve in a paper hearing the two discrete issues identified by the Supreme Court in *Morgan Stanley*; and (2) determine as a matter of law that the CPUC is subject to the *Mobile-Sierra* doctrine regardless of whether it is a non-contracting third party with respect to the contracts at issue.<sup>12</sup> The CPUC filed an answer and cross-motion following Sempra's motion,<sup>13</sup> and additional filings followed.

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<sup>7</sup> June 26, 2003 Order, 103 FERC ¶ 61,354 at P 3.

<sup>8</sup> *Pub. Utils. Comm'n of Cal. v. Sellers of Long Term Contracts*, 105 FERC ¶ 61,182 (2003).

<sup>9</sup> *Pub. Utils. Comm'n. of Cal. v. FERC*, 474 F.3d 587, 594-97 (9<sup>th</sup> Cir. 2006).

<sup>10</sup> *Sempra Generation, et al., v. Pub. Utils. Comm'n. of Cal.*, 128 S. Ct. 2993 (2008) (citing *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527 (2008) (*Morgan Stanley*)). On December 4, 2008 the Ninth Circuit issued an order vacating its prior decision in the case and remanding the matter to the Commission for further proceedings consistent with the Court's *Morgan Stanley* opinion. *Pub. Utils. Comm'n of Cal. v. FERC*, 550 F.3d 767 (9<sup>th</sup> Cir. 2008).

<sup>11</sup> *Morgan Stanley*, 554 U.S. at 626.

<sup>12</sup> Sempra December 19, 2008 Answer and Cross Motion in Docket Nos. EL02-60-003 and EL02-62-003.

<sup>13</sup> CPUC January 14, 2009 Answer and Cross-Motion in Docket Nos. EL02-60-003 and EL02-62-003.

7. On October 18, 2010, CPUC and Sempra filed the Settlement.

## **II. Procedural Matters**

8. The Parties filed the Settlement with the Commission pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.<sup>14</sup> Pursuant to Rule 602(f), initial comments were due on or before November 7, 2010, and reply comments were due on or before November 17, 2010.<sup>15</sup> No comments were filed concerning the Settlement.

## **III. The Terms of the Settlement**

9. The principal elements of the Settlement are Sempra's payment of \$130 million, plus certain interest on that amount, to an account to be designated by CDWR and the CPUC, and the mutual release by CDWR and the CPUC and Sempra of claims arising from or related to the long-term settled proceedings (as defined in the Settlement). In addition, Sempra and CDWR shall execute Amendment No. 2 to the Agreement, which provides, among other things, that: (i) as required under the Continental Forge Settlement Agreement (as defined in Amendment No. 2) Sempra shall continue its practice of applying the Continental Forge Discount (as defined in Amendment No. 2) to invoices sent to CDWR; (ii) as required under the Continental Forge Settlement Agreement, Sempra shall continue to limit its delivery flexibility under the Agreement as set forth in Amendment No. 2; and (iii) disputes between CDWR and Sempra shall be resolved pursuant the procedures set forth in Amendment No. 2.<sup>16</sup> Sempra and CDWR shall execute Amendment No. 2 within three days after the release effective date.<sup>17</sup>

10. The Parties have executed the Settlement and it became binding pursuant to its terms as of the execution date. However, some of the operative provisions become effective only as of the date on which the Commission has issued and provided notice of orders approving both the Settlement and the short-term settlement agreement filed in Docket No. EL00-95-251, *et al.*<sup>18</sup> The Settlement will terminate automatically on the date of a final Commission order rejecting the Settlement or on the date that a federal appellate court vacates the relevant Commission order. The CPUC and CDWR may terminate the Settlement for the reasons specified therein. Upon termination, the

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<sup>14</sup> 18 C.F.R. § 385.602 (2010). The Parties note that because a presiding officer has not yet been appointed in the captioned proceedings since remand of the proceedings to the Commission from the Ninth Circuit, Rule 602(b)(2)(i) does not apply and the Settlement was transmitted directly to the Commission.

<sup>15</sup> *Id.* § 385.602(f).

<sup>16</sup> Joint Explanatory Statement at 3-4.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 6.

Settlement and Amendment No. 2, if executed, will be null and void and CPUC and CDWR will return any monetary compensation received, plus interest, to Sempra.<sup>19</sup>

11. The Settlement provides that, in order to fully effectuate the release contemplated, the Commission's approval of the Settlement shall constitute a dismissal of the EL02-62-000 proceeding as it relates to Sempra and the Agreement. The Parties assert that such dismissal is appropriate because: (1) CEOB, the complainant in the EL02-62-000 proceeding, is inactive;<sup>20</sup> (2) the Commission has previously recognized that the complaints brought by CEOB in Docket No. EL02-62-000 are substantially identical and raise that same factual and legal issues as those presented in the complaint brought by CPUC in Docket No. EL02-60-000;<sup>21</sup> and (iii) CPUC and CDWR are both signatories to the Settlement.<sup>22</sup>

12. The Parties state that the Settlement benefits California ratepayers by resolving claims for refunds and other remedies as between Sempra and the CPUC and CDWR relating to the Agreement. The Parties also state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.<sup>23</sup>

#### **IV. Commission Determination**

13. The Settlement appears to be fair and reasonable and in the public interest and is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

The Commission orders:

The Settlement is hereby approved, 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> *Id.* at 6-7.

<sup>20</sup> The Parties also note that, as CEOB is no longer active, it is not a party to the Settlement. *Id.* at 2.

<sup>21</sup> *See* April 25, 2002 Order, 99 FERC ¶ 61,087 at 61,377, 61,385 (2002).

<sup>22</sup> Joint Offer of Settlement at 6.

<sup>23</sup> Joint Offer of Settlement at 5.