UNITED STATES OF AMERICA99 FERC 61,087
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Public Utilities Commission of the State of California

v. Docket No. EL02-60-000

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

California Electricity Oversight Board,

v. Docket No. EL02-62-000

Sellers of Energy and Capacity Under Long-Term Contracts With the California Department of Water Resources

(Consolidated)

ORDER SETTING COMPLAINTS FOR HEARING, ESTABLISHING HEARING PROCEDURES, AND CONSOLIDATING PROCEEDINGS

(Issued April 25, 2002)

On February 25, 2002, the Public Utilities Commission of the State of California (CPUC) and the California Electricity Oversight Board (CEOB) filed two separate, almost identical, complaints against a group of sellers of energy under long-term contracts with the California Department of Water Resources (CDWR) alleging that the prices, terms, and conditions of such contracts are unjust and unreasonable and, to the extent applicable, not in the public interest. The complaints also allege that the respondents obtained the prices, terms, and conditions in the contracts through the exercise of market power, in violation of the Federal Power Act (FPA), and the respondents actions are causing injury to the citizens and ratepayers of California on whose behalf the CPUC is statutorily entitled to act.

To ensure that the complainants have a full and fair opportunity to present their cases and that the Commission, in turn, has a complete record on which to base its ultimate decision, we are setting these complaints for an evidentiary

hearing. During this hearing, the complainants will bear the burden of proving that modification of contracts is justified. This burden is a heavy one and one that the evidence contained in the complaints taken alone does not meet. Moreover, to aid the parties in settling their disputes without the burden and expenses of litigation, we will hold the hearing in abeyance pending the outcome of settlement judge procedures. For each complaint, we also establish a refund effective date pursuant to section 206(b) of the Federal Power Act (FPA).[1]

I. Complaints

The complaints seek to modify over 30 contracts[2] with numerous sellers.[3] These contracts were entered into in 2001. Some of the contracts have concluded and others are yet to become effective and will continue through year 2021. The contract prices range from a low of $25.16 to a high of $249.

The complainants request that these contracts be abrogated as unjust and unreasonable and that the Commission establish a refund effective date at the earliest time permitted by law. In the alternative, they ask that the Commission reform the contracts to provide for just and reasonable rates, reduce their duration, and strike certain non-price terms and provisions from the contracts.

The complaints state that CDWR was forced to pay unjust and unreasonable prices and to agree to onerous, unjust and unreasonable non-price terms,[4] in order to secure the power

[1] 16 U.S.C. 824e(b) (1994).

[2] Not all of these contracts may be potentially subject to refund. For a detailed list of contracts being addressed in this order, see Appendix A. According to the announcement on the CDWR's official website, CDWR has renegotiated some of the contracts that the instant complaints seek to modify. The contracts that appear to have been renegotiated and superseded are not addressed in this order and instead will be addressed in a future order, to the extent necessary. <http://wwwcers.water.ca.gov/newContracts.html> (April 23, 2002).

[3] For a complete list of the respondents see Appendix B.

[4] CPUC and CEOB challenge non-price terms concerning: (1) priority over bond repayment; (2) dispatchability of block contracts; (3) evasion of the effect of Commission review; (4) asymmetrical credit treatment; (5) "most-favored nation"

treatment; (6) mitigation and termination; and (7) asymmetrical
(continued...)

necessary to ensure that the lights stayed on in California. The complainants allege that the prices, terms, and conditions in each challenged contract are tainted with the exercise of market power.

Both CPUC and CEOB argue that the applicable standard of review in the instant case is whether the rates are just and reasonable and that the complaints are not barred by the Mobile-Sierra doctrine.[5] They contend that because neither the complainants nor the consumers they represent are signatories to any of the challenged contracts, they are not bound by a "public interest" standard. CEOB also argues that the "public interest" standard does not apply to contracts that are, as they are here, being reviewed by the Commission for the first time.

In the alternative, CPUC and CEOB argue that even if the "public interest" standard is applicable, the challenged contracts must be abrogated as contrary to the public interest. Citing Northeast Utilities Service Co. v. FERC, 66 FERC 61,332 (1994), aff'd, 55 F.3d 686 (D.C. Cir. 1995) and PJM Interconnection, LLC, 96 FERC 61, 206 (2001), the complainants contend that the "public interest" standard can be met in a section 206 complaint by third parties who are "threatened by possible 'undue discrimination' or imposition of an excessive burden." CPUC believes that the contract rates are excessively burdensome on California customers not only because they are "catastrophically uneconomic," but also because of the highly asymmetrical distribution of burdens and benefits in the contract terms and conditions.

CPUC further argues that the contract rates can be determined to be unlawful without a finding of market power abuse. It explains that the contracts at issue were negotiated when the energy markets were dysfunctional. CPUC believes that CDWR made excessive contract payments as measured against market benchmarks, estimated cost of service, and the Commission-proposed benchmark.[6]

[4] (...continued)
allocation of future governmental action.

[5] United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) (Mobile); FPC v. Sierra Pacific Power, 350 U.S. 348 (1956) (Sierra).

[6]

See San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, 93 FERC 61,294, at 61,994-95 (2000), reh'g denied, 97 FERC 61,275, at 62,229 (2001) (setting a benchmark for five-year contracts for supply around-the-clock at $74/MWh).

Additionally, CPUC requests that the instant complaints be set for hearing before the same judge who will conduct a hearing [7] in Docket No. EL02-26-000, et al. and that the Commission take official notice of all pleadings and evidence filed to date in those dockets.

II. Responsive Pleadings

Sunrise Power Company, LLC (Sunrise), Pacificorp Power Marketing, Inc. (PPM), Morgan Stanley Capital Group, Inc. (Morgan Stanley), and Colton Power, L.P. (Colton) [8] filed motions requesting dismissal of the complaints. In addition, Coral Power, L.L.C. (Coral) and PG&E Energy Trading-Power, LP (PG&E) argue that the instant complaints should be dismissed for failure to state a claim because most of the complainants' allegations are directed either at the Commission or CDWR and that the complaints fail to allege any specific violation of the Federal Power Act, [9] Commission orders or regulations.

Sunrise, PPM, Morgan Stanley, Calpeak Project Companies (Calpeak), Constellation Power Source, Inc. and High Desert Power Project, LLC (collectively, Constellation), Sempra Energy Resources (SER), Clearwood Electric Company, LLC (Clearwood), GWF Energy LLC (GWF), Fresno Cogeneration Partners, LP, Wellhead Power Gates LLC and Wellhead Power Panoche LLC (collectively, Wellhead Companies), and Calpine Energy Services, L.P. (Calpine) argue that the complainants lack standing and/or authority under the California law to challenge the contracts in question because CDWR is the only party authorized under the California law to determine whether its power purchase contracts are just and reasonable. Sunrise adds that the complainants cannot even be considered third-party beneficiaries because the contracts at issue were negotiated by representatives of the State of California for the benefit of the State of California, not the complainants.

In response, CEOB argues that Rule 206 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.206, permits any person, including state or state entity, to file a complaint even where that person does not possess a direct interest in the transactions, so long as the person is adversely affected by the actions that are subject to the complaints. It further states

[7] Nevada Power Company and Sierra Pacific Power Company v. Duke Energy Trading and Marketing, L.L.C., et al., 99 FERC 61,047 (2002).

[8] Colton is a successor in interest to Alliance Colton LLC.

[9] 16 U.S.C. 796 et seq. (1994).

that the Commission cannot be required to interpret the scope and powers granted to the CEOB by the California legislature.

Furthermore, Clearwood, Sunrise, Morgan Stanley, Constellation, Calpeak, SER, GWF, Calpeak, Calpine, Wellhead Companies, Williams Energy Marketing & Trading Company (Williams), and Mirant America Energy Marketing, LP (Mirant), El Paso Merchant Energy, L.P. (El Paso), Dynegy Power Marketing, Inc. (Dynegy),[10] Colton, and Imperial Valley Resource Recovery Company, L.L.C. and Primary Power International (collectively, IVRRC), and Allegheny Energy Supply Company, LLC (Allegheny) argue that the complainants have failed to meet the "practically insurmountable" Mobile-Sierra public interest standard. Morgan Stanley, Williams, and GWF contend that the Mobile-Sierra standard cannot be met by the complainants pursuant to the equitable principle of "unclean hands," since the complainants themselves created the dysfunctional market conditions that led to the shortages and high spot prices they now seek to use as justification for abrogating the contracts at issue. Williams, Dynegy, and El Paso further state that in accordance with Commission and court precedent, the fact that the challenged contracts have allegedly become uneconomic to the State does not render these contracts contrary to the public interest. Calpine asserts that a mere showing of a disparity between contract and market rates does not satisfy the Mobile-Sierra standard. Certain respondents also disagree with the complainants' claim that the contracts in question are being reviewed by the Commission for the first time, when in fact, the long-term contracts have been filed with the Commission and the short-term transactions have been submitted in quarterly transaction summaries. In response, the complainants state that the contracts at issue should be reviewed under the just and reasonable standard because the Commission has not substantively reviewed the CDWR contracts.

Moreover, in response to the complainants' argument that they are not bound by the public interest standard because they represent third-party interests in these proceedings, Constellation and Morgan Stanley argue that the Commission should not permit the State of California to evade the Mobile-Sierra requirement by executing binding contracts through one agency and

then, later, attacking those contracts through another agency ostensibly representing the same interests. Coral states that the complainants' participation in this proceeding should be deemed in the same capacity as CDWR, not as a disinterested party. Williams also argues that CDWR acted as an agent of the State in negotiating and executing the contracts at issue and

10 Dynegy filed an answer to the complaints jointly with El Segundo Power LLC, Long Beach Generation LLC, and Cabrillo Power LLC.

that the complainants, which also represent the State, are not third parties to the CDWR contracts and thus are bound by these contracts. In Williams' opinion, the fact that the complaints are submitted by sister agencies is immaterial.

In response, the CPUC argues that it is not a party to the CDWR contracts and as an independent, constitutionally established state agency, it is neither liable for nor bound by CDWR's actions in signing the contracts at issue. The CPUC and CEOB further assert that the respondents' argument that one state agency can contractually bind other state agencies is not supported by legal authority.

Calpeak, SER, and Morgan Stanley also argue that the Commission's statement that any party believing that forward contract rates are unjust and unreasonable could file a FPA section 206 complaint does not operate to excuse the complainants from the Mobile-Sierra public interest standard. In addition, Mirant, Williams, Wellhead Companies, and Calpine state that their contracts with CDWR contain an explicit Mobile-Sierra clause, which precludes CDWR from unilaterally seeking changes to the contract terms under either section 205 or 206 of the FPA, as well as makes the Mobile-Sierra public interest standard applicable to challenges by third parties, including this Commission, the State of California, any of its agencies, or any

11 other governmental entity.

Morgan Stanley, GWF, Calpine, Dynegy, Colton, and Constellation further argue that the Commission's failure to uphold the contracts in question would chill participation in forward markets, deter generation investment, and result in filing of ripple claims by numerous market participants seeking to mitigate their refund exposure. Mirant and SER also assert that by abrogating the contracts at issue, the Commission will send the CDWR straight back to the spot market, which is bound to experience steep price increases and renewed volatility due to the return of all of the power needs currently covered by the long-term contracts.

Sunrise, Clearwood, PPM, Calpeak, Morgan Stanley, Constellation, Mirant, GWF, SER, Calpine, Williams, Dynegy, IVRRC, Allegheny, and El Paso further argue that the complainants did not offer evidence showing that the contracts at issue are unjust and unreasonable or otherwise unlawful and that the

[11] See Answer of Calpine Energy Services, L.P., Docket No. EL02-60-000, at 20 (March 26, 2002); Answer of Mirant-Americas Energy Marketing, LP to Complaints, Docket Nos. EL02-60-000 and EL02-62-000, Attachment A, Exhibit A, 6 (March 22, 2002); and Answer of Williams Energy Marketing & Trading Company, Docket Nos. EL02-60-000 and EL02-62-000, at 24 (March 22, 2002).

respondents exercised market power. Allegheny challenges the complainants' inference that market prices were unjust and unreasonable because after the Commission imposed the West-wide price mitigation by its June 19, 2001 order (June 19 Order),[12] they started declining. It argues that the prices had already declined by the time of issuance of the June 19 Order and that the decline was attributable to the actions of the State of California in moving to longer-term contracts, to conservation efforts and decline in natural gas prices.

Additionally, PPM, Calpeak, SER, El Paso, and Morgan Stanley assert that the rates offered by sellers with market-based pricing authority are presumed to be just and reasonable, and that the complainants failed to overcome this presumption. GWF and SER add that challenging individual contracts entered into pursuant to market-based tariffs is inconsistent with the underlying principles upon which the Commission grants market-based rate authority. Moreover, Coral states that the prices in its contracts with CDWR are lawful because they were authorized by and complied with rate schedules accepted by the Commission.[13] Thus, it concludes, the contract prices are protected by the filed rate doctrine.[14]

Furthermore, Calpeak argues that the comparison offered by the complainants of contract rates with various market benchmarks, including the Commission's advisory benchmark,[15] does not prove that the contracts at issue are unlawful. In SER's and Allegheny's opinion, the complainants' comparison of contract rates in question with the after-the-fact, cost-based benchmarks constitutes a collateral assault on the Commission's market-based rate regime. Mirant further states that the Commission adopted the advisory benchmark in order to encourage the use of forward contracts, not to set a cap on long-term forward market rates. Williams, Allegheny, and PG&E, however, state that the rates in the CDWR contracts fall within or are below the Commission's

advisory benchmark for long-term contracts. Allegheny concludes that the rates in its contracts with CDWR are thus presumptively just and reasonable.

[12] San Diego & Electric Co. v. Sellers of Energy and Ancillary Services, 95 FERC ¶ 61,418 (2001).

[13] Coral Power, L.L.C., Answer in Opposition to Complaint, Docket No. EL02-62-000, at 17 ¶ 47 (March 22, 2002).

[14] Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981) (explaining that the filed rate doctrine forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate regulatory authority).

[15] See supra n.6.

In addition, SER argues that it could not have exercised market power because it owns no generation in the relevant geographic area and that it would be in no position to exercise market power against CDWR, the largest power purchaser in California. Calpine asserts that it also lacks market power because its sales to CDWR are sales of capacity from new generating facilities constructed after the effective date of [16] Order No. 888. According to Calpine, sales from capacity for which construction has commenced on or after Order No. 888 are presumed to lack generation dominance. In addition, GWF and Calpine assert that CDWR was ably represented, had significant bargaining advantages, and proposed many terms that were eventually included in its contract with GWF. Constellation, El Paso, and Mirant state that certain non-price provisions being challenged in the complaints were specifically requested by CDWR [17] and adopted virtually unchanged. Soledad Energy, LLC (Soledad) asserts that its contract with CDWR was essentially dictated in its entirety by CDWR. Morever, it adds, certain non-price terms of its contract were unilaterally changed by CDWR after the parties had reached a final agreement. SER also states that its contract with CDWR was the product of nearly three months of negotiations. Wellhead Companies also state that the complainants had many bidders to choose from and selected the most favorable bids and entered into contracts after further negotiations. According to Allegheny, Constellation, and GWF, the Commission has determined that during the same period of time when the CDWR was negotiating the contracts at issue, it enjoyed

[16] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting

Utilities, Order No. 888, 61 Fed. Reg. 21,540, at 31,664-65 (1996), FERC Stats. & Regs. 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC 61,046 (1998), aff'd in relevant part, remanded in part on other grounds sub nom. Transmission Access Policy Study Group, et al. v. FERC, 225 F. 3d 667 (D.C. Cir. 2000), aff'd, New York v. FERC, 122 S.Ct. 1012 (2002).

17 E.g., Mirant identifies the following provisions as having been requested by CDWR: the bond priority provision, creditworthiness provision, and the Mobile-Sierra clause. Answer of Mirant-Americas Energy Marketing, LP to Complaints, Docket Nos. EL02-60-000 and EL02-62-000, at 34-36 (March 22, 2002). Further, according to El Paso, CDWR proposed the inclusion of the bond priority clause, the "most-favored nation" provision, and an asymmetrical credit treatment clause. Answer of El Paso Merchant Energy, L.P. to Complaint, Docket No. EL02-62-000, at 15 (March 22, 2002).

an undue competitive advantage, given its level of access to non-public material information unavailable to other market participants.[18] In addition, Williams and Allegheny argue that the risk and benefits of the contracts at issue should be examined over their respective terms because these contracts, as all other risk management products, are designed to accommodate swings in market prices, both up and down.

The CPUC counters the respondents' allegations that the CDWR exerted monopsony power in the long-term contract negotiations. It states that while the CDWR was certainly a large buyer, it was not the only one during the relevant time period. It also adds that the respondents were under no obligation to offer power to the CDWR, which at the time was faced with serving many thousands of MW of demand or see the lights to go out in California.

Clearwood, PPM, Calpeak, GWF, SER, Calpine, PG&E, Colton, Allegheny, and Constellation also challenge the complainants' assertion that the contract prices were the result of the dysfunctional spot market, which caused volatility and dysfunctions in the forward markets. They contend that this statement is inconsistent with the Commission's prior orders limiting the mitigation to spot markets.[19] Mirant argues that when the Commission identified "critical interdependence" between spot and forward markets in the June 19 Order,[20] it, in fact, recognized that price mitigation in spot markets "will, over time, impact bilateral and forward markets." Moreover, Morgan Stanley argues that the CPUC and CEOB have failed to demonstrate

that spot market prices are the predominant factor driving forward contract prices and other terms and conditions. It explains that many factors play a role in establishing a forward price curve, including the cost to build new generation, expected power supplies, economic conditions and weather forecasts. Allegheny also states that the complainants offered no evidence in support of their claim that forward markets were not competitive. According to Allegheny, the fact that CDWR has contracts with 23 suppliers demonstrates robust competition in the long-term bilateral market. Wellhead Companies also argue that contrary to the complainants' allegations, the bilateral

[18] They cite San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, 96 FERC 61,120, at 61,515 (2001) (July 25, 2001 Order).

[19] They cite San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, 97 FERC 61,257 (2001) (December 19 Order) and San Diego & Electric Co. v. Sellers of Energy and Ancillary Services, 95 FERC 61,418 (2001) (June 19 Order).

[20] San Diego & Electric Co. v. Sellers of Energy and Ancillary Services, 95 FERC 61,418 (2001).

markets are functional and competitive. They explain that the long-term forward contracts executed by CDWR were a primary cause of the spot price stability and of the addition of new generating capacity into the California markets.

Sunrise, PPM, Soledad, and Calpeak request that the Commission establish separate proceedings for the complaints [21] against them. Sunrise, PPM, and Calpeak explain that their contracts with CDWR were entered into after the issuance of the [22] June 19 Order imposing mitigation on West-wide markets. Soledad states that its facility is unique in its small size and impact on the market. Sunrise and Soledad also contend that their contracts with CDWR have cost-based, not market-based pricing. PPM argues that the Commission should establish separate proceedings for contracts with each seller because these contracts have no factual commonality.

Constellation and Coral filed an answer in opposition to PPM's motion to bifurcate stating that such an approach would be wasteful and cause delay, since the complaints are flawed and can easily be dismissed without reaching any specific conclusions regarding individual contracts. The complainants also oppose the requests to bifurcate the complaints into multiple proceedings. In addition, they argue that the Commission should not exclude from the instant proceeding the contracts entered into after June

20, 2001. They explain that each of the challenged contracts was negotiated prior to the imposition of the West-wide mitigation by means of an initial "letter of intent" that set forth the terms and conditions of a transaction.

Sempra filed an answer to the CPUC's request that the instant complaints be consolidated with the ongoing proceedings in Docket Nos. EL02-26-000, et al. Sempra asserts that such consolidation would serve no useful purpose because those proceedings involve transactions subject to the Western States Power Pool Agreement.

Additionally, El Paso requests that if the Commission institutes a FPA section 206 investigation, it must establish a refund effective date at the latest time permitted by law. El Paso explains that if it were to file ripple complaints, the refund effective date for those complaints could be no sooner than mid-June, leaving El Paso with close to two months of refund exposure without potential offset from its own suppliers. El

[21] Sunrise Power Company, LLC filed separately a Motion to Establish a Separate Proceeding for Complaints against Sunrise and for Consolidation, Docket Nos. EL02-60-000 and EL02-62-000 (March 19, 2002). PPM's Answer to Complaints also contains a motion to bifurcate.

[22] See supra n.20.

Paso also states that the Commission should de-link the Staff Investigation established by the February 13, 2002 order. It reasons that the Staff Investigation centers on alleged activities of a single market participant, while the instant proceedings are predicated on allegations of potentially unjust and unreasonable rates in long-term power sales contracts.

1. Comments

Independent Energy Producers Association, Electric Power Supply Association, and Western Power Trading Forum (collectively, Joint Parties) argue that the instant complaints should be dismissed because under the California law and Commission precedent, the complainants have no authority to evaluate wholesale rates in CDWR's contracts. Reliant Energy Power Generation, Inc. and Reliant Energy Resources (collectively, Reliant Companies) further argue that the complaints are barred by the Mobile-Sierra doctrine. They state that regardless of whether Commission review is sought by a contracting party or a third party, the applicable standard is whether modification of the contract is required by the public interest.

In addition, Indigo Generation LLC, Larkspur Energy LLC and

Wildflower Energy, LP, and Joint Parties state that abrogating these contracts could plunge California into a new round of crisis that would further destabilize the regional marketplace. Joint Parties also claim that granting the requested remedies will dissuade future suppliers from entering the market and doing business in California and will disrupt current contract negotiations underway recently imposed by the CPUC. Reliant Companies add that abrogation of the contracts would essentially convert long-term contracts into a "call" option from which a purchaser may alter its forward contracts according to a contemporary view of the market.

Reliant Companies and Joint Parties also argue that contrary to the complainants' assertion that CDWR was forced into signing any deal, the CDWR was fully capable of negotiating terms and conditions, and that the State actually touted the contracts at issue as highly beneficial. Also, Joint Parties suggest that, when examining the contracts at issue, the Commission should not ignore the market conditions that were in effect at the time the contracts were entered into, namely that there was a scarcity of available generation in the region.

The California State Assembly (Assembly) supports the complaints. It states that the complainants have established a prima facie case. The Assembly also claims that the respondents' actions are causing injury to the citizens of California and that the contracts should be abrogated or, in the alternative, reformed in accordance with the mandates of the FPA.

III. Notice, Interventions, Comments, and Protests

Notice of the CPUC's complaint in Docket No. EL02-60-000 was published in the Federal Register, 67 Fed. Reg. 9,728 (2002), with comments, protests, or interventions due on or before March 4, 2002. Notice of the CEOB's complaint in Docket No. EL02-62-000 was published in the Federal Register, 67 Fed. Reg. 9,727 (2002), with comments, protests, or interventions due on or before March 4, 2002. The comment period in both dockets was subsequently extended until March 22, 2002.

Timely motions to intervene were filed by entities listed in the Appendix C to this order. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.214 (2001), the filing of a timely motion to intervene that has not been opposed makes the movant a party to the proceeding. Certain parties filed late motions to intervene in this proceeding. Given the lack of undue prejudice and the parties' interests, we find good cause to grant under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.214 (2001), the unopposed, untimely motions to intervene in this proceeding.

CPUC and CEOB files answers to certain motions and to other responsive pleadings. Sempra also filed an answer to the complainants' answers. We will allow these filings, as the Commission permits parties to respond to answers only when doing so, as here, will assist the Commission's understanding of the issues raised.[23]

IV. Discussion

Certain respondents contend that under the California law, CPUC and CEOB do not have the authority to review rates in CDWR's contracts. We find these contentions to be irrelevant in this proceeding because CPUC and CEOB request Commission review of the CDWR contract rates, rather than attempt to examine the same on their own.[24] We

[23] See, e.g., Atlantic City Electric Co., 90 FERC ¶ 61,268, at 61,898 (2000) and New York Independent System Operator, Inc., 91 FERC ¶ 61,128 (2000).

[24] We believe that a state court is the proper forum to address the issue of whether the CPUC and CEOB have the authority under the California law to challenge rates in CDWR's contracts and/or take other action in regard to those contracts.

therefore believe that CPUC and CEOB have standing to submit the instant complaints pursuant to section 306 of the FPA,[25] which states in pertinent part:

> Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this chapter may apply to the Commission ...

We, however, find that in the instant proceeding, CPUC and CEOB act in the same capacity as CDWR. Based on the fact that in negotiating and executing the contacts at issue, CDWR represented the State of California, CPUC and CEOB, which are also State representatives, "stepped into the shoes" of CDWR by bringing these complaints. Thus, the same standard of review applies to

these complainants as would apply to a similar complaint filed by CDWR.

In their complaints, CPUC and CEOB seek the extraordinary remedy of contract modification. The Commission's long-standing policy, consistent with a substantial body of Supreme Court and other judicial precedent, has been to recognize the sanctity of contracts. Rarely has the Commission deviated from that policy, and then only in extreme circumstances, such as the fundamental industry-wide restructuring under Order No. 888 and the [26] reorganization of a bankrupt utility. Preservation of contracts has, if anything, become even more critical since the policy was first adopted. Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty, including certainty that the Commission will not modify market-based contracts unless there are extraordinary circumstances.

As discussed below, the Commission has determined that, based on the unusual circumstances presented, it is appropriate to set the contracts listed in Appendix A for hearing. As an initial matter, in these dockets, parties have argued extensively over whether the complainants should be bound to a Mobile-Sierra "public interest" burden of proof or a "just and reasonable" burden of proof to support reformation of the contracts. Certain contracts identified by the complainants appear to have a

[25] 16 U.S.C. 825e (1994).

[26] See Order No. 888, supra n.16, at 31,664-65; and Northeast Util. Serv. Co., 66 FERC 61,332, reh'g denied, 68 FERC 61,041 (1994).

specific contractual provision which addresses FPA sections 205 and 206 rights of the parties to these contracts, as well as the [27] section 206 rights of third parties. For these contracts (listed under a separate subheading in Appendix A) the complainants must satisfy the public interest standard to justify contract modification.

As for the contracts that do not contain an explicit Mobile-Sierra provision, we do not believe that we have a sufficient record to address the Mobile-Sierra issue definitively and, accordingly, we will set for hearing the issue of whether the complainants must bear the burden of showing that a challenged contract is contrary to the public interest, or whether they will bear the burden of showing that the contract is not just and reasonable. However, it is our view that even under a "just and reasonable" burden of proof standard, parties who seek to

overturn market-based contracts into which they voluntarily entered will bear a heavy burden. In the evidence presented thus far, the complainants have failed to show that the dysfunctional California Independent System Operator (ISO) and Power Exchange (PX) spot markets had an adverse effect on the long-term, bilateral markets in California. To meet any burden of proof to reform these market-based contracts, complainants will need to demonstrate that there was such an adverse effect and, if there was, that the effect was of a magnitude warranting modification of contracts entered into in the bilateral markets. Given the importance of these questions, we have decided it is appropriate to order a full evidentiary hearing. This hearing is designed to ensure that the complainants have a full and fair opportunity to present their cases, and that the Commission in turn, has a complete record on which to base its ultimate decision. [28]

[27] E.g., Section 10.13(c) of CDWR's contract with Allegheny states: "The Agreement should not be subject to change by application of either Party pursuant to the provisions of Section 205 or 206 of the Federal Power Act ..., absent the agreement of both Parties in a written amendment executed by both parties." Also, Section 10.14 of the CDWR/Williams contract states: "The terms and conditions and the rates for service specified herein shall remain in effect for the term of each Transaction hereunder, and shall not be subject to change through application to the Federal Energy Regulatory Commission by either Party, including any Governmental Agency, pursuant to the provisions of Section 205 or 206 of the Federal Power Act. Each Party expressly agrees that it will not make any filings under either Section 205 or 206 of the Federal Power Act to revise this rate schedule.

[28] By order issued on February 13, 2002, the Commission directed a staff investigation of potential manipulation of electric and natural gas prices in the West. We are setting the (continued...)

Therefore, we set for hearing the contracts listed in Appendix A to this order. These include only those contracts that were entered into before June 20, 2001, the date on which the Commission's West-wide mitigation went into effect. [29] CEOB argues that all of the contracts included in its complaint should be set for hearing because each of the challenged contracts was negotiated prior to the imposition of West-wide mitigation. CEOB, however, offers no evidence showing that CDWR was bound to proceed with execution of the contracts after the West-wide mitigation went into effect. Contracts entered into after the date the West-wide mitigation went into effect are not set for hearing, since the effect of the West-wide mitigation was to stabilize prices. Also, we set for hearing only those contracts

that have not yet concluded. The Commission in this context has no authority to order refunds for contracts or transactions that conclude prior to the refund effective date. Our authority to modify the long-term contracts at issue here is only from the refund effective date forward.

The hearing is limited to the question of whether the dysfunctional California spot markets [30] adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue is warranted. The hearing will not address issues concerning the Commission's policies on granting market-based rate authority or on regulation of sellers with such authority. Further, if the judge concludes that modification of one or more of the contracts is warranted, the judge should not attempt at this stage to determine how those contracts should be modified.

We expect the parties to present evidence on and direct the judge to consider the totality of purchases and sales and the

[28] (...continued) instant contracts for hearing under section 206 of the FPA based on the arguments that the dysfunctional spot markets in California caused long-term contracts not to be reasonable, whereas the investigation is looking at whether there was improper behavior by sellers that may have caused prices not to be reasonable.

[29] San Diego & Electric Co. v. Sellers of Energy and Ancillary Services, 95 FERC 61,418 (2001).

[30] Spot markets or spot market sales are sales that are 24 hours or less and that are entered into the day of or day prior to delivery. See San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, 96 FERC 61,120, at 61,515 (2001); San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, 95 FERC 61,418, at 62,545 n.3 (2001).

conditions present at the time the contracts were entered into. In particular, the judge's review should include, but is not limited to, consideration of: CDWR's overall portfolio as well as its own sales, if any (e.g., pattern, duration, price); whether CDWR's transactions were physical or financial in nature and designed to serve CDWR's load or the net short position of Southern California Edison Company and Pacific Gas & Electric Company; the terms, conditions and rate over the entire duration of each contract (e.g., whether the contract is front-end loaded); the risks and benefits of the contracts at issue over their respective terms; what other alternatives were available to

buyers and sellers; whether, at the time, it was a reasonable decision to enter into these contracts (e.g., duration, scope and time period, and the participants' expectations as to the duration of dysfunctions in the California ISO and PX markets); previously submitted testimony by CDWR on the justness and reasonableness of the contracts at issue; the terms and conditions of any request for proposals, and the process and procedures CDWR used to evaluate the contracts, including any changes in offered rates, terms, and conditions mandated or negotiated by CDWR; whether any non-price terms were adopted upon CDWR's request; whether CDWR had access to inside information from the ISO or had a market position that it could potentially use to gain advantage in contract negotiations, and whether it in fact used that information; the relation of the contract rates to the Commission's previously identified benchmark for long-term
[31]
contracts.

In addition, the parties may present evidence on: the effect of the contracts on the financial health of California and other states; the effect of the contracts on wholesale and retail customers; the impacts contract modification may have on the nation's energy markets, including, but not limited to, impacts on investment in new generation and transmission infrastructure, and effect on confidence in competitive markets; the impact of contract modification on California spot market prices; the willingness of market participants to enter into long-term contracts in the future and the prices and terms and conditions of such contracts; and the potential modification of other existing energy contracts.

That being said, we want to strongly encourage all parties involved in disputes arising from the California crisis to seriously negotiate settlements. The uncertainty and expense of continued litigation over these disputes serves the interests of neither the parties to those disputes nor the public. For this

[31] See San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, 93 FERC ¶ 61,294, 61,994-95 (2000), reh'g denied, 97 FERC ¶ 61,275, at 62,229 (2001) (setting a benchmark for five-year contracts for supply around-the-clock at $74/MWh).

reason, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the
[32]
Commission's Rules of Practice and Procedure. The Chief Judge shall appoint a settlement judge in this proceeding within 15 days of the date of issuance of this order. The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide

the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy of providing maximum protection to customers,[33] we will set the refund effective date as of the date 60 days after the date of the filing of each complaint, i.e., on April 26, 2002.

Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date for all the complaints has already passed, the Commission cannot follow its normal procedure.

Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that, assuming the cases do not settle, the presiding judge should be able to render a decision within eight months of the commencement of hearing procedures. If the presiding judge is able to render an initial decision by December 31, 2002 and assuming the cases do not settle, we estimate that we will be able to issue our

[32] 18 C.F.R. 385.603 (2001).

[33] See, e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Company, 65 FERC 61,413, at 63,139 (1993); Canal Electric Company, 46 FERC 61,153 , at 61,539, reh'g denied, 47 FERC 61,275 (1989).

decision within approximately three months of the filing of briefs on and opposing exceptions or by May 31, 2003.

Given the overlap of issues and factual inquiries, we will consolidate the instant complaints for purposes of hearing. In addition, we will leave it to the discretion of the Chief

Administrative Law Judge to determine whether, when and to what extent it may be appropriate to consolidate the instant complaints with the ongoing proceeding in Docket Nos. EL02-26-000, EL02-28-000, EL02-29-000, EL02-30-000, EL02-31-000, EL02-32-000, EL02-33-000, EL02-34-000, EL02-38-000, EL02-39-000, EL02-43-000, and EL02-56-000 .[34]

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), the captioned dockets are consolidated, and an expedited public hearing shall be held concerning the complaints in these proceedings. As discussed in the body of this order, we will hold the hearing in abeyance to give the parties time to conduct settlement judge negotiations, as discussed in paragraphs (B) and (C).

(B) Pursuant to Rule 603 of the Commission's Rule of Practice and Procedure, 18 C.F.R. 385.603 (2001), the Chief Administrative Law Judge is hereby directed and authorized to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge.

(C) Within thirty (30) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

[34] 18 C.F.R. 385.503 (2001).

(D) If the settlement judge procedures fail, and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall convene a conference in this proceeding to be held within approximately fifteen (15) days of

the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(E) The refund effective date established pursuant to section 206(b) of the Federal Power Act is April 26, 2002.

(F) Motions to dismiss filed by Sunrise Power Company, LLC, Pacificorp Power Marketing, Inc., Morgan Stanley Capital Group, Inc., and Colton Power, L.P. are hereby denied for the reasons discussed in the body of this order.

(G) Pacificorp Power Marketing, Inc.'s motion to bifurcate is hereby denied for the reasons discussed in the body of this order.

(H) Sunrise Power Company's motion to establish a separate proceeding for the complaints against it and for consolidation is hereby denied for the reasons discussed in the body of this order.

By the Commission. Commissioner Massey dissented in part with a separate statement attached.

(S E A L) Commissioner Brownell concurred with a separate statement attached.

Linwood A. Watson, Jr.,

Deputy Secretary.

Appendix A

LIST OF CONTRACTS SET FOR HEARING

Public Utilities Commission of the State of California v. Sellers of Long Term Contracts to the California Department of Water Resources
Docket No. EL02-60-000

I. Contracts for which the issue of the applicable standard of review has been summarily decided

Seller's Name	Contract Date
Williams Energy Marketing & Trading Company	2/21/2001
Allegheny Energy Supply Company, LLC	3/23/2001
Allegheny Energy Supply Company, LLC	4/20/2001
Soledad Energy, LLC	4/28/2001
GWF Energy, LLC	5/11/2001
Mirant Americas Energy Marketing, LP	5/22/2001
Coral Power, L.L.C.	5/24/2001

II. Contracts for which the issue of the applicable standard of review has been set for hearing

Seller's Name	Contract Date
El Paso Merchant, L.P.	2/13/2001
Morgan Stanley Capital Group, Inc.	2/14/2001
Dynegy Power Marketing, Inc.	3/2/2001
Imperial Valley Resource Recovery Company, L.L.C.	3/13/2001
Alliance Colton, LLC	4/23/2001
Sempra Energy Resources	5/4/2001
PG&E Energy Trading-Power, L.P.	5/31/2001

California Electricity Oversight Board v.
Sellers of Long Term Contracts to the California Department of Water Resources
Docket No. EL02-62-000

I. Contracts for which the issue of the applicable standard of review has been summarily decided

Seller's Name	Contract Date
Williams Energy Marketing & Trading Company	2/21/2001
Allegheny Energy Supply Company, LLC	3/23/2001
Allegheny Energy Supply Company, LLC	4/20/2001
Soledad Energy, LLC	4/28/2001
GWF Energy, LLC	5/11/2001

Mirant Americas Energy Marketing, LP	5/22/2001
Coral Power, L.L.C.	5/24/2001

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El Paso Merchant, L.P.	2/13/2001
Morgan Stanley Capital Group, Inc.	2/14/2001
Dynegy Power Marketing, Inc.	3/2/2001
Imperial Valley Resource Recovery Company, L.L.C.	3/13/2001
Alliance Colton, LLC	4/23/2001
Sempra Energy Resources	5/4/2001
PG&E Energy Trading-Power, L.P.	5/31/2001

Appendix B

LIST OF RESPONDENTS

Allegheny Energy Supply Company, LLC
Calpeak Project Companies
Calpine Energy Services, L.P.
Clearwood Electric Company, LLC
Colton Power, L.P.
Constellation Power Source, Inc.
Coral Power, L.L.C.
Dynegy Power Marketing, Inc.
El Paso Merchant Energy, L.P.
Fresno Cogeneration Partners, LP
GWF Energy LLC
High Desert Power Project, LLC
Imperial Valley Resource Recovery Company, L.L.C.
Mirant America Energy Marketing, LP
Morgan Stanley Capital Group, Inc.
Pacificorp Power Marketing, Inc.
PG&E Energy Trading-Power, LP
Sempra Energy Resources

Soledad Energy, LLC
Sunrise Power Company, LLC

Wellhead Power Gates LLC
Wellhead Power Panoche LLC
Williams Energy Marketing & Trading Company

Appendix C

Public Utilities Commission of the State of California v.
Sellers of Long Term Contracts to the California Department of Water Resources, et al.
Docket Nos. EL02-60-000 and Docket No. EL02-62-000

Aquila Merchant Services, Inc.
BP Energy Company
California Independent System Operator, Inc.
California State Assembly*
Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California
City of Burbank, California
City of Santa Clara, California
Cogeneration Association of California and the Energy Producers and Users Coalition
Commonwealth Edison Company
Duke Energy North America, LLC and Duke Energy Trading & Marketing, LLC.
Electric Power Supply Association*
Exelon Corporation on behalf of Exelon Generation Company, LLC, PECO Energy Company, and Commonwealth Edison Company**
Independent Energy Producers Association*
Lassen Municipal Utility District
Modesto Irrigation District
Nevada Attorney General's Office, Bureau of Consumer Protection
Nevada Power Company and Sierra Pacific Power Company
Occidental Energy Ventures Corporation
Pacific Gas & Electric Company
Portland General Electric Company
Public Utility District No. 1 of Snohomish County, Washington

Reliant Energy Power Generation, Inc. and Reliant Energy

Resources*
Sacramento Municipal Utility District
Southern California Edison Company
Southern California Water Company
Turlock Irrigation District
Universal Studios, Inc.
Western Power Trading Forum*
Wildflower Entities (Indigo Generation LLC, Larkspur Energy LLC, and Wildflower Energy, LP)*

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* protest and/or comments
** motion to intervene out-of-time

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Utilities Commission of the State of California

v. Docket No. EL02-60-000

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

California Electricity Oversight Board,

v. Docket No. EL02-62-000

Sellers of Energy and Capacity Under Long-Term Contracts With the California Department of Water Resources

(Consolidated)

(Issued April 25, 2002)

MASSEY, Commissioner, dissenting in part:

This order establishes hearing procedures to develop a record upon which the Commission will decide whether to modify the terms of a series of long term contracts negotiated when the California spot markets were wildly out of control. Consistent with our policy regarding investigations under Section 206 of the Federal Power Act, the order establishes a refund effective date. And consistent with the our precedent, the order finds that a party that seeks to modify a contract bears a heavy burden. I agree with those basic decisions reached in this order. We need to give these contracts a good, hard look.

Yes, the complainants bear a heavy burden in demonstrating that the contracts should be modified, but the Federal Power Act says that any contract that is not just and reasonable is

unlawful. I understand there is a concern that investigating these contracts may create uncertainty for long term contracting and investment. Nevertheless, this Commission is simply not meeting its statutory responsibilities if we rubber stamp contracts just because they are long term contracts. Any uncertainty in the market is caused by the Federal Power Act itself, not because we are setting these contracts for hearing.
2

There are, however, two aspects of today's order with which I disagree. First, I disagree with the order's conclusion that the complainants have not shown that the dysfunctional spot market had an adverse effect on the long term contract market. It seems obvious to me that the soaring prices in the spot market had a dramatic effect on both the negotiations and the contracts that were ultimately negotiated. Certainly no buyer would agree to pay $249 per mwh if spot market prices, and expectations of future spot market prices, were not also in that range. The Commission has recognized this relationship between spot market
1
prices and long term contract prices.

Second, I disagree with the order's erroneous conclusion that the California Public Utilities Commission (CPUC), which is not a party to any of the contracts at issue, is bound by the Mobile-Sierra language of the contracts. The reasoning seems to be that the entire California state government in some way functions as a monolith, making joint decisions on power procurement issues. Thus, under this flawed reasoning, a clause in the contracts signed by the California Department of Water Resources (CDWR) somehow binds the CPUC.

Such a conclusion is unprecedented. The CPUC points out that it did not participate in the negotiations leading to the signing of these contracts. The CPUC is an independent regulatory body responsible for regulating utilities and charged with protecting consumers. It is thus similar to this Commission. This Commission would bristle at the idea that some executive branch official in the Department of the Interior, or even the Department of Energy, could bind us in some way that is inconsistent with our statutory responsibility. That would be unprecedented and wrong. What is the limit of this line or reasoning? Is any creature or institution of the California state government bound by the clauses in the CDWR contracts, even if they had no role in the negotiations?

1 "... (m)aintaining an accurately priced spot market is the single most important element for disciplining longer term transactions." AEP Power Marketing, 97 FERC 61,219 (2001) at 61,972.

The order does not cite any precedent for the conclusion

binding the CPUC to the Mobile-Sierra clauses in the contracts. And, I believe, it is because none exists. In fact, our precedents cut the other way. Our precedents generally support the position that a signatory to a contract cannot bind non-[2] parties to a certain standard of review. For example, less than one year ago we made the following statement in an order:[3]

> Mobile-Sierra does not speak to situations such as this, where a non-party to the RAA (such as PJM, which is not a party to the RAA) seeks changes under Section 206. [fn 13 omitted] Under PPL's interpretation, parties to a contract who agree among themselves not to seek rate changes would be able to bind not only one another, but also other entities who are not parties to that contract (and did not receive the contractual benefits in exchange for which the parties traded away their right to seek rate changes). This result is not what the Supreme Court intended in Mobile-Sierra.[3]

For these reasons, I dissent in part from today's order.

_____

William L. Massey
Commissioner

[2] See, for example, Southern Company Services, Inc., 67 FERC 61,080 (1994) and Florida Power & Light Company, 67 FERC 61,141 (1994).

[3] PJM Interconnection, LLC, 96 FERC 61,206 (2001) at 61,878.

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California Electricity Oversight Board
v. Docket No. EL02-62-000
Sellers of Energy and Capacity Under
Long-Term Contracts With the
California Department of Water Resources

(Consolidated)

(Issued April 25, 2002)

BROWNELL, Commissioner, concurring

I would like to extend the comments in my concurrence in Nevada Power Company and Sierra Pacific Power Company v. Duke Energy Trading and Marketing, L.L.C., et al., 99 FERC 61,047 (2002), to these cases. First, I would like to note that in another context, I might have concluded that dismissal of the complaints was appropriate, given the lack of evidence offered. However, in this context, I have concluded that a greater airing of the evidence for and against modification of these contracts is more likely to resolve the controversy that plagues these markets. Second, I see nothing in the Mobile-Sierra case law that bars the Commission from ruling that a market-based contract's silence on a buyer's rights to seek unilateral changes under section 206 of the Federal Power Act triggers the public interest standard. Moreover, I believe that such a ruling may be

[1]

[1] See, e.g., Texaco Inc. v. FERC, 148 F.3d 1091, 1096 (D.C. Cir. 1998) ("The law is quite clear: absent contractual language susceptible to the construction that the rate may be altered while the contract subsists, the Mobile-Sierra doctrine applies."); Boston Edison Co. v. FERC, 233 F.3d 60, 67 (1st Cir. 2000) ("[T]he specification of a rate or formula by itself implicates Mobile-Sierra (unless the parties negate the implication)."); and San Diego Gas & Electric Company v. Public Service Company of New Mexico, 91 FERC 61,233, at 61,851-53 (2000) (buyer held to public interest standard notwithstanding contract's silence as to section 206 rights and evidence "that the parties did not ever discuss either Section 206 or the applicable standard of review were a Section 206 complaint to be filed.").

appropriate, as policy matter. However, I am comfortable deferring judgment on the standard to be applied to those contracts that do not contain explicit section 206 waivers, pending a determination at hearing of whether there is any extrinsic evidence of the parties' intent.

For these reasons, I respectfully concur with this order.

Nora Mead Brownell