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**FILED**

JUL - 2 2004

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PACIFICORP,

Plaintiff,

v.

SEMPRA ENERGY TRADING CORP.;  
and DOES 2-10,

Defendants.

CIV-04-0701 DFL/PAN

MEMORANDUM OF OPINION  
AND ORDER

This action arises out of the alleged unjust enrichment of defendant Sempra Energy Trading Corporation ("Sempra"). Plaintiff, PacifiCorp, alleges that the California Independent System Operator Corporation ("the ISO") erroneously imposed congestion fees on PacifiCorp and then credited Sempra a portion of these charges. (Opp'n at 2-3.) Both PacifiCorp and Sempra have entered into the 1997 California Independent System Operator Corporation Agreement and Tariff ("Tariff"). (Compl. ¶ 6.) The Tariff, formally approved by the Federal Energy Regulatory Commission ("FERC"), sets forth the rules that govern the operation of transmission lines and associated markets. (Id.)

1 The Tariff contains detailed alternative dispute resolution  
2 procedures ("ADR Procedures"), including provisions for mediation  
3 and arbitration, through which disputes "between parties which  
4 arise under the ISO Documents" are to be resolved.<sup>1</sup> (Hindus Decl.  
5 Ex. 9 at 269.) The parties agree that because there is an  
6 arbitration provision in the Tariff which affects interstate  
7 commerce, the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 et  
8 seq., controls its interpretation. (Mot. at 5; Opp'n at 5).

9       Sempra requests an order compelling arbitration and staying  
10 these proceedings pending arbitration. Sempra argues that  
11 because the Tariff's arbitration agreement covers this dispute,  
12 the court must compel arbitration. (Mot. at 5.) The ISO has  
13 filed a brief in support of Sempra's position. PacifiCorp argues  
14 that arbitration should not be compelled because Sempra failed to  
15 perform a condition precedent to arbitration and, alternatively,  
16 because Sempra waived its right to compel arbitration. (Opp'n at  
17 5, 10.) For the reasons stated below, Sempra's motions to compel  
18 arbitration and stay these proceedings are GRANTED.

19 I. Good Faith Negotiations as Condition Precedent

20       PacifiCorp argues that the Tariff conditions the obligation  
21 to submit a dispute to arbitration on the parties first  
22 negotiating in good faith.<sup>2</sup> Private arbitration is a matter of  
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24       <sup>1</sup> The parties agree that this dispute arises "under the ISO  
25 Documents" and must be resolved according to the procedures set  
forth in the Tariff.

26       <sup>2</sup> In its opposition to Sempra's motion, PacifiCorp mentions  
only in passing that filing a statement of claim is also a  
condition precedent to invoking the arbitration procedures.

1 agreement between the parties and is governed by contract law."  
2 Platt Pac., Inc. v Anderson, 6 Cal.4th 307, 313, 24 Cal.Rptr.2d  
3 597, 601 (1993). Under California contract law, it is well  
4 settled that a duty to submit a dispute to arbitration may be  
5 subject to a condition precedent. Id. Therefore, parties to an  
6 arbitration agreement may stipulate that certain acts must occur  
7 before the duty to arbitrate attaches. In California, conditions  
8 precedent must be set forth expressly. Ins. Co. of Pa. v.  
9 Associated Int'l Ins. Co., 922 F.2d 516, 524 (9th Cir. 1990).  
10 "[C]ontractual provisions are not deemed to be conditions  
11 precedent unless stated 'in conspicuous, unambiguous, and  
12 unequivocal language.'" Id. (quoting Thompson v. Occidental Life  
13 Ins. Co. of Cal., 9 Cal.3d 904, 912, 109 Cal.Rptr. 473 (1973)).

14 Section 13.2.1 of the Tariff states that the parties "shall"  
15 engage in good faith negotiations "prior to" invoking the ADR  
16 Procedures. PacifiCorp urges the court to interpret "shall" as  
17 "must;" however, there is an equally reasonable alternative  
18 interpretation. In context, the word "shall" may reasonably be  
19 understood as "should," a precatory encouragement to the parties  
20 to work matters out. See Carter v. Seaboard Fin. Co., 33 Cal.2d  
21 564, 573, 203 P.2d 758 (1949) (stating that the word "shall"  
22 should not be interpreted as mandatory language without looking  
23 to the entirety of the statute). Section 13.1.1 of the Tariff

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26 (Opp'n at 8.) This issue will not be considered by the court,  
however, as it has not been adequately raised or briefed by the  
parties. The court confines itself to those issues that were  
raised and briefed.

1 contemplates the use of the ADR Procedures in all disputes. If  
2 "shall" in section 13.2.1 imposes a condition precedent, then the  
3 ADR Procedures could be circumvented every time the parties  
4 failed to negotiate in "good faith," frustrating the clear intent  
5 of the Tariff. Given the subjective nature of good faith  
6 negotiations, whether a party has acted in "good faith" to  
7 negotiate the dispute may be often unclear and subject to  
8 contrary and quite subjective interpretations. In virtually  
9 every case, a party could frustrate, or prolong, the ADR  
10 Procedures simply by claiming "bad faith" in the pre-arbitration  
11 discussions.<sup>3</sup> Because the word "shall" may reasonably be  
12 construed to mean either "should" or "must," the court finds that  
13 its meaning is unclear. See B. Garner, A Dictionary of Modern  
14 Legal Usage 939-41 (2d ed. 1995) (noting that "shall" has as many  
15 as eight different meanings and that its use violates all the  
16 basic principles of good legal drafting; "lawyers are not  
17 educable on the subject of *shall*, so the only solution is  
18 complete abstinence.").

19 When interpreting an arbitration agreement that is unclear,  
20 the court must consider the strong federal and state policy in  
21 favor of arbitration. "As a matter of law, any doubts concerning  
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23 <sup>3</sup> PacifiCorp cites a number of cases interpreting language  
24 similar to that in the Tariff as a condition precedent. The  
25 conditions in these cases were all subject to an objective  
26 measure, however; it was clear whether the parties fulfilled the  
required condition precedent. See HIM Portland, LLC v. DeVito  
Builders, Inc., 317 F.3d 41, 44 (1st Cir. 2003) (holding that a  
request for mediation was a condition precedent to arbitration);  
Kemiron Atl., Inc. v. Aquakem Int'l Inc., 290 F.3d 1287, 1291  
(11th Cir. 2002) (same).

1 the scope of arbitrable issues should be resolved in favor of  
2 arbitration, whether the problem at hand is the construction of  
3 the contract language itself or an allegation of waiver, delay or  
4 a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v.  
5 Mercury Constr. Corp., 460 U.S. 1, 25, 103 S.Ct. 927 (1983). See  
6 also Coast Plaza Doctors Hosp. v. Blue Cross of Cal., 83  
7 Cal.App.4th 677, 686, 99 Cal.Rptr.2d 809 (2000) ("California has  
8 a strong public policy in favor of arbitration and any doubts  
9 regarding the arbitrability of a dispute are resolved in favor of  
10 arbitration.").

11 Both state contract law and federal and state arbitration  
12 policy require that the court interpret the unclear language in  
13 the Tariff in a way that most favors arbitration. The word  
14 "shall" in section 13.2.1, therefore, is interpreted to have a  
15 precatory meaning. Accordingly, when a dispute arises under the  
16 Tariff, the parties should negotiate in good faith, but, if such  
17 an attempt fails, the parties must use the ADR Procedures.<sup>4</sup>

## 18 II. Waiver

19 PacifiCorp also argues that Sempra waived its right to  
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21 <sup>4</sup> PacifiCorp's request for a trial on the issue of whether  
22 Sempra failed to perform under the arbitration agreement is  
23 denied. (Opp'n at 10.) Because good faith negotiations are only  
24 precatory, Sempra did not violate an arbitration provision by its  
25 refusal to negotiate.

26 PacifiCorp also argues that Sempra "repudiated its ADR  
obligations under the Tariff" by refusing to engage in good faith  
negotiations, and is, therefore, precluded from enforcing the  
arbitration contract. (Opp'n at 8-9.) Again, because good faith  
negotiations are not a condition precedent, Sempra could not have  
repudiated its arbitration contract by failing to negotiate in  
good faith.

1 compel arbitration by failing to respond to PacifiCorp's requests  
2 to negotiate, thereby delaying the arbitration process. (Opp'n  
3 at 11.) To prove that Sempra waived its right to arbitration,  
4 PacifiCorp must prove "(1) knowledge of an existing right to  
5 compel arbitration; (2) acts inconsistent with that existing  
6 right; and (3) prejudice to the party opposing arbitration  
7 resulting from such inconsistent acts." Fisher v. A.G. Becker  
8 Paribas Incorporation, 791 F.2d 691, 694 (9th Cir. 1986).

9 Here, Sempra acted consistently with its right to  
10 arbitration. As established above, Sempra's refusal to negotiate  
11 did not "frustrate the arbitration of this dispute," as  
12 PacifiCorp argues. (Opp'n at 11.) PacifiCorp could have  
13 proceeded directly to arbitration. Moreover, because good faith  
14 negotiation is not required before arbitration is invoked,  
15 Sempra's failure to respond to PacifiCorp's requests to negotiate  
16 was not inconsistent with its arbitration right. Additionally,  
17 Sempra has introduced evidence showing that, in its  
18 communications with PacifiCorp, it asserted and reserved its  
19 right to arbitration. (Yudkowsky Decl. ¶ 2, Ex. A.) Sempra did  
20 not waive its right to compel arbitration.

### 21 III. Request for Stay

22 The FAA provides that if a party brings suit on an issue  
23 "referable to arbitration" under an arbitration agreement, a  
24 court may "stay the trial of the action until such arbitration  
25 has been had in accordance with the terms of the agreement." 9  
26 U.S.C. § 3. PacifiCorp argues that Sempra was in "default in

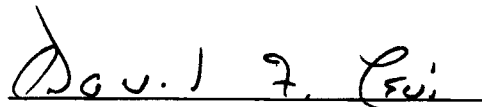
1 proceeding with the arbitration" and, therefore, cannot request a  
2 stay. (Opp'n at 12.) However, because Sempra did not frustrate  
3 the arbitration process or waive its right to arbitration, the  
4 court will stay the proceedings pending a resolution of this  
5 dispute in arbitration.

6 IV. Conclusion

7 Because the parties have entered into an arbitration  
8 agreement and because this dispute is covered by that agreement,  
9 the Sempra's motion to compel arbitration and stay these  
10 proceedings pending arbitration is GRANTED.

11  
12 IT IS SO ORDERED.

13 Dated: 2 July 2004.

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17 DAVID F. LEVI  
18 United States District Judge  
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United States District Court  
for the  
Eastern District of California  
July 2, 2004

\* \* CERTIFICATE OF SERVICE \* \*

2:04-cv-00701

Pacificorp

v.

Semptra Energy

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 2, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

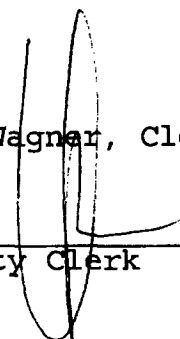
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