125 FERC ¶ 61,151
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sempra Energy Trading LLC	Docket Nos. ER03-1413-005
	ER08-100-002
	ER08-100-004
Sempra Energy Solutions LLC	ER07-265-002
	ER07-265-004
The Royal Bank of Scotland plc	ER07-1215-005

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS AND COMPLIANCE FILINGS

(Issued November 7, 2008)

1. In this order, the Commission accepts an updated market power analysis filed by Sempra Energy Trading Corp. (Sempra), as supplemented, as discussed below.[1] The Commission concludes that Sempra satisfies the Commission's standards for market-based rate authority.

2. Additionally, as discussed below, we grant Sempra and Sempra Energy Solutions LLC's (Sempra Energy Solutions) request to be designated as Category 1 sellers in the Northeast, Southeast, Central, and Southwest Power Pool regions;[2] accordingly, they

[1] Subsequent to the filing of its updated market power analysis, Sempra was succeeded by Sempra Energy Trading LLC, effective as of December 29, 2007. *See Sempra Energy Trading LLC*, Docket No. ER08-100-000 (Dec. 26, 2007) (unpublished letter order).

[2] Sempra's June 30, 2008 Request for Designation as Category 1 Sellers, Docket No. ER08-100-002, *et al.*; Sempra September 12, 2008 Filing at 2-3, Docket No. ER08-100-004, *et al.*

are not required to file regularly scheduled updated market power analyses for the Northeast, Southeast, Central, and Southwest Power Pool regions. We also grant Sempra's and Sempra Energy Solutions' request to be designated as Category 2 sellers in the Southwest and Northwest regions. Therefore, Sempra and Sempra Energy Solutions are required to file an updated market analysis for the Southwest and Northwest regions according to the regional reporting schedule adopted in Order No. 697.[3]

Background

August 1, 2006 Updated Market Power Analysis

3. On August 1, 2006, Sempra filed an updated market power analysis. Sempra states that it is a full-service energy trading company that markets and trades physical and financial energy and metals products, including electric energy and power, natural gas, crude oil, base metals, and associated commodities. According to Sempra, it does not own or operate any electric generation, transmission, or distribution facilities.[4]

4. At the time when Sempra submitted its updated market power analysis, Sempra was a wholly-owned subsidiary of Sempra Energy. However, as of April 1, 2008, Sempra is a wholly-owned subsidiary of RBS Sempra Commodities LLP (RBS Sempra Commodities), a United Kingdom limited liability partnership. RBS Sempra Commodities is owned by The Royal Bank of Scotland plc (Royal Bank of Scotland), which directly owns 51 percent of the voting interests in Sempra, and Sempra Energy, which indirectly owns 49 percent of the voting interests in Sempra.[5]

5. Sempra's updated market power analysis explains that Sempra Energy is a public utility holding company that also wholly owns Southern California Gas Company

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[3] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 848-50, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055 (2008).

[4] Sempra's August 1, 2006 Updated Market Power Analysis at 2.

[5] The Commission authorized the transfer of voting interests in Sempra to RBS Sempra Commodities in *Sempra Energy Trading Corp*., 120 FERC ¶ 62,184 (2007).

(SoCalGas) and San Diego Gas & Electric Company. SoCalGas is described as a natural gas distribution company that serves customers throughout most of southern California and part of central California. Sempra also states that San Diego Gas & Electric Company provides electric and natural gas service in San Diego County and southern Orange County, California.

6. According to Sempra, Sempra Energy is the parent company of Sempra Energy Solutions, a California limited liability company that offers electricity and natural gas supply and risk management services to commercial, industrial, and institutional retail customers, and Sempra Generation, a California corporation formerly operating as Sempra Energy Resources, which owns and operates power plants in the Western Electricity Coordinating Council region.

7. In its updated market power analysis, Sempra's horizontal market power analysis addressed relevant markets located within the Western Electricity Coordinating Council region as well as the PJM Interconnection, L.L.C. (PJM) and ISO New England, Inc. (ISO-NE) markets.[6]

8. For the horizontal market power analysis in the markets located within Western Electricity Coordinating Council region, Sempra relies on the updated market power analysis submitted by its affiliate Elk Hills Power, LLC (Elk Hills Update).[7] Sempra states that because the Elk Hills Update analyzed all of Sempra's affiliated generation in the Western Electricity Coordinating Council region,[8] and because Sempra does not otherwise control any additional generation in the Western Electricity Coordinating Council region, Sempra relies on the Elk Hills Update to demonstrate that it lacks

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[6] Sempra's August 1, 2006 Updated Market Power Analysis at 5 (citing *AEP Power Marketing, Inc*., 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order)).

[7] *See Elk Hills Power, LLC*, Docket No. ER03-394-004, *et al*. (June 21, 2006) (unpublished letter order).

[8] The Elk Hills Update includes market power analyses for markets located within the Western Electricity Coordinating Council region, including the California Independent System Operator Corporation (CAISO) market, the Arizona Public Service Company Salt River Project, the Nevada Power Company, and the Bonneville Power Administration balancing authority areas. *See* Elk Hills Power, LLC's January 10, 2006 Updated Market Power Analysis, Docket No. ER03-394-004.

horizontal market power in the Western Electricity Coordinating Council region.

9. Sempra's updated market power analysis also includes horizontal market power analyses for ISO-NE and PJM. In ISO-NE, Sempra had tolling agreements with Lake Road Generating Company, L.P. (Lake Road), Pittsfield Generating Company, L.P. (Pittsfield), and Pawtucket Power Associates, LP (Pawtucket Power). In addition, Sempra had an energy management agreement with Boston Generating, LLC (Boston Generating) for the power generated by Boston Generating's subsidiaries Mystic I, LLC (Mystic I), Mystic Development, LLC (Mystic Development), and Fore River Development, LLC (Fore River) (together, Boston Generating Project Companies).[9] In PJM, Sempra purchases power from Ingenco Wholesale Power, L.L.C. (Ingenco) under a long-term power purchase agreement. Sempra states that except for these contractual arrangements in ISO-NE and PJM, neither Sempra nor any of its affiliates controls any additional generation in the markets outside the Western Electricity Coordinating Council region.[10]

10. Sempra explains that in applying the Commission's pivotal supplier and market share screens in ISO-NE, it made the conservative assumptions that Sempra's contractual agreements with Lake Road, Pittsfield, Pawtucket, and Boston Generating give Sempra control over those generating facilities.[11] However, Sempra did not attribute to Sempra the output of the Pittsfield facility and of Mystic Development's Units 8 and 9. Sempra submits that because they operate as reliability must run units

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[9] Sempra states that the Boston Generating Project Companies are wholly-owned subsidiaries of Boston Generating and own the following five operational generating facilities located in the Boston area: Fore River Edgar (872.2 MW), Mystic Unit 7 (617.0 MW), Mystic Unit 8 (872.2 MW), Mystic Unit 9 (872.2 MW), and Jet (14.2 MW). These units have a total nameplate capacity of 3,247.8 MW. *See* Sempra's August 1, 2006 Updated Market Power Analysis at 5; Sempra's July 25, 2007 Comments at 2.

[10] Sempra's August 1, 2006 Updated Market Power Analysis at 5-6.

[11] Sempra notes that it conservatively assumed that its energy management agreement with Boston Generating gives Sempra "control" over the generating facilities owned by the Boston Generating Project Companies. *Id*. at 6.

under a cost of service agreement with ISO-NE, those units should not be attributed to Sempra for purposes of assessing Sempra's horizontal market power.[12]

11. Sempra states that it satisfies the pivotal supplier and market share screens for ISO-NE and PJM. Therefore, Sempra states that it does not possess horizontal market power in ISO-NE or PJM.

Notice of Filing and Responsive Pleadings

12. Notice of Sempra's updated market power analysis was published in the *Federal Register*, 71 Fed. Reg. 47,198 (2006), with interventions or protests due on or before August 22, 2006. None was filed.

Sempra's February 21, 2007 Supplemental Filing

13. Sempra submitted a supplement to its updated market power analysis on February 21, 2007. While noting that its August 1, 2006 analysis made the conservative assumption that all of its energy management agreements and tolling agreements with generators in ISO-NE confer to Sempra control over the related generating facilities, Sempra provides information on why it believes that the energy management agreement with Boston Generating does not confer control on Sempra. Sempra states that the energy management agreement provides that Boston Generating retains sole discretion to determine the amount of power available for sale; designate the heat rate and the characteristics of the fuel to be supplied to each generating unit; and make all decisions regarding operating and maintenance. Sempra therefore concludes that "[n]ot attributing the output of Boston Generating's units to [Sempra] results in a reduction of [Sempra's] uncommitted capacity in ISO-NE, even assuming reliability must run units were considered in the analysis of a seller's ability to exercise generation market power. Therefore, [Sempra] continues to pass the pivotal supplier and market share screens for ISO-NE."[13]

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[12] *Id*. at 6-7 (citing *Pittsfield Generating Company, L.P.*, 115 FERC ¶ 61,059 (2006); *Mystic Development, LLC*, 114 FERC ¶ 61,200 (2006); *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077, at P 31 (2005); *PSEG Power Connecticut, LLC*, 111 FERC ¶ 61,441, at P 43 (2005); *Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California v. CAISO*, 107 FERC ¶ 61,070, at P 26 n.6 (2004)).

[13] Sempra's February 21, 2007 Supplemental Filing at 4. We note that in its December 7, 2007 response, which is discussed further below, Sempra states that the

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14. Further, Sempra states that, as of January 1, 2007, the tolling agreement with Lake Road was also converted to an energy management agreement. It explains that its energy management agreement with Lake Road contains provisions analogous to its energy management agreement with Boston Generating, and provides that Lake Road retains sole discretion to determine the amount and characteristics of the fuel to be supplied to the generating units, and that Lake Road is responsible for making all decisions regarding operation and maintenance.[14]

Notice of Filing and Responsive Pleadings

15. Notice of Sempra's supplemental filing was published in the *Federal Register*, 72 Fed. Reg. 11,021 (2007), with interventions or protests due on or before March 14, 2007. On May 30, 2007, ISO-NE submitted a motion to intervene out-of-time, which included comments in response to Sempra's supplemental filing.

ISO-NE's Comments on Sempra's February 21, 2007 Supplemental Filing

16. In its comments, ISO-NE provides an analysis of why generating units that Sempra excludes from its market power analysis should be included. ISO-NE states that the Commission should consider the extensive bid knowledge that Sempra has for all generating units for which Sempra serves as a lead market participant,[15] including Pittsfield and Mystic Development's Units 8 and 9.[16]

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energy management agreement with Boston Generating was terminated effective December 1, 2007.

[14] As discussed more fully below, Sempra's June 14, 2007 Filing states that Sempra's energy management agreement with Lake Road was terminated, effective June 1, 2007.

[15] ISO-NE states that the lead market participant is "'the Entity authorized to submit Supply Offers and Demand Bids for a Resource and to whom Energy TUs [Energy Transaction Units] are assessed under Schedule 2 of Section IV.A of the Tariff.'" ISO-NE's May 30, 2007 Comments, Chao Aff. n.1 (citing http://www.iso-ne.com/rules_proceds/isone_mnls/m_35_definitions_and_abbreviations_(revision_22)__04_13_07.doc).

[16] ISO-NE's May 30, 2007 Comments, Chao Aff. ¶ 11.

17. ISO-NE argues that Sempra's bid knowledge for all of the units for which Sempra serves as lead market participant could be used to influence market outcomes using other market instruments, such as virtual transactions or financial transmission rights. ISO-NE argues that Sempra would still have inside, advance knowledge about such units, including any forced outage or dispatch schedules that it could use to participate in and affect the various markets. ISO-NE contends that without having the opportunity to review any energy management agreements or tolling agreements pursuant to which Sempra operates any generating units in New England, and without having a more detailed explanation from Sempra and the unit owners as to how Sempra executes its functions on a daily basis, it is difficult to conclude that Sempra does not control Mystic Development's Units 8 and 9 such that Sempra should be allowed to exclude them from its market power analysis. Thus, ISO-NE argues that the Commission should not allow Sempra to exclude from its market power analysis any units for which it serves as a lead market participant that are subject to reliability must run agreements, including Pittsfield and Mystic Development's Units 8 and 9, which were excluded from Sempra's updated market power analysis.

Sempra's July 25, 2007 Comments Responding to ISO-NE

18. On July 25, 2007, Sempra submitted comments in response to the ISO-NE's comments. In addition, Sempra submitted for filing a supplemental market power analysis and related exhibits. In its comments, Sempra notes that on February 21, 2007, the Commission accepted for filing a settlement that terminated Mystic Development's reliability must run agreement with ISO-NE, effective December 31, 2006.[17] Sempra also states that on April 2, 2007, the Commission accepted for filing an offer of settlement setting the cost-based rates for Pittsfield's sales under the reliability must run agreement with ISO-NE.[18]

19. In addition, Sempra explains that on May 30, 2007, the Commission accepted for filing a notice of change in status that Boston Generating and the Boston Generating Project Companies filed as a result of their affiliation with Astoria Generating Company, L.P.[19] Sempra states that the market power analysis filed in support of the

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[17] Sempra's July 25, 2007 Comments at 3 (citing *Mystic Development, LLC*, 118 FERC ¶ 61,144 (2007)).

[18] *Id*. (citing *Pittsfield Generating Company, L.P.*, 119 FERC ¶ 61,001 (2007)).

[19] *Id*. (citing *Boston Generating, LLC*, Docket No. ER04-994-003, *et al*. (May 30, 2007) (unpublished letter order)).

notice of change in status stated that Boston Generating and the Boston Generating Project Companies control the output of their generation,[20] and therefore no control over their generation was transferred to Sempra.[21]

20. Sempra asserts that ISO-NE's contention that an entity that does not own or control generation should nevertheless be attributed control over any generating units for which it acts as lead market participant is inconsistent with the Commission's precedent.[22] Sempra argues that the focus of the Commission's horizontal market power analysis is on the physical capacity actually controlled by a seller. Further, Sempra states that ISO-NE recommends a departure from the Commission's existing methodology by recommending that the Commission look past the entity with actual control over generation for purposes of assessing horizontal market power. Sempra argues that for the reasons provided in its updated market power analysis and its February 21, 2007 supplemental filing, the Commission should exclude both energy management agreements with Boston Generating and Lake Road and any other reliability must run units in computing the generating capacity owned or controlled by Sempra in the ISO-NE.[23]

21. Further, Sempra states that it performed another market power analysis using ISO-NE's assumptions, i.e., attributing to Sempra all the generating units identified in the updated market power analysis. Sempra submits that that analysis, which uses 2006 data instead of the 2005 data used in Sempra's August 1, 2006 updated market power analysis, does not alter the conclusion that Sempra lacks horizontal market power in ISO-NE. Sempra states that the supplemental affidavit submitted with its July 25, 2007 Comments shows that Sempra is not a pivotal supplier in ISO-NE and that its market

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[20] *Id.* at 3-4 (citing Boston Generating, LLC March 13, 2007 Hieronymus Aff. at 2, Docket No. ER04-994-003, *et al.*).

[21] *Id.* Additionally, as noted above, the energy management agreement with Boston Generating terminated effective December 1, 2007.

[22] *Id*. at 5 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 174).

[23] As stated above, Sempra explains that its energy management agreement with Lake Road contains provisions analogous to its energy management agreement with Boston Generating, and provides that Lake Road retains sole discretion to determine the amount and characteristics of the fuel to be supplied to the generating units, and that Lake Road is responsible for making all decisions regarding operation and maintenance.

share is below twenty percent in any season. Therefore, Sempra argues that the analysis submitted with its July 25, 2007 Comments shows that Sempra passes the Commission's horizontal market power screens using the assumptions proposed by ISO-NE.

Notice of Filing and Responsive Pleadings

22. Notice of Sempra's July 25, 2007 comments was published in the *Federal Register*, 72 Fed. Reg. 43,266 (2007), with interventions or protests due on or before August 15, 2007. None was filed.

Sempra's June 14, 2007 Filing

23. On June 14, 2007, Sempra submitted a filing informing the Commission that, effective June 1, 2007, Sempra's energy management agreement with Lake Road was terminated.

Notice of Filing and Responsive Pleadings

24. Notice of Sempra's June 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 39,614 (2007), with interventions or protests due on or before July 23, 2007. None was filed.

Requests for Additional Information

November 2007 Request for Information

25. On November 7, 2007, in response to Sempra's updated market power analysis, and February 21, June 14 and July 25 filings, the Director, Division of Tariffs and Market Development -- West issued a letter to Sempra requesting additional information (November 2007 Request for Information) regarding Sempra's power purchase agreements documented as standard-type liquidated damages contracts with third-parties.[24] Specifically, the letter stated that if Sempra owns other generation (i.e., liquidated damages contracts made through firm purchases) in addition to the generation already included in its updated market power analysis, Sempra should revise its updated market power analysis to include the additional generation. The November

[24] *Sempra Energy Trading Corp*., Docket No. ER03-1413-005 (Nov. 7, 2007) (unpublished letter order).

2007 Request for Information stated that, in the alternative, Sempra may describe in further detail why the liquidated damages contracts should not be included in Sempra's updated market power analysis, and directed Sempra to provide all relevant work papers and documentation.

26. On December 7, 2007, Sempra responded (December 2007 Response) to the November 2007 Request for Information. In its response, Sempra explains that it does not consider its liquidated damages contracts as firm purchases that guarantee Sempra the delivery of power for resale to third parties. It explains that sellers under such liquidated damages contracts retain the ability to pay the liquidated damages and sell power to a party other than Sempra, or not sell at all. Sempra states that it is unable to withhold power and it is appropriate to conclude that Sempra's liquidated damages contracts do not transfer "control" from sellers to Sempra. Therefore, Sempra concludes that its purchases under liquidated damages contracts should not be considered in its market power analysis.

27. Sempra's December 2007 Response also notes changes that have occurred since the submission of its 2006 updated market power analysis. In particular, Sempra explains that its energy management agreement with Lake Road terminated effective June 1, 2007, and that its agreement with Pawtucket Power terminated effective November 30, 2007. Sempra's agreement with Boston Generating terminated effective December 1, 2007.[25] Sempra also states that it serves as the ISO-NE lead participant and asset owner for the Pittsfield facility, but does not purchase or take title to the power generated by the Pittsfield facility and sold to ISO-NE. It believes that even where it acts as lead participant it does not control the output. Therefore, Sempra concludes that only the Ingenco power purchase agreement in PJM is currently relevant for the assessment of Sempra's market power in the Northeast region.

Notice of Filing and Responsive Pleadings

28. Notice of Sempra's December 2007 Response to the November 2007 Request for Information was published in the *Federal Register*, 72 Fed. Reg. 73,016 (2007), with interventions and protests due on or before December 28, 2007. None was filed.

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[25] Sempra's December 7, 2007 Response at 2-3. Sempra notes that as of December 1, 2007, it acts as a scheduling agent for Boston Generating and is no longer the lead participant or asset owner in ISO-NE's market for those generating facilities. *Id*. n.5.

April 2008 Request for Information

29. On April 22, 2008, in response to Sempra's December 2007 Response, the Director, Division of Tariffs and Market Development -- West issued a letter to Sempra (April 2008 Request for Information) requesting more detailed support on whether Sempra's standard-type liquidated damages contracts with third parties allow Sempra to control generation capacity.[26] It also directed Sempra to provide all relevant work papers and documentation, including the amount of generation capacity and/or energy purchased under these standard-type liquidated damages contracts.

30. On May 22, 2008, Sempra responded to the April 2008 Request for Information (May 2008 Response). In its response, Sempra states that it has no standard-type liquidated damages contracts with third parties that allow Sempra to control generation capacity. Sempra states that similar to the "Firm (LD)" product defined by the EEI Master Power Purchase & Sale Agreement, its purchases under its standard-type liquidated damages contracts do not confer on Sempra any rights that would allow Sempra to control generation capacity.[27]

Notice of Filing and Responsive Pleadings

31. Notice of Sempra's May 2008 Response to the April 2008 Request for Information was published in the *Federal Register*, 73 Fed. Reg. 33,071 (2008), with interventions and protests due on or before June 12, 2008. None was filed.

Sempra's Request for Category Seller Designations

32. On June 30, 2008 Sempra and Sempra Energy Solutions submitted a request for designation as Category 1 sellers in the Northeast region in accordance with the criteria set forth in section 35.36(a)(2) of the Commission's regulations.[28] Sempra and Sempra

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[26] *Sempra Energy Trading Corp*., Docket No. ER03-1413-005 (Apr. 22, 2008) (unpublished letter order).

[27] Sempra's May 22, 2008 Response at 2 (citing *Intergys Energy Group, Inc.*, 123 FERC ¶ 61,034 (2008)).

[28] 18 C.F.R. § 35.36(a)(2)-(3) (2008). Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating

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Energy Solutions state that they and their affiliates do not own or control more than 500 MW of generation in the Northeast region, do not own, operate or control transmission facilities in the Northeast region, and are not affiliated with a franchise public utility in the Northeast region.

33. On July 30, 2008, Sempra, Sempra Energy Solutions, and Royal Bank of Scotland submitted revised market-based rate tariffs to include standard provisions with regard to sales of certain ancillary services in the markets administered by PJM, New York Independent System Operator, Inc. (New York ISO), ISO-NE, CAISO, Midwest Independent Transmission System Operator, Inc. (Midwest ISO), as well as a provision regarding sales of ancillary services as a third-party provider. In addition, the revised market-based rate tariffs include the required provision concerning seller categories. In particular, Sempra and Sempra Energy Solutions' market-based rate tariffs category seller provisions state that they are Category 1 sellers in the Northeast, Southeast, Central, and Southwest Power Pool regions and Category 2 sellers in the Southwest and Northwest regions.[29]

34. On September 11, 2008, Sempra and Sempra Energy Solutions submitted a clarification to their June 30, 2008 filing requesting designation as Category 1 sellers in the Northeast region. Sempra and Sempra Energy Solutions clarify their affirmative statement with regard to barriers to entry and state that "none of Sellers or any of their affiliates has erected or will erect barriers to entry in the relevant market."[30]

35. On September 12, 2008, Sempra, Sempra Energy Solutions, and Royal Bank of Scotland submitted a filing that provides additional information regarding their seller category designations in their revised market-based rate tariffs submitted on July 30, 2008. They state that Sempra and Sempra Energy Solutions each meet the criteria for

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facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.

[29] We note that the Commission previously determined that Royal Bank of Scotland is Category 1 seller in every region. *See The Royal Bank of Scotland plc*, Docket No. ER07-1215-000 (October 12, 2007) (unpublished letter order).

[30] Sempra's September 11, 2008 Filing at 1, Docket No. ER08-100-002, *et al.*

Category 1 seller status in the Northeast, Southeast, Central, and Southwest Power Pool regions because they and their affiliates do not own or control more than 500 MW of generation in aggregate in any of these regions, do not own, operate or control transmission facilities in these regions, and are not affiliated with a franchised public utility in these regions. They also state that Sempra and Sempra Energy Solutions are Category 2 sellers in the Southwest region because they are affiliated with San Diego Gas & Electric, which owns more than 500 MW of generation, owns transmission facilities, and is a franchised public utility in the Southwest region. Additionally, they state that Sempra and Sempra Energy Solutions are Category 2 sellers in the Northwest region because Sempra, Sempra Energy Solutions and their affiliate, San Diego Gas & Electric Company own more than 500 MW of generation in the Northwest region.[31]

Notice of Filing and Responsive Pleadings

36. Notice of Sempra's June 30, 2008 request for designation as Category 1 sellers was published in the *Federal Register*, 73 Fed. Reg. 40,561 (2008), with interventions or protests due on or before July 21, 2008. None was filed.

37. Notice of Sempra's July 30, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 47,145 (2008), with interventions or protests due on or before August 20, 2008. None was filed.

38. Notice of Sempra's September 11, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 55,069 (2008), with interventions or protests due on or before October 2, 2008. None was filed.

39. Notice of Sempra's September 12, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 55,070 (2008), with interventions or protests due on or before October 3, 2008. None was filed.

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[31] In accepting the Royal Bank of Scotland's application for market-based rate authorization, the Commission noted that Royal Bank of Scotland would not be affiliated with San Diego Gas & Electric Company, and designated Royal Bank of Scotland as a Category 1 seller. *The Royal Bank of Scotland plc*, Docket No. ER07-1215-000, at 4-5 (October 12, 2007) (unpublished letter order); *see also* Sempra's September 12, 2008 Filing, Docket No. ER08-100-004, *et al*., at n.6 (stating that Sempra Energy and Sempra Energy Solutions are not affiliates of Royal Bank of Scotland).

Discussion

A. Procedural Issues

40. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.214(d) (2008), the Commission will grant ISO-NE's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

41. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Sempra's answer because it has provided information that assisted us in our decision-making process.

B. Market-Based Rate Authorization

42. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.[32] As discussed below, we conclude that Sempra satisfies the Commission's standards for market-based rate authority in the relevant markets located within the Western Electricity Coordinating Council region, based on Sempra's reliance on the updated market power analysis submitted by its affiliate Elk Hills Power, LLC.[33] Furthermore, the Commission concludes that Sempra satisfies the Commission's standards for market-based rate authority in PJM and ISO-NE, based on Sempra's August 1, 2006 updated market power analysis which uses historical data for the 2005 calendar year, as supplemented by Sempra's February 21, 2007 filing.

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[32] Sempra's updated market power analysis was submitted prior to the issuance of Order No. 697. *See* Sempra's August 1, 2006 Updated Market Power Analysis at 1 (citing *AEP Power Marketing, Inc*. 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order)). However, Sempra's analysis used the two indicative market power screens (the uncommitted market share screen and the uncommitted pivotal supplier screen) that were adopted in the April 14 Order and the July 8 Order, and that continue to be used in Order No. 697 to analyze horizontal market power. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 13, 62, 399, 408, 440.

[33] *See Elk Hills Power, LLC*, Docket No. ER03-394-004, *et al*. (June 21, 2006) (unpublished letter order).

1. Horizontal Market Power

43. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.[34]

44. The Commission has reviewed Sempra's pivotal supplier and wholesale market share screens, as supplemented, and has determined that Sempra passes the pivotal supplier and the wholesale market share screens in the relevant markets located in the Western Electricity Coordinating Council region; PJM; and ISO-NE.

45. For the Western Electricity Coordinating Council region, Sempra relies on the Elk Hills Update, based on 2004 data, submitted by its affiliates Elk Hills Power, LLC and accepted by the Commission on June 21, 2006.[35] Sempra submits that the Elk Hills Update analyzed all of Sempra's affiliated generation in markets located within the Western Electricity Coordinating Council region, and Sempra does not otherwise control any additional generation in the Western Electricity Coordinating Council region through tolling agreements, energy management agreement, or other contractual arrangements.

46. In PJM, based on Sempra's August 1, 2006 updated market power analysis, which used 2005 data, Sempra's Ingenco power purchase agreement gives Sempra a market share of 0.1 percent[36] and Sempra is not a pivotal supplier.

47. With regard to the ISO-NE market, Sempra's August 1, 2006 updated market power analysis conservatively assumes that Sempra's contractual agreements with Lake Road, Pittsfield, Pawtucket and Boston Generating give Sempra control over those generating facilities, however does not attribute to Sempra the output of the Pittsfield

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[34] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62.

[35] *Elk Hills Power, LLC*, Docket No. ER03-394-004, *et al*. (June 21, 2006) (unpublished letter order). As noted above, The Elk Hills Update includes market power analyses for markets located within the Western Electricity Coordinating Council region, including the CAISO market, the Arizona Public Service Company Salt River Project, the Nevada Power Company, and the Bonneville Power Administration balancing authority areas. *See* Elk Hills Power, LLC's January 10, 2006 Updated Market Power Analysis, Docket No. ER03-394-004.

[36] August 1, 2006 Updated Market Power Analysis at 6.

facility and of Mystic Development's Units 8 and 9 because they operate as reliability must run units. In its February 21, 2007 supplemental filing, Sempra notes that while its August 1, 2006 updated market power analysis made the conservative assumption that all of its energy management agreements and tolling agreements with generators in ISO-NE confer to Sempra control over the related generating facilities, Sempra believes that the energy management agreement with Boston Generating, which, as stated above, includes the Mystic Development and Fore River units, does not confer control to Sempra.

48. ISO-NE is concerned that Sempra's bid knowledge for all of the units for which Sempra serves as lead market participant could be used to influence market outcomes using other market instruments, and therefore argues that the Commission should not allow Sempra to exclude from its market power analysis Pittsfield and Mystic Development's Units 8 and 9. With regard to ISO-NE's argument, we note that the Commission has not adopted a presumption of control regarding energy management agreements. The Commission has explained that it considers the totality of circumstances and attaches the presumption of control when an entity can affect the ability of capacity to reach the market. The Commission's guiding principle is that an entity controls the facilities when it controls the decision-making over sales of electric energy, including discretion as to how and when power generated by these facilities will be sold.[37]

49. Prior to Order No. 697, the Commission required that sellers with energy management agreements make an affirmative statement regarding whether the agreement transfers control of any assets.[38] In the instant case, Sempra has stated that

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[37] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 176.

[38] *Calpine Energy Services, L.P.*, 113 FERC ¶ 61,158, at P 13 (2005) (clarifying that sellers making a change in status filing to report an energy management agreement are required to make an affirmative statement regarding whether the agreement transfers control of any assets and whether it results in any material effect on the conditions the Commission relied on when granting market-based rates). Order No. 697 requires sellers when filing an application for market-based rate authority or an updated market power analysis, to make an affirmative statement as to whether any contractual arrangements result in the transfer of control of any assets, including whether the seller is conferring control to another entity or obtaining control of another entity's assets. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 186. In addition, Order No. 697 requires that a seller making such an affirmative statement seek a "letter of concurrence" from other affected

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its energy management agreement with Boston Generating does not confer to Sempra control over any generating capacity, and, as noted above, the Commission has accepted a notice of change in status filed by Boston Generating stating that Boston Generating and Boston Generating Project Companies own and operate 3,247.8 MW of generation capacity in ISO-NE.[39] Therefore, Sempra argues that its energy management agreement with Boston Generating should be excluded from Sempra's horizontal market power analysis.

50. Although ISO-NE has raised concerns regarding Sempra's knowledge concerning the Boston Generating Mystic Development 8 and 9 units, it has not presented evidence to show that Sempra controlled those units. Given Sempra's representations to the contrary and Boston Generating's filings attributing the generation to Boston Generating, we reject ISO-NE's argument that the Boston Generating Mystic Development 8 and 9 units should be attributed to Sempra. We accept Sempra's representations, and find that Sempra's energy management agreement with Boston Generating is properly excluded from Sempra's horizontal market power analysis. Therefore, Sempra passes the pivotal supplier and wholesale market share screens in ISO-NE.[40]

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parties identifying the degree to which each party controls a facility and submit these letters with its filing. *Id*. P 187. Because Sempra and Boston Generating submitted their updated market power analyses prior to the effective date of Order No. 697, we will not require a letter of concurrence in the instant case.

[39] *See Boston Generating, LLC*, Docket No. ER04-994-003, *et al*. (May 30, 2007) (unpublished letter order). Additionally, the Commission accepted Boston Generating's application for market-based rate authorization which attributed ownership of the Boston Generating Project Companies to Boston Generating in its horizontal market power analysis. *Boston Generating, LLC*, Docket No. ER04-994-000 (July 30, 2004) (unpublished letter order).

[40] We note however, as stated above, in its July 25, 2007 filing, Sempra provided a market power analysis using ISO-NE's assumptions, i.e., attributing to Sempra all the generating units identified in the updated market power analysis. Sempra submits that that analysis (which uses 2006 data instead of the 2005 data used in Sempra's August 1, 2006 updated market power analysis) does not alter the conclusion that Sempra lacks horizontal market power in ISO-NE. Sempra states that the July 25, 2007 filing shows

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51. Accordingly, based on Sempra's representations, the Commission finds that Sempra satisfies the Commission's requirements for market-based rates regarding horizontal market power in the relevant markets located in the Western Electricity Coordinating Council region; PJM; and ISO-NE.

2. Vertical Market Power[41]

52. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff (OATT) on file before granting a seller market-based rate authorization.

53. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis. The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls inputs to electric power production.[42] The Commission also requires sellers to

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that Sempra is not a pivotal supplier in ISO-NE and that its market share is below twenty percent in any season when using the assumptions proposed by ISO-NE.

[41] Prior to the issuance of Order No. 697, the Commission considered whether a seller is able to erect barriers to entry as a separate prong of its market power analysis. *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,602, at P 89 (2006) (Order No. 697 NOPR). In Order No. 697, the Commission determined that it will consider a seller's ability to erect other barriers to entry as part of the vertical market power analysis. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

[42] In Order No. 697, the Commission provided clarification regarding the information that a seller must provide with respect to other barriers to entry (including which inputs to electric power production the Commission will consider as other barriers to entry). *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440, 447. Prior to the issuance of Order No. 697, the Commission required a seller to provide a description of its affiliation, ownership or control of inputs to electric power production, ownership or control of gas storage or intrastate transportation and distribution of inputs to electric power production, and control of sites for new capacity development in the relevant market. Order No. 697 NOPR, FERC Stats. & Regs. ¶ 32,602 at P 92.

make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.[43]

54. Sempra states that its affiliate, San Diego Gas & Electric Company, owns transmission facilities in the CAISO. However, Sempra states that Sempra and its affiliates do not have the ability to exercise transmission market power,[44] because San Diego Gas & Electric Company conveyed operational control over its transmission system to CAISO, which has an OATT on file with the Commission.[45]

55. Sempra states that although Sempra's affiliates include entities that own or control fuel delivery systems, including SoCalGas and San Diego Gas & Electric Company, such affiliations do not raise concerns with respect to barriers to entry. Sempra states that both SoCalGas and San Diego Gas & Electric Company are required to operate their systems in accordance with the nondiscriminatory open-access requirements of the California Public Utilities Commission (CPUC) and strict conditions have been imposed by the CPUC and the Commission on interactions between Sempra and its regulated affiliates.

56. Based on Sempra's representations, we find that Sempra satisfies the Commission's requirements for market-based rates regarding vertical market power.

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[43] The Commission did not require sellers to make this affirmative statement before the issuance of Order No. 697. *See* Order No. 697 NOPR, FERC Stats. & Regs. ¶ 32,602 at P 92. *See also* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447. Sempra's updated market power analysis was filed prior to the issuance of Order No. 697 and therefore did not include the affirmative statement regarding barriers to entry subsequently required by Order No. 697. However, as discussed above, on September 11, 2008, Sempra and Sempra Energy Solutions affirmatively state that "none of Sellers or any of their affiliates has erected or will erect barriers to entry in the relevant market."

[44] We note that prior to the issuance of Order No. 697, the Commission considered transmission market power as one prong of the market based rates analysis. Since the issuance of Order No. 697, transmission market power has been subsumed under the vertical market power analysis of the market based rates review. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 399.

[45] Sempra's August 1, 2006 Updated Market Power Analysis at 8 (citing *Sempra Energy Resources*, 110 FERC ¶ 61,344, at P 22 (2005)).

C. Compliance Filing

57. Sempra's updated market power analysis also includes a revised market-based rate tariff that removes the market behavior rules. We will accept Sempra's tariff revisions.[46]

D. Reporting Requirements

58. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report.[47] Sempra must also timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.[48]

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[46] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 (2006). *See also Sempra Energy Trading LLC*, Docket No. ER08-100-000 (Dec. 26, 2007) (unpublished letter order), where the Commission accepted Sempra's revised market-based rate tariffs that comply with Order No. 697.

[47] *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Reports to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at http://www.ferc.gov/docs-filing/eqr.asp.

[48] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2008).

E. Request For Category Seller Designations

59. In Order No. 697, the Commission created two categories of sellers.[49] Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.[50] Sellers that do not fall into Category 1 are designated as Category 2 and are required to file an updated market power analysis.[51]

Commission Determination

60. Based on Sempra and Sempra Energy Solutions' representations, we find that Sempra and Sempra Energy Solutions meet the criteria for Category 1 seller in the Northeast, Southeast, Central and Southwest Power Pool regions and are so designated. Therefore, Sempra and Sempra Energy Solutions are not required to file regularly scheduled updated market power analyses for the Northeast, Southeast, Central, and Southwest Power Pool regions. We also find, based on Sempra and Sempra Energy Solutions' representations, that Sempra and Sempra Energy Solutions are Category 2 sellers in the Southwest and Northwest regions and are so designated. Thus, Sempra and Sempra Energy Solutions must file an updated market power analysis for the Southwest and Northwest regions in compliance with the regional reporting schedule adopted in Order No. 697.[52] The Commission also reserves the right to require such an analysis, for any region at any intervening time.

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[49] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

[50] 18 C.F.R. § 35.36(a)(2) (2008).

[51] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

[52] *Id*. P 882.

F. Order No. 697 Compliance Filing

61. In Order No. 697, the Commission adopted two standard required provisions hat each seller must include in its market-based rate tariff: a provision requiring compliance with the Commission's regulations and a provision identifying any limitations and exemptions regarding the seller's market-based rate authority.[53] In addition to the required tariff provisions, the Commission adopted a set of standard provisions that must be included in a seller's market-based rate tariff to the extent that they are applicable.[54] In Order No. 697-A, the Commission also required that each seller include in its market based rate tariff a provision identifying which category of seller it qualifies as in each region.[55]

62. Sempra, Sempra Energy Solutions, and Royal Bank of Scotland have market-based rate tariffs on file that include the Commission's two required provisions, indicating that they intend to comply with the Commission's regulations, including the affiliate restrictions.[56] Sempra's revised market-based rate tariff includes a set of standard provisions with regard to sales of certain ancillary services in the Midwest ISO, as well as a provision regarding sales of ancillary services as a third-party provider, and the required category seller provision. Sempra Energy Solutions' revised market-based rate tariff includes a set of standard provisions with regard to sales of certain ancillary services in the markets administered by PJM, New York ISO, ISO-NE, CAISO, Midwest ISO, as well as a provision regarding sales of ancillary services as a third-party provider, and the required category seller provision. Royal Bank of Scotland's revised market-based rate tariff includes a standard provision with regard to sales of certain ancillary services in the markets administered by Midwest ISO, and the required category seller provision. We find that the revised market-based rate tariffs of Sempra, Sempra Energy Solutions, and Royal Bank of Scotland satisfy the Commission's

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[53] *Id*. P 914.

[54] *Id*. P 917.

[55] Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 391-93.

[56] *See Sempra Energy Trading LLC*, Docket No. ER08-100-000 (Dec. 26, 2007) (unpublished letter order); *Sempra Energy Solutions LLC*, Docket No. ER07-265-001 (June 13, 2008) (unpublished letter order); *The Royal Bank of Scotland plc*, Docket No. ER07-1215-000, *et al*. (October 12, 2007) (unpublished letter order).

requirements set forth in Order Nos. 697 and 697-A, and accept their revised market-based rate tariffs.

The Commission orders:

(A) Sempra's updated market power analysis, as amended, is hereby accepted, as discussed in the body of this order.

(B) The market-based rate tariff revisions of Sempra, Sempra Energy Solutions, and Royal Bank of Scotland are hereby accepted, as discussed in the body of this order.

(C) Sempra and Sempra Energy Solutions LLC are hereby designated as Category 1 sellers in the Northeast, Southeast, Central, and Southwest Power Pool regions.

(D) Sempra and Sempra Energy Solutions LLC are hereby designated as Category 2 sellers in the Southwest and Northwest regions.

(E) Sempra and Sempra Energy Solutions LLC are hereby directed to file an updated market analysis for the Southwest and Northwest regions according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.