

110 FERC ¶ 61,344
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Sempra Energy Resources	Docket Nos. ER01-1178-003 ER01-1178-004
Sempra Energy Solutions	ER00-3444-002 ER00-3444-003 ER00-3444-004
Sempra Generation	ER05-440-000 ER05-440-001 ER05-440-002

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS AND
REVISED MARKET-BASED RATE TARIFF

(Issued March 25, 2005)

1. In this order, we accept an updated market power analysis filed by Sempra Energy Resources (Sempra Generation)¹ and Sempra Energy Solutions (Sempra Solutions) (collectively, Sempra), and a notice of succession and a revised market-based rate tariff filed by Sempra Generation. As discussed below, we conclude that Sempra satisfies the Commission's standards for market-based rate authority. This order benefits customers by reviewing the conditions under which market-based rate authority is granted, thus ensuring that the prices charged for jurisdictional sales are just and reasonable. Sempra's next updated market power analysis is due three years from the date of this order.

¹ On January 12, 2005, in Docket No. ER05-440-000, Sempra Generation filed a notice of succession to reflect a corporate name change. Sempra Energy Resources became known as Sempra Generation.

Background

2. Sempra Generation and Sempra Solutions are indirect wholly-owned subsidiaries of a holding company, Sempra Energy Global Enterprises (Sempra Energy Global). Sempra Energy Global also owns, among others, San Diego Gas & Electric (SDG&E), a regulated utility that provides electric and natural gas service to retail customers in San Diego and Orange Counties in California, and Sempra Energy Trading Corp., an energy and commodities marketer that also owns a generating facility in Grant County, Washington. Sempra Energy Global is owned by Sempra Energy, a publicly traded California corporation. Sempra owns and operates power plants in the Western Electricity Coordinating Council (WECC).
3. On July 23, 2001 Sempra Solutions filed an updated market power analysis pursuant to the Commission's order granting Sempra Solutions authority to sell electric capacity at market-based rates (July 2001 filing).²
4. On April 9, 2004, Sempra Generation and Sempra Solutions jointly submitted an updated market power analysis in Docket Nos. ER01-1178-003 and ER00-3444-003 (April 2004 filing) pursuant to the Commission's orders granting them market-based rate authority.³ This filing used the Supply Margin Assessment test for generation market power.
5. On November 9, 2004, Sempra submitted for filing a revised updated market power analysis (November 2004 filing), pursuant to the Commission's order issued on May 13, 2004.⁴ The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004, and clarified on July 8, 2004.⁵

²*Enova Energy, Inc.*, 76 FERC ¶ 61,242 (1996). On August 14, 2000, in Docket No. ER00-3444-000, Sempra Energy Solutions filed a Notice of Succession to reflect a corporate name change. Enova Energy, Inc. became known as Sempra Energy Solutions.

³ *Sempra Energy Resources*, Docket No. ER01-1178-000 (letter order dated April 10, 2001). As noted above, Sempra Solutions filed an updated market-based power analysis on July 23, 2001. Pursuant to the order granting it market-based rate authority, Sempra Solutions' next updated market power analysis would have been due on July 23, 2004. Sempra Solutions and Sempra Generation state that in the interest of administrative efficiency, Sempra Solutions joined Sempra Generation in filing a combined updated market power analysis.

⁴ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

⁵ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

6. On February 8, 2005, in Docket No. ER05-440-001, Sempra Generation filed a revised tariff, at the request of Commission staff, to reflect the name change throughout the tariff and include the Commission's market behavior rules.⁶ The revised tariff also includes the required section in Sempra Generation's statement of policy and code of conduct with regard to brokering of its utility affiliate's power. This sheet had been inadvertently omitted from the Sempra Generation tariff that was originally approved by the Commission in April 2001 in Docket No. ER01-1178-000.

Notice and Responsive Pleadings

7. Notice of Sempra Solutions' July 2001 filing was published in the *Federal Register*, 66 Fed. Reg. 39,744 (2001), with interventions or protests due on or before August 13, 2001. On August 13, 2001, the California Public Utilities Commission (California Commission), filed a notice of intervention, protest and comments. The California Commission asserted that the hub and spoke analysis that Sempra Solutions utilized in the July 2001 filing was an inappropriate tool to assess the ability of individual suppliers to exercise market power in California, given what they described as an anti-competitive market environment in the state. On August 31, 2001, Sempra Solutions filed an answer to the California Commission's protest (August 2001 answer).

8. Notice of Sempra's April 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 2,187 (2004), with interventions or protests due on or before April 30, 2004. On April 28, 2004, The People of the State of California ex rel. Bill Lockyer (the California Attorney General), filed a motion to intervene and protest. On May 12, 2004, Sempra filed an answer to this motion to intervene and protest (May 2004 answer).

9. Notice of Sempra's November 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 68,894 (2004), with interventions or protests due on or before November 30, 2004. On November 30, 2004, the California Electricity Oversight Board filed a motion to intervene and comments. On December 1, 2004, Southern California Edison Company (SoCal Edison) filed a motion for leave to intervene out of time.

10. Notice of Sempra Generation's filing of a notice of succession was published in the *Federal Register*, 70 Fed. Reg. 4117 (2005), with interventions or protests due on or before February 2, 2005. None were filed.

⁶ Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003), order on reh'g, 107 FERC ¶ 61,175 (2004).

Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18.C.F.R. §385.214 (2004), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, given the early stage of this proceeding, its interest in this proceeding, and the lack of undue prejudice or delay, the Commission finds good cause to grant SoCal Edison's untimely, unopposed motion to intervene.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest, unless otherwise ordered by the decisional authority. We will accept Sempra's May 2004 answer because it has provided information that assisted us in our decision-making process.⁷

Discussion

Market-Based Rate Authorization

13. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁸

14. As discussed below, the Commission concludes that Sempra satisfies the Commission's standards for market-based rate authority.

Generation Market Power

15. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. Sempra has prepared both the pivotal supplier and the wholesale market share screens for the California Independent System Operator⁹ (CAISO) market and other markets where Sempra has generation, namely, the Los Angeles Department of

⁷ As discussed below, we will dismiss as moot the California Commission's protest of the July 2001 filing. As a result, we will deny Sempra's Solution's August 2001 answer to that protest.

⁸ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899 (1996); accord *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

⁹ See *Pacific Gas and Electric Company, San Diego Gas & Electric Company and Southern California Edison Company*, 81 FERC ¶ 61,122 (1997).

Water Power (LADWP), Arizona Public Service Company (ARP)/Salt River Project (SRP), Nevada Power Company (NPC) and Bonneville Power Administration (BPA) markets.

16. The Commission finds that Sempra passes the Commission's screens for generation market power in the relevant control areas. Accordingly, the Commission finds that Sempra satisfies the Commission's generation market power standard for the grant of market-based rate authority.¹⁰

17. In its protest of Sempra's April 2004 filing, the California Attorney General argues that Sempra used the Supply Margin Assessment analysis¹¹ instead of the newly adopted pivotal supplier analysis and market share analysis as laid out in the April 14 Order. The California Attorney General also claims that Sempra possesses and exercises generation market power in the CAISO market and has impeded the Commission's investigations into Sempra's behavior during the California electricity crisis.¹² Finally, the California Attorney General claims that the Commission and Congress need to formulate more effective regulatory and statutory regimes before granting or renewing any market-based rate authority to any market participant. Sempra responds that it used in its April 2004 filing the analysis that was required at the time it filed and that when it was required to update that analysis it would do so.

18. In response to the argument that Sempra has market power in the CAISO market as demonstrated by the allegations set forth in the California Refund Proceeding and the Commission's Gaming Order and Partnership Order, Sempra notes that it has entered into a settlement with Commission trial staff that resolves all issues in the Gaming

¹⁰ With regard to the California Commission's protest filed in response to Sempra Solution's July 2001 market power analysis, we note that the Commission has now abandoned the hub and spoke analysis, as discussed in the April 14, May 13, and July 8 Orders. As a result, the protest asserting that the hub and spoke analysis is inadequate is moot.

¹¹ See *AEP Power Marketing, Inc.*, 97 FERC ¶ 61219 (2001) (SMA Order), *order on reh'g*, April 14 Order, 107 FERC ¶61018, *order on reh'g*, July 8 Order, 108, FERC ¶ 61,026 (2004). In the 2001 SMA Order, the Commission announced a new generation market power test, the Supply Margin Assessment (SMA), to be applied to market-based Rate applications. In the April 14 Order, the Commission replaced the SMA generation market power test with two indicative screens for assessing generation market power, the pivotal supplier and wholesale share screens.

¹² The California Attorney General cites to the California Refund Proceeding, *San Diego Gas & Electric Co.*, Docket No. EL00-95-045, *et al.*; *American Electric Power Service Corp.*, 103 FERC ¶ 61,345 (2003), (Gaming Order); *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, 103 FERC ¶ 61,346 (2003), (Partnership Order).

Order and Partnership Order proceedings.¹³ Sempra states that the California Attorney General's attempt to reargue the same issues in this proceeding should be rejected. It adds that the California Attorney General's argument that the Commission must examine the allegations of wrongdoing associated with the 2000-2001 California power crisis as part of a larger whole in order to capture the collective effects of all market participants' behavior has been rejected by the Commission on several occasions and the California Attorney General has failed to demonstrate why the same result should not apply here. According to Sempra, the California Attorney General's generalized attacks on the Commission's market based rate policies have no place in this proceeding.

19. The Commission will reject the California Attorney General's argument that Sempra's April 2004 filing used an incorrect market power analysis methodology. We note that Sempra, in compliance with the May 13 Order, subsequently submitted the generation market power screens adopted in the April 14 Order. As noted above, at the time that Sempra filed its April 2004 updated market power analysis, the Commission had not yet issued the April 14 Order announcing the new generation market power analysis screens. Thus, at the time of filing of the April 2004 updated market power analysis, Sempra's filing complied with the existing market power screen, the supply margin assessment test. In any event, when required by the May 13 Order to submit a revised updated market power analysis, Sempra did so within the time frame required of it.

20. Although the California Attorney General has also raised an argument concerning Sempra's behavior during the California electricity crisis, these issues have been raised before the Commission in other proceedings¹⁴ and, accordingly, are not appropriately reargued in the instant proceeding, which concerns the updated market power analysis that Sempra has submitted in support of its market-based rate authorization.

21. Finally, the Commission will reject the California Attorney General's claims that the Commission and Congress need to formulate more effective regulatory and statutory requirements before granting market-based rate authority to any market participant. The instant proceeding concerns Sempra's market power analysis, which Sempra has submitted in support of its market-based rate authorization. The Commission's review

¹³ The Commission has subsequently issued an order approving the settlement. *See Sempra Energy Trading Trading Corp.*, 108 FERC ¶ 61,114 (2004), *reh'g pending* (Sempra Settlement Order).

¹⁴ *See Sempra Settlement Order*, 108 FERC ¶ 61,114; *Gaming Order*, 103 FERC ¶ 61,345, *reh'g denied*, 106 FERC ¶ 61,020 (2004); *Partnership Order*, 103 FERC ¶ 61,346, *reh'g denied*, 106 FERC ¶ 61,024 (2004).

of the updated market power analysis involves an examination of whether Sempra satisfies the Commission's standards for market-based rate authority, which address generation market power, transmission market power, other barriers to entry, and affiliate abuse/reciprocal dealing, such that Sempra may continue to make sales of energy at market-based rates. Whether the Commission should revise its approach for granting market-based based rate authority to any market participant is more appropriately raised in the generic rulemaking proceeding in Docket No. RM04-7-000.

Transmission Market Power

22. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. Sempra states that SDG&E conveyed operational control over its transmission system to CAISO, which has an OATT on file with the Commission.¹⁵ Sempra states that it and its affiliates do not own any transmission facilities other than limited generation interconnect facilities and therefore do not have the ability to exercise transmission market power. Based on Sempra's representations, we find that Sempra satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

Other Barriers to Entry

23. Sempra states that it and its affiliates may own or control (for their own use) generation sites or resources for the development of new generation plants. It notes that the Western Electric Coordinating Council (WECC) estimates that over 6,000 MW of new generation will be coming on line by the summer of 2004 – 2006 in the California - Arizona-New Mexico-Southern Nevada region. Sempra states that, given the forecast entry of competitors in the WECC, neither Sempra nor its affiliates have the means to exclude others from these markets and cannot monopolize the market for new generation. Thus, Sempra concludes that ownership by Sempra or its affiliates of a limited number of building sites does not create or present a barrier to entry by other competitors.

24. Sempra states that it and its affiliates, through their parent Sempra Energy are affiliated with Southern California Gas (SoCalGas), a natural gas distributor that makes sales to retail customers throughout southern California, as well as with SDG&E, which owns and operates a natural gas distribution system. Sempra states that both SoCalGas and SDG&E are required to operate their systems in accordance with the nondiscriminatory open-access requirements of the California Commission.

¹⁵ Pacific Gas and Electric, 81 FERC ¶61,122 (1997).

25. Sempra adds that the Commission has made it clear in a previous case that should Sempra or any of its affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the Commission that could result in the suspension of Sempra's authority to sell power at market-based rates.¹⁶ In these circumstances, Sempra states that SoCalGas and SDG&E could not use their natural gas systems to preclude entry into the generation and power supply field.

26. Based on Sempra's representations, the Commission is satisfied that Sempra cannot erect barriers to entry.

Affiliate Abuse

27. The Commission is also concerned with the potential for affiliate abuse. Sempra states that the Commission has required certain revisions to the codes of conduct adopted by SDG&E and Sempra Solutions pursuant to the market-based rate authorization issued to Sempra Solutions. Given these protections, along with the protections implemented by the Commission's Order No. 2004,¹⁷ Sempra argues that neither it nor its affiliates can engage in affiliate abuse or reciprocal dealings. Based on Sempra's representations, the Commission finds that Sempra satisfies the Commission's concerns with regard to affiliate abuse.

Reporting Requirements

28. 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 containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or

¹⁶ See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

¹⁷ *Standards of Conduct for Transmission Providers*, Order No. 2004, 68 Fed. Reg. 69,134 (Dec. 11, 2003), FERC Stats. & Regs. ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, 69 Fed. Reg. 23,562 (Apr. 29, 2004), FERC Stats. & Regs. ¶ 31,161 (2004), *order on reh'g*, Order No. 2004-B, 69 Fed. Reg. 48,371 (Aug. 10, 2004), FERC Stats. & Regs. ¶ 31,166 (2004), *order on reh'g*, Order No. 2004-C, 70 Fed. Reg. 284 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,172 (2005), *reh'g pending*.

greater) market-based power sales during the most recent calendar quarter.¹⁸ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁹

29. Sempra must 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.²⁰ Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, Sempra is directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the following provision:

[market-based rate seller name] must 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. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

¹⁸ *Revised Public Utility Filing Requirements, Order No. 2001*, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted 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>.

¹⁹ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

²⁰ Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005); FERC Stats. & Regs. ¶ 31,175 (2005).

30. Sempra's notice of succession and revised tariff are hereby accepted for filing, effective January 1, 2005.

31. Sempra is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

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

(B) Sempra's next updated market power analysis is due within three years of the date of this order.

(C) Sempra Generation's notice of succession and revised tariff are hereby accepted for filing, as discussed in the body of this order.

(D) Sempra is hereby directed to inform the Commission of any change in status, as discussed in the body of this order. Sempra is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariffs to include the change in status reporting requirement adopted in Order No. 652.

(E) Sempra's revised tariff sheet incorporating the market behavior rules are accepted for filing, effective December 17, 2003.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.