

125 FERC ¶ 61,247  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Sempra Energy Trading LLC  
Sempra Energy Solutions LLC  
The Royal Bank of Scotland plc

Docket No. EC09-19-000

ORDER AUTHORIZING DISPOSITION  
OF JURISDICTIONAL FACILITIES

(Issued December 1, 2008)

1. On November 10, 2008, Sempra Energy Trading LLC (Sempra Trading), Sempra Energy Solutions LLC (Sempra Solutions), and The Royal Bank of Scotland plc (Royal Bank of Scotland) (collectively, Applicants), filed a joint application under section 203(a)(1) of the Federal Power Act (FPA)<sup>1</sup> requesting Commission authorization for the indirect disposition of Applicants' jurisdictional facilities that may result from the implementation of a recapitalization plan for Royal Bank of Scotland's upstream parent company, The Royal Bank of Scotland Group plc (RBS Group). The jurisdictional facilities are Applicants' market-based rate tariffs and related contracts, agreements, and associated books and records. Applicants request expedited treatment, with approval granted no later than December 1, 2008.
2. The Commission has reviewed the application under the Commission's Merger Policy Statement.<sup>2</sup> As discussed below, we will authorize the proposed Transaction

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<sup>1</sup> 16 U.S.C. § 824b(a)(1) (2006).

<sup>2</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

under section 203(a)(1) of the FPA, as we find that it is consistent with the public interest.

## **I. Background**

### **A. Description of the Parties**

#### **1. Sempra Energy**

3. Sempra Energy is a public utility holding company that wholly owns Southern California Gas Company, a natural gas distribution company serving southern and central California and San Diego Gas & Electric, a public utility serving San Diego and Southern Orange County, California. Sempra Energy is the ultimate parent company of Sempra Generation, an owner and operator of generation facilities in the Western Electric Coordinating Council. Sempra Energy owns directly or indirectly interests in natural gas facilities, including storage facilities, pipelines, and distribution facilities.

#### **2. Royal Bank of Scotland**

4. The Royal Bank of Scotland, a public limited company registered in Scotland, is a financial holding company under the U.S. Bank Holding Company Act of 1956, as amended. It is registered with, and under the supervision of the Board of Governors of the Federal Reserve System. Royal Bank of Scotland is engaged in a range of banking, capital markets, and asset management activities. It engages in derivative contract trading activities both within and outside of the United States and holds market-based rate authority granted by the Commission.<sup>3</sup>

5. Royal Bank of Scotland is a wholly-owned subsidiary of RBS Group, a public limited company registered in Scotland. RBS Group is a holding company of one of the world's largest banking, financial services, and insurance groups. RBS Group operates in the United Kingdom, the United States, and internationally through its two principal subsidiaries: Royal Bank of Scotland and National Westminster Bank plc, which is a wholly-owned subsidiary of Royal Bank of Scotland.

6. Applicants state that, except for Sempra Trading and Sempra Solutions, Royal Bank of Scotland has no U.S. energy affiliates and does not own or operate any electric generation, transmission or distribution facilities in the United States. None of Royal Bank of Scotland's affiliates is a public utility with a franchised service territory or captive ratepayers in the United States. Royal Bank of Scotland, or its affiliates, may act as an underwriter or market-maker for utility securities, hold utility securities for the account of clients, hold utility securities as a custodian and provide clearing services in its own name or on behalf of clients, hold utility securities as loan collateral under a

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<sup>3</sup> Application at 6, *citing Royal Bank of Scotland plc*, Docket Nos. ER07-1215-000, *et al.* (October 12, 2007) (unpublished letter order).

margin agreement, hold utility securities as collateral for loans, obtain and hold passive investments in utility securities for its own account which do not result in obtaining control over the utility, or hold title to utility securities as part of asset management activities.

### **3. RBS Sempra Commodities**

7. RBS Sempra Commodities is jointly owned by the Royal Bank of Scotland and Sempra Energy, who have 51 percent direct ownership and 49 percent indirect ownership, respectively. Sempra Trading and Sempra Solutions are wholly owned subsidiaries of RBS Sempra Commodities LLP (RBS Sempra Commodities), a UK limited liability partnership. Applicants state that this ownership structure causes Sempra Trading and Sempra Solutions to be affiliated with both Sempra Energy and Royal Bank of Scotland, but there is no affiliate relationship between Sempra Energy and Royal Bank of Scotland.

### **4. Sempra Trading**

8. Sempra Trading is an energy trading company that markets and trades physical and financial energy and metals products. It is authorized by the Commission to sell energy, capacity, and ancillary services at market-based rates.<sup>4</sup> Applicants state that Sempra Trading does not operate any electric generation, transmission, or distribution facilities, and does not have a franchised service territory or captive ratepayers.

### **5. Sempra Solutions**

9. Sempra Solutions offers electricity and natural gas supply and risk management services to commercial, industrial, and institutional retail customers under retail choice programs. Sempra Solutions is authorized by the Commission to make wholesale energy and capacity sales at market-based rates.<sup>5</sup> Applicants state that Sempra Solutions does not operate any electric generation, transmission, or distribution facilities and does not have a franchised service territory or captive ratepayers.

## **B. Description of the Proposed Transaction**

10. Applicants state that the proposed Transaction is part of the comprehensive set of measures undertaken by the Government of the United Kingdom to stabilize the financial markets. The Finance Ministry's recapitalization plan for RBS Group involves a £20 billion overall investment consisting of the purchase of £5 billion of preference shares and the underwriting of an offer and placing of £15 billion of ordinary shares, backed by a commitment by the Finance Ministry to act as a "buyer of last resort" for those ordinary

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<sup>4</sup> *Sempra Energy Trading LLC*, 125 FERC ¶ 61,151 (2008).

<sup>5</sup> *Id.*

shares not purchased by existing shareholders or the market. Applicants state that, although not known with certainty, it is expected that no ordinary shareholder, with the exception of the Finance Ministry will own 10 percent or greater interest in RBS Group after the Transaction. The proposed Transaction will affect the indirect upstream ownership of Royal Bank of Scotland and, as a result of Royal Bank of Scotland's 51 percent ownership interest in RBS Sempra Commodities, Sempra Trading and Sempra Solutions. Applicants state that the proposed Transaction will not affect Sempra Energy's indirect 49 percent ownership interest in Sempra Trading and Sempra Solutions.

## **II. Notice of Filing and Responsive Pleadings**

11. Notice of the filing was published in the *Federal Register*, 73 Fed. Reg. 70,993 (2008), with interventions and protests due on or before November 28, 2008.<sup>6</sup> None was filed.

## **III. Discussion**

### **A. Standard of Review under Section 203**

12. Under section 203(a)(1)(A) of the FPA, a public utility may not sell, lease, "or otherwise dispose of" its jurisdictional facilities of a value in excess of \$10 million without prior Commission approval. The Commission has interpreted a transfer of control of jurisdictional facilities through disposition of securities to fall within the "or otherwise dispose" language of section 203(a)(1)(A) and thus require prior Commission authorization. The Commission has also interpreted an indirect transfer of control of jurisdictional facilities by a public utility to require section 203(a)(1)(A) approval.<sup>7</sup>

13. We agree with Applicants' analysis that the proposed Transaction does not require approval under section 203(a)(2). Sempra Trading and Sempra Solutions, as described by Applicants, are power marketers; therefore, even if the Finance Ministry was a holding company, authorization under section 203(a)(2) would not be required for the acquisition of Sempra Trading and Sempra Solutions because a power marketer is not a "transmitting utility" as defined in the FPA or an "electric utility company" or a "holding company" as defined in the Public Utility Holding Company Act of 2005 (PUHCA).<sup>8</sup>

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<sup>6</sup> On November 24, 2008, the Commission issued an Errata Notice shortening the original comment date from December 1, 2008 to November 28, 2008.

<sup>7</sup> *JPMorgan Chase & Co.*, 123 FERC ¶ 61,088, at 13 (2008) citing *Phelps Dodge Corp.*, 121 FERC ¶ 61,251, at P 19 (2007).

<sup>8</sup> Although the power marketers here are considered "public utilities" under the FPA, they are not considered "electric utility companies" under PUHCA. *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, FERC Stats. & Regs. ¶ 31,197, at P 28 (2005),

14. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. Under the Commission's regulations, its analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>9</sup> Section 203 also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."<sup>10</sup> The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or an inappropriate pledge or encumbrance of utility assets.<sup>11</sup>

### 1. Effect on Competition

15. Applicants state that the proposed Transaction will have no adverse effect on competition. With regard to horizontal market power, they argue that they are power marketers that do not own or operate any electric generation, transmission, or distribution facilities. Applicants state that the Commission has found no adverse effect on competition when the disposition of a power marketer's jurisdictional facilities does not involve physical facilities. Applicants also state that the Commission has previously found that the parties to the transaction lack generation market power. Applicants note that they are parties to certain agreements with generators in PJM Interconnection, L.L.C. and the Bonneville Power Authority balancing authority area,<sup>12</sup> but do not control the generation. They assert that the Commission granted Applicants market-based rate authority and determined that Sempra Trading, Sempra Solutions and Royal Bank of Scotland lack market power.

16. Applicants state that no shareholder, with the exception of the Finance Ministry, is expected to hold a 10 percent or greater interest in RBS Group and meet the Commission's threshold for affiliation with Applicants. Therefore, Applicants argue that the proposed Transaction raises no horizontal market power concerns.

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*order on reh'g*, Order No. 667-A, FERC Stats. & Regs. ¶ 31,213, *order on reh'g*, Order No. 667-B, FERC Stats. & Regs. ¶ 31,224 (2006), *order on reh'g*, Order No. 667-C, 118 FERC ¶ 61,133 (2007).

<sup>9</sup> See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>10</sup> 16 U.S.C. § 824b(a)(4).

<sup>11</sup> 18 C.F.R. § 33.2 (2008).

<sup>12</sup> Application at 5 n.11.

17. Applicants also contend that the proposed Transaction raises no vertical market power concerns. They assert that none of the Applicants control any transmission facilities or significant interests in fuel delivery or supply facilities in the United States, and the proposed Transaction is not expected to create any new affiliation with entities that own or control transmission facilities or fuel delivery or supply facilities in the United States.

18. We agree with Applicants' analysis of the horizontal and vertical market effects of the proposed Transaction. The Commission notes that the new possible upstream owner, the Finance Ministry, owns no generation assets in any geographic market and does not control any generation inputs, nor can it create barriers to entry in the market. Therefore, we find that the proposed Transaction will not adversely affect competition.

## **2. Effect on Rates**

19. Applicants state that the wholesale rates of Sempra Trading, Sempra Solutions and Royal Bank of Scotland will continue to be market-based, rather than cost-based. In addition, Applicants do not have any transmission facilities or transmission customers.

20. The Commission has found that, where electricity is sold only under market-based rates, the transaction is unlikely to have an adverse impact on rates.<sup>13</sup> We note that nothing in the application indicates that rates to customers will increase as a result of the proposed Transaction, and no party argues otherwise. For these reasons, we find that the proposed Transaction will not have an adverse effect on rates. However, we do note that Order No. 652 requires that sellers with market-based rate authorization 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.<sup>14</sup> The proposed Transaction may result in a change in status. Accordingly, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make any appropriate filings under section 205 of the FPA to implement the Transaction.

## **3. Effect on Regulation**

21. Applicants state that the proposed Transaction will not affect the manner or extent to which the Commission, any state, or any other federal agency may regulate Applicants. Upon completion of the proposed Transaction, Applicants will continue to be public utilities with market-based rates subject to the jurisdiction of the Commission. Moreover,

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<sup>13</sup> *Union Electric Co.*, 114 FERC ¶ 61,255 at P 45.

<sup>14</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

as a bank and financial holding company, Royal Bank of Scotland and its affiliates are supervised and regulated by the Board of Governors of the Federal Reserve System, as well as by the U.S. Securities and Exchange Commission.

22. We note that no party alleges that regulation would be impaired by the proposed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation. We find that neither state nor federal regulation will be impaired by the proposed Transaction.

#### **4. Cross-Subsidization**

23. In the Supplemental Policy Statement, the Commission described several types of “safe harbor” transactions in which it is clear that no cross-subsidization issues arise and therefore no detailed showing is required.<sup>15</sup> Applicants assert that the Transaction falls into the safe harbor where “a franchised public utility with captive customers is not involved.”<sup>16</sup> Because none of Sempra Trading, Sempra Solutions, or RBS have any controlling interest in any franchised public utility with captive customers,<sup>17</sup> Applicants contend that no cross-subsidization concerns are raised by the proposed Transaction.

24. Applicants assert that based on facts and circumstances known to them or that are reasonably foreseeable, the proposed Transaction will not result in, at the time of the closing or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of assets of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional facilities for the benefit of an associate company. Applicants explain that their proposed Transaction will not result, now or in the future, in: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate

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<sup>15</sup> Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 17.

<sup>16</sup> Application at 13.

<sup>17</sup> *Id.* Applicants state that some of Sempra Energy’s subsidiaries have franchised service territories for natural gas and electricity, but these subsidiaries are not a part of the Transaction.

company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.<sup>18</sup>

25. Based on the facts as presented in the application, we find that the proposed Transaction will not result in cross-subsidization of a non-utility company or the pledge or encumbrance of utility assets for the benefit of an associate company.

26. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired unless it has access to the parent company's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. However, the Commission's jurisdiction does not extend to foreign companies operating outside of U.S. borders. The Commission has acted previously to protect energy customers by requiring access to a foreign parent company's books and records<sup>19</sup> and the approval of the proposed Transaction is conditioned on Applicants' agreement to provide access to *all* books and records within the lawful scope of Section 301(c) of the FPA.

## **B. Conclusion**

27. Applicants state that the Transaction may be completed before the Commission issues an order authorizing it. In light of the extraordinary circumstances surrounding the proposed Transaction, Applicants request expedited action by December 1, 2008.

28. The Commission stands ready to act in processing urgent FPA section 203 filings in response to the current financial market turmoil. As in other recent orders,<sup>20</sup> the Commission will act promptly to provide regulatory certainty to those jurisdictional entities adversely affected by the unprecedented, ongoing market conditions. We recognize that stabilizing the global financial market is a goal consistent with the public interest. At this time, the Finance Ministry has not begun implementation of the proposed Transaction. Therefore, we approve the proposed Transaction and grant authorization effective as of the date of this order, December 1, 2008.

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<sup>18</sup> See Application, Exhibit M.

<sup>19</sup> See *New England Power Co., et al.*, 87 FERC ¶ 61,287 (1999). See also *Consolidated Water Power Company, et al.*, 91 FERC ¶ 61,275, at 61,931-61,932 (2000); *PacifiCorp*, 87 FERC ¶ 61,288, at 62,152-62,153 (1999).

<sup>20</sup> See *Bank of America Corp.*, 125 FERC ¶ 61,181 (2008); see also *Lehman Brothers Commodity Services, Inc.*, 125 FERC ¶ 61,122 (2008).

The Commission orders:

(A) The proposed disposition of jurisdictional facilities is hereby authorized under section 203(a)(1) of the FPA, as discussed in the body of this order.

(B) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the application.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before this Commission.

(D) The Commission retains the authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(F) If the transaction results in changes in the status or the upstream ownership of Applicants' affiliated qualifying facilities, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made.

(G) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the acquisition and disposition.

(H) Applicants shall notify the Commission within 10 days of the date that the acquisition and disposition of jurisdictional facilities have been consummated.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.