

125 FERC 61,073
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.

PSEG Energy Resources & Trade LLC	Docket Nos. ER99-3151-008 ER99-3151-009
Public Service Electric and Gas Company	Docket Nos. ER97-837-007 ER97-837-008
PSEG Power Connecticut LLC	Docket Nos. ER03-327-002 ER03-327-003
PSEG Fossil LLC	Docket Nos. ER08-447-000 ER08-447-001
PSEG Nuclear LLC	Docket Nos. ER08-448-000 ER08-448-001

**ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS AND
COMPLIANCE FILING, DIRECTING FURTHER COMPLIANCE FILING,
AND GRANTING MARKET-BASED RATE AUTHORIZATION**

(Issued October 17, 2008)

1. In this order, the Commission accepts an updated market power analysis filed by PSEG Energy Resources & Trade LLC (PSEG ER&T), Public Service Electric and Gas Company (PSE&G), and PSEG Power Connecticut LLC (PSEG CT) (collectively, PSEG Companies). As discussed below, the Commission concludes that PSEG Companies satisfy the Commission's standards for market-based rate authority.
2. The Commission further grants market-based rate authorization to PSEG Fossil LLC (PSEG Fossil) and PSEG Nuclear LLC (PSEG Nuclear) (collectively,

PSEG Applicants), effective March 14, 2008.¹ PSEG Applicants must revise their tariff sheets to include this effective date.²

3. The Commission also accepts PSEG Companies' and PSEG Applicants' (collectively, PSEG Entities) proposed revisions to their market-based rate tariffs that incorporate provisions as adopted in Order Nos. 697³ and 697-A,⁴ to be effective September 18, 2007 as requested, subject to the compliance filings directed herein.

4. Additionally, as discussed below, PSEG Entities meet the criteria for Category 1 sellers in the Central, Southwest Power Pool, Southeast, Southwest and Northwest Regions, and the criteria for Category 2 sellers in the Northeast, and are so designated. PSEG Entities' next updated market power analysis must be filed according to the regional schedule adopted in Order No. 697.⁵

I. Background

5. On January 14, 2008, PSEG Companies filed an updated market power analysis in accordance with the reporting schedule adopted in Order No. 697,⁶ and PSEG Applicants filed initial applications for market-based rates.

¹ PSEG Fossil LLC, FERC Electric Tariff Original Vol. 1, Original Sheet Nos. 1-3. PSEG Nuclear LLC, FERC Electric Tariff Original Vol. 1, Original Sheet Nos. 1-3.

² *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 389 (2008).

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 882-93 and Appendix D, *clarified*, 121 FERC ¶ 61,260, at P 9-10 (2007) (Order Clarifying Final Rule); *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008).

⁴ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268.

⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-93, app. D; Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 9-10, app. D-1, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at apps. D, D-1, and D-2.

⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882. The Commission stated that "both the Commission and market participants will benefit from greater

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6. Each of the PSEG Companies is a wholly-owned direct or indirect subsidiary of Public Service Enterprise Group Incorporated, and each has been granted market-based rate authorization by the Commission.⁷
7. On January 18, 2008, PSEG Entities filed a request that review of PSEG Applicants' initial market-based rate authorization applications be conducted contemporaneously with the Commission's review and consideration of the same analysis in connection with PSEG Companies' updated market power analysis filing.
8. On March 13, 2008, PSEG Entities filed an amendment to the January 14, 2008 filing to correct a factual error contained therein and to explain further the statement that no PSEG units currently are treated as "exempt units" under Section 6.5 of the PJM Operating Agreement.
9. On April 4, 2008, the Director, Division of Tariffs and Market Development – West, acting under delegated authority, requested additional information in relation to the updated market power analyses filed by numerous filers within the PJM Interconnection, LLC market (PJM) (collectively, PJM RTO Filers). Specifically, the request noted that the identified PJM RTO Filers had failed to provide a simultaneous import limitation (SIL) study with their updated market power analyses as required by the Commission in Order No. 697. The April 4, 2008 request for information directed the PJM RTO Filers to provide a SIL study consistent with the requirements of Order No. 697, or in the alternative to provide a SIL study done by PJM that adequately addresses the Order No. 697 principles for how to measure transmission import capability.
10. On April 30, 2008, the PJM RTO Filers submitted a partial response to the April 4, 2008 request for information stating that PJM was submitting a SIL study

data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers' rates remain just and reasonable." *See also* Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 13.

⁷ *PSEG Energy Resources & Trade LLC*, Docket No. ER97-837-000 (Feb. 12, 1997) (unpublished letter order), *Public Service Electric and Gas Co.*, Docket No. ER99-3151-000 (Sep. 29, 1999)(unpublished letter order), *PSEG Power Connecticut LLC*, 86 FERC ¶ 61,133 (1999).

for the PJM market at the request of the PJM RTO filers and requested an extension of time to file their individual responses to the April 4, 2008 request for information.

11. On April 30, 2008, PJM filed a motion to intervene out-of-time in the above-captioned dockets and a SIL study for the entire PJM region (PJM SIL Study). On June 2, 2008, as amended on July 14, 2008, PJM filed a SIL study for the PJM-East submarket (PJM-East SIL study). On August 6, 2008, in *PSEG Energy Resources & Trade LLC*, 124 FERC ¶ 61,147 (2008) (PJM SIL Order),⁸ the Commission found that the PJM SIL Study and PJM-East SIL Study meet the Commission's requirements for SIL studies as discussed in Appendix E of the April 14 Order⁹ and Order No. 697. In the PJM SIL Order, the Commission gave the PJM RTO Filers the following three options: (1) choose to rely on the PJM SIL Study and the PJM-East SIL Study; (2) conduct sensitivity studies on the PJM SIL Study and the PJM-East SIL Study, which they would submit along with the PJM SIL Study or PJM-East SIL Study; or (3) perform their own SIL studies.¹⁰

12. On September 2, 2008, PSEG Entities filed a revised market power analysis in accordance with the Commission's directive in the PJM SIL Order. PJM Entities state that this amended filing was prepared in reliance upon SIL values from the PJM and PJM-East SIL Studies submitted by PJM and addressed in the PJM SIL Order. The September 2, 2008 filing also included revised market-based rate tariff sheets for PSEG Entities reflecting seller category designations and modifying provisions regarding sales of ancillary services as a third-party provider.

A. PJM Market

13. PSEG Entities state that PSE&G is a public utility operating company engaged primarily in the transmission of electricity and the provision of gas and electric distribution service in New Jersey. They state that PSE&G does not own or operate any electric generation facilities. PSEG Entities state that pursuant to

⁸ The entire history and findings relating to the PJM SIL Study and the PJM-East SIL Study are detailed in the PJM SIL Order and are not repeated here.

⁹ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

¹⁰ PJM SIL Order, 124 FERC ¶ 61,147 at P 22.

the Electric Discount and Energy Competition Act of 1999,¹¹ which initiated the transition from a regulated to a competitive retail power market in New Jersey, the New Jersey Department of Public Utilities annually approves statewide auctions to determine the entities that will supply Basic Generation Service (BGS) in New Jersey. PSEG Entities assert that PSE&G and other New Jersey electric utilities with franchised service territories are required to obtain all electric supply requirements through this BGS auction on an annual basis for retail customers that do not purchase electric supply from third-party suppliers. They state that PSE&G's affiliate, PSEG ER&T, has participated directly in all of the auctions for BGS supply held since 2004 and has consistently won tranches in those auctions for BGS within the franchised service territory of PSE&G.¹²

14. Pursuant to certain long-term contracts comprised entirely of contracts under the Public Utilities Regulatory Policy Act (PURPA) or restructured successor contracts to PURPA contracts that PSE&G originally entered into with Qualifying Facilities (QFs), PSEG Entities state that PSE&G has a continuing obligation to purchase certain quantities of energy and capacity. They state that the total maximum capacity that PSE&G is contractually obligated to purchase from current and former non-utility generators (NUGs) is approximately 552 Megawatts (MW) of installed capacity and associated energy. PSE&G then sells the energy purchased under these PURPA contracts and former-PURPA contracts in the PJM-administered spot market pursuant to market-based rate authority granted by the Commission. With the advent of the Reliability Pricing Model (RPM) for capacity in PJM on June 1, 2007, PSE&G began receiving non-unit specific capacity rights covering the bulk of its capacity purchases – about 507 MW – which are settled financially within the RPM. Finally, PSEG Entities state that the remainder of the capacity purchased by PSE&G from NUGs is bid into RPM auctions.¹³

15. PSEG Entities state that PSEG ER&T does not own or operate any generation, transmission or distribution facilities. PSEG ER&T was formed to market the power that it purchases from its affiliates including PSEG Fossil and PSEG Nuclear, each wholly-owned subsidiaries of PSEG Power LLC, as well as from other sources, and to engage in wholesale marketing, brokering and physical and financial trading and hedging activities.

¹¹ N.J.S.A. § 48:3-49 *et seq.*

¹² PSEG Entities January 14, 2008 filing (Jan. 14 Filing) at 4.

¹³ Jan. 14 Filing at 4-5.

16. PSEG Entities state that PSEG Fossil is an Exempt Wholesale Generator (EWG)¹⁴ that owns and operates 9,236 MW of electric generation facilities located within PJM and sells its entire output to its affiliate PSEG ER&T pursuant to cost-based contracts approved by the Commission.¹⁵ In addition, PSEG Fossil has obtained a position in the PJM interconnection queue and is currently engaged in the PJM interconnection study process for the potential construction of 138 MW of new peaking facilities at its Kearney station.¹⁶

17. PSEG Fossil and Jersey Central Power and Light Company (Jersey Central P&L) are each 50 percent co-owners of the 400 MW Yard's Creek pumped storage hydroelectric facility. PSEG Entities state that Jersey Central P&L is the operator and makes dispatch decisions in accordance with the joint operating agreement applicable to the unit. Accordingly, for this market power analysis, the entire unit capacity has been assigned to Jersey Central P&L.¹⁷

18. PSEG Entities state that PSEG Nuclear is an EWG¹⁸ that owns and operates 3,688 MW of electric generation facilities located within the PJM footprint and sells its entire output to its affiliate PSEG ER&T pursuant to cost-based contracts approved by the Commission.¹⁹ PSEG Nuclear is planning an uprate of its Hope Creek facility of approximately 120 MW, which could be completed as early as the summer of 2008.²⁰

¹⁴ *PSEG Fossil LLC*, 89 FERC ¶ 62,337 (1999); *PSEG Fossil LLC*, 95 FERC ¶ 61,405 (2001); *PSEG Fossil LLC*, 99 FERC ¶ 62,167 (2002).

¹⁵ *Public Service Electric and Gas Co.*, 88 FERC ¶ 61,299 (1999); *Public Service Electric and Gas Co.*, Docket No. ER99-3151-001 (Feb. 4, 2000) (unpublished letter order).

¹⁶ Jan. 14 Filing at 7-8.

¹⁷ Letter of Concurrence (stating that, "for purposes of the market power analysis required by Order No. 697, [Jersey Central P&L] shall be deemed to control the Yards Creek Project generation capacity and electric energy output."). Jan. 14 Filing, App. E.

¹⁸ *PSEG Nuclear LLC*, 97 FERC ¶ 62,191 (2001).

¹⁹ *Public Service Electric and Gas Co.*, 88 FERC ¶ 61,299 (1999); *Public Service Electric and Gas Co.*, Docket No. ER99-3151-001 (Feb. 4, 2000) (unpublished letter order).

²⁰ Jan. 14 Filing at 8.

19. PSEG Entities state that PSEG Nuclear is a joint owner with Exelon Generation LLC of the Salem and Peach Bottom nuclear plants. PSEG Entities add that PSEG Nuclear is the operator of Salem, Exelon Generation is the operator of Peach Bottom, and PSEG and Exelon are deemed to control each of the facility's output according to their ownership share.²¹ PSEG Entities represent that PSEG Fossil is approximately a 23 percent joint owner of interests in the Conemaugh and Keystone generating stations located in Pennsylvania. Reliant Energy Northeast Management Company is the operator.²²

20. PSEG Entities state that they are also affiliated with PSEG Global LLC, which owns an indirect minority interest in Pennsylvania Renewable Resources' two 7.5 MW (net) hydroelectric facilities, the output of which is sold under a long-term contract that expires in 2008. PSEG Entities also are affiliated with PSEG Lawrenceburg, LLC, a New Jersey limited liability company that owned the Lawrenceburg Facility, which has a summer net capacity rating of 1,095 MW. PSEG Entities note that the Lawrenceburg facility was sold to AEP Generating Company on May 16, 2007 in a sale approved by the Commission.²³

B. ISO-New England Market

21. PSEG CT is a Connecticut limited liability company and EWG that owns and operates electric generation facilities.²⁴ PSEG CT's two generation facilities, Bridgeport Harbor and New Haven Harbor, are both located in the State of

²¹ Letter of Concurrence (stating "[a]s such, PSEG and Exelon should be deemed to control 50 % of Peach Bottom's output, and PSEG should be deemed to control 57.41 % of Salem's output with Exelon controlling 42.59%.'). Jan. 14 Filing, App. E.

²² Letter of Concurrence (stating that each owner is deemed to control the generating capacity in accordance with its respective ownership for purposes of Order No. 697). Jan. 14 Filing, App. E.

²³ Jan 14 Filing at 9. *See PSEG Lawrenceburg Energy Co. LLC*, 119 FERC ¶ 62,015 (2007).

²⁴ PSEG CT was authorized to sell electric energy and capacity at wholesale at market-based rates in *Wisvest Corp.*, 101 FERC ¶ 61,166 (2002). In addition, PSEG Companies' and PSEG Applicants' affiliate PSEG Global has a 40 percent interest in Bridgewater Power Company LP, which owns an 8 MW nameplate-rated facility in ISO-NE.

Connecticut within the market administered by ISO New England Inc. (ISO-NE).²⁵ PSEG CT sells the output of these generation facilities to its affiliate PSEG ER&T under an agreement entered into pursuant to PSEG CT's market-based rate authority.²⁶ PSEG CT is also a party to certain Reliability Must Run (RMR) agreements approved by the Commission.²⁷

C. New York ISO Market

22. PSEG Entities additionally represent that they are affiliated with PSEG Power New York, Inc. (PSEG New York). PSEG Entities state that PSEG New York is a Delaware corporation and EWG that operates the Bethlehem Energy Center in the State of New York. PSEG Entities state that the Bethlehem Energy Center is located in the New York Independent System Operator, Inc. (NYISO) market and is an approximately 750 MW combined-cycle natural gas-fired facility. PSEG Entities explain that PSEG New York sells the output from the Bethlehem Energy Center facility to its affiliate PSEG ER&T pursuant to a cost-based contract.²⁸

II. Notices and Responsive Pleadings

23. Notice of the January 14, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 6176 (2008), with interventions or protests due on or before March 14, 2008. A notice of intervention was filed by the New Jersey Board of Public Utilities. The State of New Jersey Department of the Public Advocate Division of Rate Counsel (New Jersey Rate Council) filed a motion to intervene on March 14,

²⁵ In particular, New Bridgeport Harbor is located in the Connecticut Import Interface (Connecticut) and Southwest Connecticut (SWCT) submarkets, and New Haven Harbor is located in the Connecticut but not SWCT submarket. *See* Jan. 14 Filing, Frame Aff. at n. 21.

²⁶ Until October 31, 2006 when the contract terminated, PSEG CT had a sales contract with Unitil Power Corp. (Unitil) under which Unitil had the right to the capacity and energy output of Bridgeport Harbor Unit No. 3 and New Haven Harbor based on Unitil's fixed entitlement percentages. Jan. 14 Filing at 6-7.

²⁷ *See PSEG Power Connecticut LLC*, 119 FERC ¶ 61,168 (2007), *reh'g denied*, 121 FERC ¶ 61,041 (2007).

²⁸ Jan. 14 Filing at 9.

2008. The PJM Industrial Customer Coalition (PJM Industrial Customers) filed a motion to intervene and protest on March 14, 2008.

24. Notice of the March 13, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 15,999 (2008), with interventions or protests due on or before April 3, 2008. None was filed.

25. Notice of the September 2, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 53,214 (2008), with interventions or protests due on or before September 23, 2008. None was filed.

III. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notice of intervention of the New Jersey Board of Public Utilities and the timely, unopposed motions to intervene of the New Jersey Rate Counsel and PJM Industrial Customers serve to make them parties to this proceeding.²⁹

B. Market-Based Rate Authorization

27. 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.³⁰ As discussed below, the Commission concludes that PSEG Entities satisfy the Commission's standards for market-based rate authority.

1. Horizontal Market Power

28. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.³¹

²⁹ As noted above, PJM filed a motion to intervene out of time in the above captioned dockets. In the PJM SIL Order, the Commission granted PJM's late-filed motion to intervene. 124 FERC ¶ 61,147 at P 11.

³⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

³¹ *Id.* P 62.

29. As discussed below, PSEG Entities have prepared the pivotal supplier and wholesale market share screens for the PJM, PJM-East, Northern-PSEG, ISO-NE, Connecticut, SWCT, and NYISO markets and submarkets, consistent with the requirements of Order No. 697.³²

a. PJM Market

30. For the PJM market, PSEG Entities state that they rely on the PJM SIL Study. We note that in preparing their horizontal analyses, PSEG Entities reduced the PJM SIL Study values by 1,455 MW “to reflect the amount used by market participants other than PSEG to import their . . . percent of the output rights in two generating facilities owned by the Ohio Valley Electric Corporation.”³³ Whether using the PJM SIL values from the PJM SIL Study or PSEG’s values, we have determined that PSEG Entities pass the pivotal supplier screen and the wholesale market share screen in the PJM market with market shares ranging by season from 9.3 to 10.6 percent.³⁴

i. PJM-East

31. For the PJM-East submarket, PSEG Entities state that they rely on the PJM-East SIL Study.³⁵ PSEG Entities submitted two alternative horizontal analyses. PSEG Entities state that they pass the pivotal supplier screens under the two analyses, but acknowledge that they fail the market share screens under both analyses.³⁶

³² *Id.* P 235-36.

³³ PSEG Entities September 2, 2008 filing, Frame Aff. at P 35.

³⁴ We note that PSEG Entities fail to account for all first-tier markets in their analysis; however, this omission has little effect on the screen results because they have accounted all of their own generation in the first-tier markets.

³⁵ We note that PSEG Entities apparently use the initial SIL values that were submitted by PJM on June 2, 2008 rather than correctly using the revised, lower SIL values submitted in PJM’s July 14, 2008 filing and addressed by the Commission in the PJM SIL Order.

³⁶ We note that PSEG Entities’ analyses both contain errors. PSEG Entities’ first analysis appears to *understate* the effect of competing capacity imports into PJM-East because it does not include potential competing imports

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32. The Commission has established a rebuttable presumption that a seller possesses horizontal market power if it fails either screen.³⁷ However, PSEG Entities submit that Commission-approved market monitoring and mitigation in PJM is adequate to overcome any market power concerns.

33. PSEG Entities state that within the PJM market, there are specific Commission-approved mitigation measures in place that were designed and implemented for the purpose of addressing local market power concerns such as those that, in principle, might arise in PJM East. They state that these procedures are contained in Section 6 (“Must-Run” for Reliability Generation) of the “Amended and Restated Operating Agreement of PJM Interconnection, L.L.C.” and discussed by the PJM’s Market Monitoring Unit (MMU) in, among other places, Appendix L of the MMU’s 2007 State of the Market Report. The same local market power mitigation procedures now apply for PJM East as they do elsewhere in the PJM market.³⁸

34. In addition to the local market power mitigation, PSEG Entities state that the presence of marketing monitoring within the PJM market should lessen potential concern that PSEG Entities might be able to exercise market power notwithstanding the failed market share screen in PJM East. They state that PJM’s market monitoring plan is included in Attachment M of the PJM Open Access Transmission Tariff (PJM OATT). The MMU is the organization that is responsible for implementing the market monitoring plan. PSEG Entities state that the MMU also monitors both the potential for market participants to exercise market power and the actual exercise of market power. Furthermore, PSEG Entities state that the Commission has determined that the types of activities conducted by the MMU can serve to mitigate market power concerns.³⁹

from other suppliers in the NYISO. Their second analysis appears to *overstate* the effect of competing imports because it includes uncommitted capacity as competing imports from suppliers in the Midwest ISO, which is not a first-tier market to PJM-East.

³⁷ 18 C.F.R. § 35.37(c)(1) (2008).

³⁸ *See Order Granting in Part and Dismissing in Part Complaint, and Establishing Section 206 Hearing*, 123 FERC ¶ 61,169 (2008) at P 46.

³⁹ Jan. 14 Filing (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 241).

35. The Commission stated in Order No. 697 that with respect to market concentration within RTO/ISO submarkets, it will consider an existing Commission-approved market monitoring and mitigation regime already in place within the RTO/ISO that provides for mitigation of the submarket.⁴⁰ The Commission finds that PJM market monitoring and mitigation are sufficient to address market power concerns in the PJM-East submarket.⁴¹

36. Based on the foregoing market monitoring and mitigation present in the PJM market, and applicable to PJM-East, the Commission finds that PSEG Entities satisfy our horizontal market power concerns in the PJM-East submarket.

ii. Northern PSEG

37. In the January 14, 2008 filing, PSEG Entities submitted the pivotal supplier and wholesale market share analyses for the Northern PSEG submarket. Since that time, the Commission issued Order No. 697-A granting rehearing regarding the Commission's determination in Order No. 697 that Northern PSEG is a separate market in PJM.⁴²

38. Accordingly, the Commission did not review the indicative screen analysis of the Northern PSEG submarket.

b. ISO-New England Market

39. For the ISO-NE market, PSEG Entities did not submit a SIL study but instead conservatively assumed that the import capability into the ISO-NE market was limited to the size of PSEG Entities' generating capacity in NYISO and that 100 percent of this import capability amount was allocated to PSEG. In other words, no non-affiliate uncommitted capacity imports were considered in PSEG Entities' analysis. Using these conservative assumptions on import capability,

⁴⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 242.

⁴¹ We note that in Order No. 697-A, the Commission adopted a rebuttable presumption that existing Commission-approved RTO/ISO marketing monitoring and mitigation is sufficient to address any market power concerns. Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 111.

⁴² Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 90.

PSEG Entities pass the pivotal supplier and wholesale market share screens in ISO-NE with market shares ranging from 1.3 to 2.5 percent.⁴³

40. Accordingly, the Commission finds that PSEG Entities satisfy the Commission's requirements for market-based rates regarding horizontal market power in the ISO-NE market.

Connecticut and SWCT submarkets

41. For the Connecticut and SWCT submarkets, PSEG Entities did not submit SIL studies but instead used estimates of import capability found in the ISO-NE RTEP04 Draft Technical Report (ISO-NE RTEP04 Report), which has not been found by the Commission to be an acceptable substitute for a SIL. PSEG Entities used an import capability of 2,200 MW into the Connecticut submarket derived from the ISO-NE RTEP04 Report, which is a lower amount than the 2,500 MW of import capability into the Connecticut submarket that the Commission has previously accepted.⁴⁴ When using an import capability of 2,200 MW into the Connecticut submarket, PSEG Entities pass the pivotal supplier and wholesale market share screens in the Connecticut submarket with a zero percent market share. PSEG Entities used an import capability of 2,550 MW into the SWCT submarket, which is a higher amount than the 2,350 MW of import capability into the SWCT submarket that the Commission has previously accepted.⁴⁵ When we apply the previously accepted import capability of 2,350 MW into the SWCT submarket, PSEG Entities pass the pivotal supplier and wholesale market share screens in the SWCT submarket with a market share of zero percent.⁴⁶

42. Accordingly, the Commission finds that PSEG Entities satisfy the Commission's requirements for market-based rates regarding horizontal market power in the Connecticut and SWCT submarkets.

⁴³ Jan. 14 Filing, Attachment 9.

⁴⁴ *Northeast Utilities Service Company*, 123 FERC ¶ 61,172, at P 11, 14-15 (2008) (*Northeast Utilities*).

⁴⁵ *Id.*

⁴⁶ Although PSEG used 2,550 MW of imports into SWCT, we applied the screens with 2,350 MW of imports into SWCT, the SIL amount for SWCT used by Northeast Utilities and accepted by the Commission in *Northeast Utilities*. *Id.*

c. New York ISO Market

43. For the NYISO market, PSEG Entities did not submit a SIL study but instead used total “external rights” of 2,755 MW as identified on the NYISO’s website. PSEG Entities represent that “external rights” are the maximum amount of installed capacity that the NYISO will allow to be imported from external control areas. These “external rights” used by PSEG Entities have not been found by the Commission to be an acceptable substitute for a SIL. However, in the recent *Niagara Mohawk Power Corp.* order, the Commission accepted SIL values derived from the 2005 NYISO transmission planning studies. The 2005 NYISO transmission planning studies SIL value is higher than PSEG Entities’ proposed 2,755 MW of import capability into the NYISO market.⁴⁷ When using an import capability of 2,755 MW into the NYISO market, PSEG Entities pass the pivotal supplier screen and the wholesale market share screen in the NYISO market with a five percent market share.

44. Accordingly, the Commission finds that PSEG Entities satisfy the Commission’s requirements for market-based rates regarding horizontal market power in the NYISO market.

2. Vertical Market Power

45. 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 OATT on file before granting that utility or affiliate market-based rate authorization.⁴⁸

46. PSEG Entities state that other than incidental generator interconnection facilities owned by each of the EWGs and QFs, and the transmission assets owned by PSE&G within PJM, no transmission assets are controlled by PSEG Applicants, PSEG Companies, or any affiliates. PSEG Entities state that the PSE&G transmission facilities have been turned over the operational control of PJM,⁴⁹ which has an OATT on file with the Commission.⁵⁰

⁴⁷ *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,175 (2008).

⁴⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

⁴⁹ See *New England Power Pool*, 83 FERC ¶ 61,045 (1998); *ISO New England Inc.*, 106 FERC ¶ 61,280, *order on reh'g and compliance*, 109 FERC

47. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.⁵¹ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and equipment for the transportation of coal supplies, such as barges and rail cars (collectively, inputs to electric power production).⁵² The Commission also requires sellers to 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.⁵³

48. With regard to other barriers to entry, PSEG Entities state that some of the PSEG Companies and PSEG Applicants own sites within their relevant markets that would be suitable for future generating facilities. These include space at many of the existing generating sites of PSEG Fossil and at the sites of PSEG New York and PSEG CT. Furthermore, PSEG Nuclear's Salem facility may also be suitable for future construction. PSEG Entities also state that PSE&G owns certain sites that would be suitable for generating facilities but under New Jersey's Energy Discount and Competition Act, PSE&G is effectively barred from owning and operating generation except "on-site" generation for supply of specific end-users.

49. PSEG Entities further state that PSE&G owns natural gas distribution facilities in New Jersey including peak-shaving, liquefied petroleum gas and liquefied natural gas facilities, which are used to provide distribution to retail

¶ 61,147 (2004), *order on reh'g and compliance*, 110 FERC ¶ 61,111, *order on reh'g and compliance*, 110 FERC ¶ 61,335, *order on reh'g and compliance*, 110 FERC ¶ 61,344 (2005).

⁵⁰ See *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997).

⁵¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

⁵² *Id.* P 447. In Order No. 697-A, the Commission revised the definition of inputs to electric power production to include "physical coal supply sources and ownership of or control over who may access transportation of coal supplies." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

⁵³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

customers. PSEG Entities state that service over such distribution facilities is provided pursuant to state regulated tariffs on an open access type basis.

50. The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.⁵⁴

51. PSEG Entities affirmatively state that its affiliates have not erected barriers to entry in the relevant markets and will not erect barriers to entry in the relevant markets in the future.

52. Based on PSEG Companies' and PSEG Applicants' representations, they satisfy the Commission's requirements for market-based rates regarding vertical market power.

3. Other Matters

53. PJM Industrial Customers repeat arguments they raised on rehearing of Order No. 697 that the Commission fails to answer a threshold question of whether the PJM market rules and structure result in a competitive market for electric energy and capacity. PJM Industrial Customers thus assert that Order No. 697 is unlawful and, therefore, the approval or continuation of a seller's market-based rate authority is unlawful. PJM Industrial Customers further assert that unless and until the Commission identifies the characteristics of a competitive market and finds that such a market actually exists, the Commission cannot approve the instant request for authorization to continue making sales at market-based rates.

Commission Determination

54. We find that PJM Industrial Customers' arguments are improper in this proceeding. The Commission recently addressed PJM Industrial Customers' arguments on rehearing of Order No. 697. Specifically, in Order No. 697-A, the Commission rejected the argument that Order No. 697 does not reflect reasoned decision-making because the Commission did not find the existence of a competitive market before relying on market-based rate authority.⁵⁵ Thus, we reject PJM Industrial Customers' arguments here.

⁵⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

⁵⁵ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 407-12, 425-33.

C. Affiliate Restrictions

55. PSEG Entities state that they do not have captive customers, as defined by the Commission, and therefore, they request that the Commission find that the affiliate restrictions contained in the Commission's regulations do not apply to them. PSEG Entities submit that, as a result of retail competition in New Jersey, they do not have any captive customers and explain that retail customers who choose to be served under cost-based rates but have the ability to select a retail supplier are not considered to be under cost-based regulation and, therefore, are not captive.⁵⁶

56. Although PSEG Entities represent that they lack retail captive customers, they have not addressed whether they have wholesale customers and, if so, whether those wholesale customers are adequately protected against affiliate abuse.⁵⁷ Accordingly, they have not demonstrated that the affiliate restrictions should not apply. Thus, pursuant to the "Compliance with Commission Regulations" provision in their tariffs, PSEG Entities are required to comply with the affiliate restrictions in section 35.39 of the Commission's regulations.

D. Order Nos. 697 and 697-A Compliance Filings

57. In Order No. 697, the Commission adopted two standard required provisions that 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.⁵⁸ 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.⁵⁹ In Order No. 697-A, the

⁵⁶ Jan. 14 Filing at 32-33.

⁵⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 551; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 201.

⁵⁸ *Id.* P 914.

⁵⁹ *Id.* P 917.

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.⁶⁰

58. PSEG Companies' revised market-based rate tariffs include the Commission's two standard required provisions, standard provisions with regard to sales of certain ancillary services in various markets, a provision regarding sales of ancillary services as a third-party provider where applicable, and the required category designation provision. PSEG Companies' revised market-based rate tariffs also delete certain provisions that are now codified in the Commission's regulations. PSEG Companies' proposed tariff sheets are conditionally accepted, subject to PSEG Companies making compliance filings as directed below.⁶¹

59. PSEG Companies' proposed market-based rate tariffs improperly include an unapproved ancillary service provision entitled "Other Markets and Services." This provision should be removed from PSEG Companies' respective tariffs. PSEG Companies have also incorrectly titled tariff provisions relating to the sale of ancillary services in ISO-NE, NYISO, and PJM as "New England Power Pool," "New York Power Pool," and "Pennsylvania-New Jersey-Maryland Interconnection." These titles should be revised to read "New England," "New York," and "PJM," consistent with Order No. 697, Appendix C. In addition, PSEG has failed to comply with Order No. 697's requirement to include information regarding its market-based rate authorization and any exemptions, waivers and blanket authorizations it may have been granted.⁶² PSEG Companies are directed to file revised market-based rate tariffs within 30 days of the date of this order to correct the above tariff issues.

⁶⁰ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 391-393.

⁶¹ PSEG Energy Resources & Trade LLC, FERC Electric Tariff, Volume No. 1, First Revised Sheet No. 1, Second Revised Sheet No. 2, Third Revised Sheet No. 3 (superseding Original Sheet No. 1, First Revised Sheet No. 2, and Second Revised Sheet No. 3). Public Service Electric and Gas Company, FERC Electric Tariff, Volume No. 6, First Revised Sheet No. 1 and Original Sheet No. 3 (superseding Original Sheet No.1). PSEG Power Connecticut LLC, Original Rate Schedule FERC No. 1, Original Sheet No. 1, First Revised Sheet No. 2, Original Sheet No. 5A, Original Sheet No. 6, First Revised Sheet Nos. 7-8, Second Revised Sheet No. 9, Original Sheet No. 9A, Original Sheet No. 10, First Revised Sheet No. 11, Original Sheet Nos. 12 – 22, and First Revised Sheet No. 23, Original Sheet No. 24.

⁶² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914; *see also*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 382-84.

60. In addition, in Order No. 664, the Commission stated that it no longer intends to grant waivers of the full requirements of Part 45 in its orders granting market-based rate authority. Rather, persons seeking to hold interlocking positions will be required henceforth to comply with the full requirements of Part 45.⁶³ With respect to an individual who currently is authorized to hold interlocking positions, that individual will not need to refile under the full requirements of Part 45 to continue to hold such interlocking positions (unless and until that individual assumes different or additional interlocking positions).⁶⁴ Thus consistent with Order No. 664, PSEG Entities are required to comply with the full requirements of Part 45. PSEG CT is therefore ordered to remove any reference to an exemption from the full requirements of Part 45 from the Limitations and Exemptions provisions in its market-based rate tariff.

61. PSEG Entities also include a list of assets as required by Order No. 697.⁶⁵

E. Waivers and Authorizations

62. PSEG Applicants request the following waivers and authorizations: (1) waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except as to sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of Parts 41, 101, and 141 of the Commission's accounting and periodic reporting requirements; and (3) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

63. The Commission will grant the above-requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.⁶⁶ Notwithstanding the waiver of the accounting and reporting

⁶³ *Commission Authorization to Hold Interlocking Positions*, Order No. 664, FERC Stats. & Regs. ¶ 31,194, at P 34 (2005), *order on reh'g*, Order No. 664-A, 114 FERC ¶ 61,142 (2006).

⁶⁴ Order No. 664, FERC Stats. & Regs. ¶ 31,194 at P 36.

⁶⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 894-95.

⁶⁶ It should be noted that the Commission has recently examined and approved the continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101, and 141), as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of
(continued...)

requirements here, the Commission expects PSEG Applicants to keep their accounting records in accordance with generally accepted accounting principles.

F. Reporting Requirements

64. 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 (EQR) 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 longer) market-based power sales during the most recent calendar quarter.⁶⁷ Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.⁶⁸

65. PSEG Entities 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.⁶⁹

liabilities (18 C.F.R. Part 34). *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 984-85 (regarding waiver of Parts 41, 101, and 141), 999-1000 (regarding blanket approval under Part 34).

⁶⁷ *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>.

⁶⁸ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). 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.

⁶⁹ *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(a) (2008).

66. Additionally, in Order No. 697, the Commission created two categories of sellers.⁷⁰ 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.⁷¹ Sellers that do not fall into Category 1 are designated as Category 2 and are required to file an updated market power analysis.⁷²

67. Based on PSEG Entities' representations, we find that they meet the criteria for a Category 2 seller in the Northeast Region and are so designated based on their ownership of generation assets totaling greater than 500 MW of capacity and because their affiliates own transmission in the Northeast Region. Thus, PSEG Entities must file an updated market power analysis for the Northeast Region in compliance with the regional reporting schedule adopted in Order No. 697.⁷³ The Commission also reserves the right to require such an analysis at any intervening time.

68. Based on PSEG Entities' representations, we also find that they meet the criteria for a Category 1 seller in the Central, Southwest Power Pool, Southeast, Southwest and Northwest Regions and are so designated based on their representations that PSEG Entities and their affiliates do not own or control more than 500 MW of generation or transmission facilities outside of the Northeast region as defined in Order Nos. 697 and 697-A, nor do they own or control any other assets outside of the Northeast region which might raise vertical concerns.

⁷⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

⁷¹ 18 C.F.R. § 35.36(a)(2) (2008).

⁷² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

⁷³ *Id.* P 882.

The Commission orders:

(A) PSEG Companies' updated market power analysis and Order No. 697 compliance filing are hereby accepted for filing, as discussed in the body of this order.

(B) PSEG Companies' revisions to their market-based rate tariffs are hereby accepted for filing effective September 18, 2007, subject to compliance filings, as discussed in the body of this order.

(C) PSEG Applicants' market-based rate tariffs are hereby accepted for filing, effective March 14, 2008, as discussed in the body of this order.

(D) Waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15 and 35.16, is hereby granted to PSEG Applicants.

(E) Waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted to PSEG Applicants, with the exception of 18 C.F.R. §§ 141.14, 141.15 (2006).

(F) Within 30 days of the date of the issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by PSEG Applicants should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214 (2008).

(G) Absent a request to be heard within the period set forth above, PSEG Applicants are hereby authorized to issue securities and assume obligations or liabilities as guarantor, endorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of PSEG Applicants, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(H) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of PSEG Applicants' issuances of securities or assumptions of liabilities.

(I) PSEG Applicants are required to file EQRs in compliance with Order No. 2001. If the effective date of PSEG Applicants' market-based rate tariffs falls within a quarter of the year that has already expired, PSEG Applicants' EQRs for the expired quarter(s) are due within 30 days of the date of this order.

(J) PSEG Entities are hereby directed to file an updated market analysis for those regions where they are designated as Category 2 sellers according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.