

**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

**Benson Power, LLC**

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**Docket No. ER15-\_\_\_-000**

**PETITION OF BENSON POWER, LLC FOR  
ORDER ACCEPTING MARKET-BASED RATE TARIFF FOR  
FILING, REQUEST FOR WAIVERS AND BLANKET APPROVALS,  
AND REQUEST FOR EXPEDITED ACTION**

Benson Power, LLC (Seller), pursuant to section 205 of the Federal Power Act, as amended (FPA), 16 U.S.C. § 824d (2012), Rule 205 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or Commission), 18 C.F.R. § 385.205 (2014), and Part 35 of the Commission's regulations under the FPA, 18 C.F.R. Part 35, hereby petitions the Commission for: (1) acceptance of Seller's Market-Based Rate Tariff effective March 3, 2015; (2) waiver of certain Commission regulations under the FPA; and (3) the granting of certain blanket approvals.

As further described in the pending FPA section 203 application filed concurrently with this Petition, Seller will acquire a 64 MW (nameplate) poultry-litter and other biomass-fueled electric generating facility located in Benson, Minnesota (Facility) in a receivership sale of the Facility. Following the consummation of that transaction (Transaction), Seller will become the owner and operator of the Facility. Seller submits this Petition for Commission authorization to make wholesale sales of energy, capacity, and ancillary services at market-based rates in advance of the Transaction to ensure that Seller has the necessary authority under FPA section 205 to begin making wholesale power sales upon consummation of the Transaction.

The parties intend to consummate the Transaction as soon as possible, subject to the receipt of Commission authorization pursuant to FPA section 203. Therefore, Seller respectfully requests that the Commission grant expedited treatment for this Petition and issue an order on or before March 3, 2015, that accepts for filing Seller's Market-Based Rate Tariff effective March 3, 2015. Seller respectfully requests waiver of the Commission's prior notice filing requirement to the extent necessary to accommodate this requested effective date.<sup>1</sup>

**I. COMMUNICATIONS**

Communications with regard to this Petition should be addressed to the following persons:

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**II. DESCRIPTION OF SELLER AND ITS AFFILIATES**

**A. Seller**

Seller is a Delaware limited liability company formed for the purpose of acquiring, owning, and operating the Facility. Seller does not currently own or control any FERC-jurisdictional or power-related assets. Seller intends to operate as an EWG and will self-certify the Facility as a small power production qualifying facility.

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<sup>1</sup> 18 C.F.R. §§ 35.3 and 35.11.

All of the output of the Facility currently is sold to Northern States Power Company, d/b/a Xcel Energy (NSP), pursuant to a long-term contract. The Facility is interconnected to the transmission system owned by Great River Energy and operated by the Midcontinent Independent Transmission System Operator, Inc. (MISO) regional transmission organization. After the Transaction, Seller intends to continue selling the entire output of the Facility to NSP under the existing long-term power purchase agreement under its market-based rate authority.

Ownership of Seller is divided among three classes of membership interests: Class A managing membership interests (Class A Interests), Class B non-managing membership interests (Class B Interests), and Class C non-managing membership interests (Class C Interests). The Class A member is the sole managing member (Managing Member), responsible for managing the business and affairs of Seller, including the day-to-day management, operations, and business of the Facility. In addition, there will be a board of directors (Board) comprised of the Managing Member and two independent directors.<sup>2</sup> Class B and C members are passive, non-managing members, whose voting rights are limited to those rights necessary to protect their

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<sup>2</sup> As defined in the Benson Power, LLC Limited Liability Company Agreement, “independent” means a person who (a) is not compensated by, employed by, or an officer or director of any member and who otherwise has no material or pecuniary relationship with Seller, except for receiving compensation as an independent member of the Board, (b) is not a director, officer, or 5% or more owner of a company (other than Seller) that owns or controls generation facilities that are interconnected to the transmission system under the control of the MISO or owns or controls any transmission facilities; and (c) is not an officer or director of (1) a public utility (other than Seller), (2) a bank, trust company, banking association or firm authorized by law to underwrite or participate in the marketing of securities of Seller, or (3) any company supplying electrical equipment to Seller, unless the holding of the interlocking positions described in (c)(1), (2), or (3) is authorized by FERC.

financial investment. As such the Class B and C members have no authority to manage, control, or direct the operations of Seller or the Facility.

Class A Interests are held (100%) by CPV Biomass Holdings, LLC (CPV Biomass), a wholly-owned subsidiary of Competitive Power Ventures, Inc. (CPV). Class B Interests are held by: The Prudential Insurance Company of America, PRUCO Life Insurance Company, PRUCO Life Insurance Company of New Jersey, PAR U Hartford Life & Annuity Comfort Trust, Prudential Annuities Life Assurance Corporation, and Prudential Retirement Insurance and Annuity Company (collectively, Prudential), John Hancock Life Insurance Company (U.S.A.) (Hancock), Nationwide Life Insurance Company (Nationwide), Beneficial Life Insurance Company (Beneficial), and CRT Capital Group LLC (CRT). Class C Interests are held by The Prudential Insurance Company of America and Metropolitan Life Insurance Company (MetLife). For purposes of this Petition, Prudential, Hancock, Nationwide, Beneficial, CRT, and MetLife together are Investors.

As demonstrated by the information provided in Attachment C hereto, the limited consent rights attached to Investors' Class B and Class C Interests are substantially similar to the consent rights held by the passive tax equity investors in AES Creative Resources.<sup>3</sup> In AES Creative Resources, the Commission held that passive investors with limited consent rights with respect to major decisions of electric generation companies were not affiliates of such electric generation companies for purposes of the Commission's market power analysis. Accordingly, as the holders of the Class B and Class C Interests, Investors are not affiliates of Seller.

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<sup>3</sup> 129 FERC ¶ 61,239 (2009).

## B. CPV Biomass

CPV Biomass is a wholly-owned subsidiary of CPV, which, in turn, is a wholly-owned subsidiary of Competitive Power Ventures Holdings, LLC (CPV Holdings).<sup>4</sup> Subsidiaries of CPV Holdings develop, own, and operate gas-fired and renewable generation facilities throughout the United States. Neither CPV Biomass nor its affiliates own or control any generation in the MISO Balancing Authority Area (BAA).<sup>5</sup> In addition, neither CPV Biomass nor its affiliates own any transmission or distribution assets (other than limited interconnection facilities used to deliver power from generation facilities to the transmission grid) or other inputs to electric power production that could be used to erect barriers to entry in any market.<sup>6</sup> None of CPV Biomass or any of its affiliates is a public utility with a franchised electric service territory.<sup>7</sup>

CPV Biomass is affiliated with the following entities that own or control generation capacity located within the Southwest Power Pool, Inc. (SPP) and PJM Interconnection, L.L.C. (PJM), first-tier markets to the MISO BAA:

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<sup>4</sup> Warburg Pincus Private Equity IX, L.P. and Warburg Pincus Equity Partners Liquidating Trust have a collective ownership interest of 95.2% of the voting shares in CPV Holdings. The remaining ownership interests are owned by individuals, directly or through partnerships, trusts, or limited liability companies, but none owns 10% or more of the voting interests in CPV Holdings.

<sup>5</sup> See Attachment A for a list of CPV Biomass' energy affiliates.

<sup>6</sup> The Commission defines inputs to electric power production as intrastate natural gas transportation, intrastate natural gas storage or distribution facilities, sites for generation capacity development, physical coal supply sources, and access to transportation of coal supplies. See 18 C.F.R. §§ 35.37(d), 33.4 (2014). While affiliates of CPV Biomass have demonstrated site control for generation development through the interconnection process, none of such sites is located in the MISO BAA.

<sup>7</sup> As Managing Member, CPV Biomass might be deemed to be a public utility. See D.E. Shaw Plasma Power, LLC, 102 FERC ¶ 61,265 at P 24 (2004). CPV Biomass concurrently is submitting an application for market-based rate authority and request for waivers and blanket authorizations typically granted to entities with market-based rate authority.

- CPV Keenan II Renewable Energy Company, LLC (Keenan II), which owns a 152 MW (nameplate) wind-powered generation facility in SPP. Keenan II is an EWG with market-based rate authority.<sup>8</sup>
- CPV Shore, LLC (Shore), which is developing and will own a 725 MW (nameplate) gas-fired generation facility in PJM. Shore is an EWG with market-based rate authority.<sup>9</sup>
- CPV Maryland, LLC (Maryland), which is developing and will own a 725 MW (nameplate) gas-fired generation facility in PJM. Maryland is an EWG with market-based rate authority.<sup>10</sup>

Accordingly, following the Transaction, Seller and its affiliates will own or control approximately 64 MW of generation capacity located within the MISO BAA, and approximately 1,602 MW of generation capacity located in markets first-tier to the MISO BAA.

### C. Board

The Board will be comprised of the Managing Member and two independent directors. Board approval is required for (i) approval of each annual operating budget for Seller and of any proposed budget line item variance of 10% or more or of proposed variances in the aggregate of 10% or more of the approved budget; (ii) execution or amendment by Seller of any of the following agreements: any power purchase and sale agreement, any interconnection agreement, any fuel supply or transportation agreement with a term of greater than two years or value greater than \$2.5 million, and any

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<sup>8</sup> CPV Keenan II Renewable Energy Company, LLC, Docket No. EG10-2-000, Notice of Self-Certification of Exempt Wholesale Generator Status (Oct. 8, 2009); CPV Keenan II Renewable Energy Company, LLC, Docket No. ER10-64-000 (Nov. 30, 2009) (unpublished letter order).

<sup>9</sup> CPV Shore, LLC, Docket No. EG13-17-000, Notice of Self-Certification of Exempt Wholesale Generator Status (Mar. 4, 2013); CPV Shore, LLC and CPV Maryland, LLC, 142 FERC ¶ 61,081 (2013).

<sup>10</sup> CPV Maryland, LLC, Docket No. EG08-67-000, Notice of Self-Certification of Exempt Wholesale Generator Status (Apr. 28, 2008); CPV Shore, LLC and CPV Maryland, LLC, 142 FERC ¶ 61,081 (2013).

agreement with an asset manager or operator of the Facility; (iii) appointment of officers of Seller; (iv) removal of the asset manager or operator of the Facility for cause and selection of a replacement asset manager or operator of the Facility; and (v) capital expenditures of \$2.5 million (individually or in the aggregate).

Initially, the two independent directors will be Michael J. Hanson, President of Aevenia, Inc.,<sup>11</sup> and Dale W. Linaweaver, President of Mountaineer Power Consulting, Inc.<sup>12</sup> Consistent with the independence criteria in the limited liability company agreement for Benson, neither of the two independent members of the Board is a director, officer, or 5% or more owner of a company that owns or controls generation facilities in the MISO BAA or owns or controls any transmission facilities. Further, neither of the two independent directors is an officer or director of a public utility or other entity that is not an authorized interlock under Part 45 of the Commission's regulations (i.e., the independent directors will not be affiliated with a public utility with a franchised electric service territory).

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<sup>11</sup> Aevenia, Inc. is an electrical and energy construction firm owned by Otter Tail Corporation.

<sup>12</sup> Mountaineer Power Consulting, LLC provides expert witness, management audits, due diligence, asset management, and asset optimization services in the energy sector.

### **III. REQUEST FOR AUTHORIZATION TO SELL ENERGY, CAPACITY, AND ANCILLARY SERVICES AT MARKET-BASED RATES**

#### **A. Description of Seller's Market-Based Rate Tariff**

Seller requests authorization under its proposed Market-Based Rate Tariff to sell energy, capacity, and certain ancillary services to any purchaser that is not a franchised public utility affiliate.<sup>13</sup>

#### **B. Satisfaction of Criteria for Market-Based Rates**

The Commission permits sales of energy, capacity, and ancillary services at market-based rates if the seller and its affiliates (i) lack horizontal market power in the relevant geographic market, *i.e.*, they do not have (or have adequately mitigated) market power in generation; and (ii) lack vertical market power in the relevant geographic market, *i.e.*, they do not have (or have adequately mitigated) market power in transmission and cannot erect barriers to entry to competing suppliers through the control of inputs to electric power production.<sup>14</sup> As discussed below, none of Seller or any of its

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<sup>13</sup> 18 C.F.R. § 35.39 requires separate Commission authorization under section 205 of the FPA for the sales of energy or capacity to a franchised public utility affiliate. Seller currently is not affiliated with any public utility with a franchised electric service territory.

<sup>14</sup> See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440 (2007), clarified, 121 FERC ¶ 61,260 (2007), order on reh'g, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008), order on reh'g, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), order on reh'g, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009), order on reh'g, Order No. 697-D, 75 Fed. Reg. 14,342 (Mar. 25, 2010), FERC Stats. & Regs. ¶ 31,305 (2010), order on clarification, 131 FERC ¶ 61,021 (2010), aff'd sub nom. Mont. Consumer Counsel v. FERC, 659 F.3d 910 (9th Cir. 2011), cert denied sub nom. Pub. Citizen, Inc. v. FERC, 133 S. Ct. 26 (2012); see also Heartland Energy Services, Inc., 68 FERC ¶ 61,223 at ¶ 62,060-63 (1994); Enron Power Enter. Corp., 52 FERC ¶ 61,193, at 61,708 (1990); FirstEnergy Servs., Inc., 94 FERC ¶ 61,052 at 61,251-52 (2001).



affiliates has horizontal or vertical market power. Therefore, the Commission should grant Seller's request for market-based rate authorization.

### **1. Seller Lacks Horizontal Market Power**

The Commission reviews horizontal market power by assessing the market power of the seller and any of its affiliates that own or control generation in the relevant market.<sup>15</sup> The Commission has indicated that the relevant geographic market is the BAA or submarket, as applicable, where the seller's generation is physically located.<sup>16</sup> Accordingly, Seller is using the MISO BAA as the relevant geographic market for purposes of its horizontal market power analysis.

The Commission has authorized the submission of streamlined applications and the use of simplifying assumptions, where appropriate.<sup>17</sup> Seller has conservatively assumed that all of the generation capacity owned or controlled by Seller or any of its affiliates located within the MISO BAA is uncommitted. Seller also has conservatively assumed that all of the generation capacity owned or controlled by Seller's affiliates in first-tier markets is uncommitted and available for import within the MISO BAA. Using these conservative assumptions, the total capacity that will be owned or controlled by Seller and its affiliates in the MISO BAA after consummation of the Transaction will be approximately 64 MW. In first-tier markets to the MISO BAA, Seller is affiliated with approximately 1,450 MW in the PJM BAA, and 152 MW in the SPP BAA. Therefore, Seller conservatively assumes that the total uncommitted capacity owned or controlled by

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<sup>15</sup> See Order No. 697 at PP 231-32 n.216; AEP Power Mktg., Inc., 107 FERC ¶ 61,018 at P 73 n.63 (2004), order on reh'g, 108 FERC ¶ 61,026 at P 31 (2004).

<sup>16</sup> Id.

<sup>17</sup> See Order No. 697 at P 321; AEP Power Marketing, Inc., 107 FERC ¶ 61,018 at PP 113-117.

Seller and its affiliates in the MISO BAA and first-tier markets is approximately 1,666 MW.

As demonstrated below, Seller passes the pivotal supplier screen and market share screens for the relevant market. In any event, Seller commits to comply with all applicable MISO rules regarding market monitoring and mitigation.<sup>18</sup>

a) Pivotal Supplier Screen

The pivotal supplier screen compares the amount of uncommitted capacity owned or controlled by an applicant in the relevant market and the net uncommitted capacity in that market. If the applicant's total uncommitted capacity in the market is less than the difference between the total uncommitted capacity and the wholesale load, then the applicant passes the screen.<sup>19</sup>

The total uncommitted capacity of Seller and its affiliates is approximately 1,666 MW. In contrast, the net uncommitted supply in the MISO BAA is 36,066 MW. These numbers are reflected Attachment B, which is based on data recently submitted by MISO to the Commission.<sup>20</sup> Because the uncommitted capacity owned or controlled by Seller and its affiliates within the MISO BAA is less than the net uncommitted supply in the MISO BAA, Seller passes the pivotal supplier test for the relevant market.

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<sup>18</sup> The Commission has adopted a rebuttable presumption that existing Commission-approved RTO/ISO market monitoring and mitigation is sufficient to address any market power concerns. See Order No. 697-A at P 111; see also NextEra Energy Power Market, LLC, Letter Order, Docket Nos. ER09-832-004, et al. (Mar. 25, 2010).

<sup>19</sup> Order No. 697 at P 42; AEP Power Mktg., Inc., 107 FERC ¶ 61,018 at P 99.

<sup>20</sup> See Docket No. AD10-2-004, Accession No. 20141218-5384, "2014 Simultaneous Transmission Import Limit Study for MISO Region of Midcontinent Independent System Operator, Inc.", filed Dec. 18, 2014 (Public Version).

b) Market Share Screen

The market share screen calculates the applicant's share of uncommitted capacity in the relevant market during each of the four seasons. If an applicant's share of uncommitted capacity in the relevant market is under 20% in each season, the applicant passes the market share screen.

Seller and its affiliates own or control no more than 2.96% of the total uncommitted capacity within the MISO BAA in any of the four seasons. Seller's market share within the MISO BAA for each of the four seasons is reflected in Attachment B, which is based on data recently submitted by MISO to the Commission.<sup>21</sup> Because Seller and its affiliates own or control less than 20% of the total uncommitted capacity in the MISO BAA in all four seasons, Seller also passes the market share screen for the relevant market.

Therefore, Seller and its affiliates do not have horizontal market power.

**2. Seller Lacks Vertical Market Power**

None of Seller or any of its affiliates owns a 10% or greater voting interest in or controls any electric transmission facilities used for the transmission of electricity in interstate commerce in the United States, except for the limited equipment necessary to interconnect individual generating facilities to the transmission grid. Further, none of Seller or any of its affiliates owns or controls any other inputs to electric power production, including intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; physical coal supply sources and ownership of or control over who may access transportation of coal supplies.

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<sup>21</sup> Id.

Seller affirms that Seller and its affiliates have not erected barriers to entry in the relevant market and will not erect barriers to entry in the relevant market. Therefore, Seller and its affiliates do not have vertical market power.

### **3. There Is No Potential for Affiliate Abuse or Reciprocal Dealing**

The Commission traditionally has indicated its concern that a public utility having a franchised service territory and an affiliate may be able to transact in ways that transfer benefits from the captive customers of the franchised utility to the affiliate and its shareholders. In Order No. 697, the Commission discontinued considering affiliate abuse as a separate “prong” of the market-based rate analysis and codified affiliate restrictions in the Commission’s regulations as a condition of obtaining and retaining market-based rate authority. Seller currently is not affiliated with a public utility having a franchised service territory. Nonetheless, Seller agrees to abide by the Commission’s codified affiliate restrictions as a condition of its market-based rate authority.

#### **C. Ancillary Services**

Seller seeks authorization to sell certain ancillary services in the markets administered by MISO, PJM, New York Independent System Operator, Inc. (NYISO), ISO New England, Inc. (ISO-NE), California Independent System Operator Corporation (CAISO), and SPP. The Commission requires a separate study of the ancillary services markets to support a market-based rate filing for ancillary services. With respect to sales of ancillary services in the markets operated by MISO, PJM, NYISO, ISO-NE, CAISO, and SPP, Seller relies, in the same manner as other sellers, on the studies submitted and accepted by the Commission in previous orders.<sup>22</sup>

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<sup>22</sup> See e.g., AES Redondo Beach, L.L.C., 83 FERC ¶ 61,358 (1998), order on reh’g, 85 FERC ¶ 61,123 (1998), order on reh’g, 87 FERC ¶ 61,208, order on reh’g, 88 FERC ¶

In addition, Seller seeks authorization to sell ancillary services at market-based rates under requirements set forth in Avista Corp.,<sup>23</sup> as modified by Order No. 697<sup>24</sup> and 784,<sup>25</sup> in markets for which the Commission has not accepted a market power study and has not generically authorized the sale of ancillary services at market-based rates. Seller has included in its market-based rate tariff the applicable standard tariff provisions adopted in Order Nos. 697, 697-A, and 784 for the proposed sales of ancillary services described above.

#### **D. Reporting Requirements**

Seller agrees to comply with the reporting requirements normally imposed on sellers that are permitted to sell power at market-based rates. In particular, Seller will file Electric Quarterly Reports (EQRs) concerning its sales in conformance with the Commission's requirements.<sup>26</sup> Seller also will comply with the market power analysis

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61,096 (1999), order on reh'g and clarification, 90 FERC ¶ 61,036 (2000) (CAISO); see e.g. New England Power Pool, 85 FERC ¶ 61,379 (1998), reh'g denied, 95 FERC ¶ 61,074 (2001) (ISO-NE); see e.g., Cent. Hudson Gas & Elec. Corp., 86 FERC ¶ 61,062 (1999), order on reh'g and clarification, 88 FERC ¶ 61,138 (1999) (NYISO); see e.g., PJM Interconnection, L.L.C., 86 FERC ¶ 61,247 (1999); Atlantic City Elec. Co., 86 FERC ¶ 61,248 (1998), clarified, 86 FERC ¶ 61,310 (1999) (PJM); PJM Interconnection, L.L.C., 91 FERC ¶ 61,021 (2000); see e.g., Midwest Indep. Transmission Sys. Operator, Inc., 122 FERC ¶ 61,172 (2008), order on reh'g and clarification, 123 FERC ¶ 61,297 (2008) (MISO); Southwest Power Pool, Inc., 144 FERC ¶ 61,224 at PP 412-413 (2013) (SPP).

<sup>23</sup> 87 FERC ¶ 61,223 (1999), order on reh'g, 89 FERC ¶ 61,136 (1999).

<sup>24</sup> See Order No. 697 at PP 1058-61.

<sup>25</sup> Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies, Order No. 784, 78 Fed. Reg. 46,178 (July 30, 2013), FERC Stats. & Regs. ¶ 31,349 at PP 200-201 (2013); order granting reh'g, 146 FERC ¶ 61,114 (2014).

<sup>26</sup> Revised Public Utility Filing Requirements, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 (2002), order on reh'g, Order No. 2001-A, 100 FERC ¶ 61,074 (2002), order on reconsideration and clarification, Order No. 2001-B, 100 FERC ¶ 61,342 (2002), order directing filings, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), order directing refiling,

update requirements. In addition, pursuant to the requirements set forth in Section 35.42 of the Commission's regulations, Seller agrees to file timely notices of material changes in status that explain whether such changes reflect a departure from the characteristics relied upon by the Commission in originally granting Seller market-based rate authority.<sup>27</sup>

Seller also agrees to comply with the Commission's market behavior rules codified at 18 C.F.R. § 35.41. In accordance with section 35.41(c) of the Commission's regulations, as amended by Order Nos. 768 and 768-A,<sup>28</sup> to the extent Seller engages in reporting of transactions to publishers of electric or natural gas price indices, Seller will identify in its EQRs the publishers of electricity and natural gas indices to which Seller report its transactions.

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Order No. 2001-D, 102 FERC ¶ 61,334 (2003), order on filing requirements, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), clarification order, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), order adopting dictionary, Order No. 2001-G, 120 FERC ¶ 61,270 (2007), clarification order, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), order revising EQR data dictionary, Order No. 2001-I, 73 Fed. Reg. 65,526 (Nov. 4, 2008), FERC Stats. & Regs. ¶ 31,282 (2008); Electricity Market Transparency Provisions of Section 220 of the Federal Power Act, Order No. 768, 77 Fed. Reg. 61,896 (Oct. 11, 2012), FERC Stats. & Regs. ¶ 31,336 (2012), order partially extending compliance date, 142 FERC ¶ 61,105 (2013), order on reh'g, Order No. 768-A, 78 Fed. Reg. 24,101 (Apr. 24, 2013), 143 FERC ¶ 61,054 (2013) (requiring market participants excluded from Commission jurisdiction under section 205 of the FPA that have more than a *de minimis* market presence to file electronic quarterly reports); Revisions to Electric Quarterly Report Filing Process, Order No. 770, 77 Fed. Reg. 71,288 (Nov. 30, 2012), FERC Stats. & Regs. ¶ 31,338 (2012) (adopting filing of EQRs in XML format).

<sup>27</sup> See 18 C.F.R. § 35.42.

<sup>28</sup> Electricity Market Transparency Provisions of Section 220 of the Federal Power Act, Order No. 768, 77 Fed. Reg. 61,896 (Oct. 11, 2012), FERC Stats. & Regs. ¶ 31,336 at PP 137-138, 178 (2012), order partially extending compliance date, 142 FERC ¶ 61,105 (2013), order on reh'g, Order No. 768-A, 78 Fed. Reg. 24,101 (Apr. 24, 2013), 143 FERC ¶ 61,054 at PP 40, 47 (2013).

**E. Category 1 Seller Status**

The Commission's regulations define Category 1 Sellers as wholesale power marketers and wholesale power producers that meet each of the following criteria: (1) own or control 500 MW or less of generation in aggregate per region; (2) do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid; (3) are not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as the seller's generation assets; (4) are not affiliated with a franchised public utility in the same region as the seller's generation assets; and (5) do not raise other vertical market power issues.<sup>29</sup> Category 2 Sellers are all sellers that are not Category 1 Sellers.<sup>30</sup> Category 2 Sellers are required to submit updated market analyses every three years pursuant to the Commission's regional schedule.

Seller meets the criteria for Category 1 Seller status in all regions. Specifically, Seller does not own or control, and is not affiliated with, more than 500 MW of generation in aggregate in the Central region, and Seller does not own or control generation in any other region. Seller does not own, operate, or control transmission facilities other than limited equipment necessary to connect Seller's Facility to the transmission grid. In addition, Seller is not affiliated with any entity that owns, operates, or controls transmission facilities in the same region as Seller's generation assets. Further, Seller is not affiliated with a franchised public utility in any region and does not raise other vertical market power issues. Accordingly, Seller meets the criteria for

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<sup>29</sup> See id. § 35.36(a)(2).

<sup>30</sup> Id.

classification as a Category 1 Seller, as defined in 18 C.F.R. § 35.36(a) of the Commission's regulations, in all regions.

#### **IV. REQUEST FOR PRE-APPROVALS AND WAIVERS**

Seller seeks the same pre-approvals and waivers of Commission rules and filing requirements previously granted to other sellers permitted to sell at market-based rates.

This relief consists of:

- Waiver of Parts 41, 101, and 141 of the Commission's accounting and periodic reporting regulations except for sections 141.14 and 141.15;
- Waiver of Subparts B and C of Part 35 of the Commission's regulations, except as to sections 35.12(a), 35.13(b), 35.15, and 35.16; and
- Blanket approval under Part 34 for all future issuances of securities and assumptions of liability.

#### **V. REQUESTED EFFECTIVE DATE**

As discussed above, Seller must obtain market-based rate authorization prior to the consummation of the Transaction in order to begin making power sales upon consummation of the transaction. Subject to the receipt of Commission authorization, the Transaction is expected to close as soon as possible. Therefore, Seller respectfully requests that the Commission grant expedited treatment for this Petition and issue an order by March 3, 2015, accepting Seller's Market-Based Rate Tariff for filing effective March 3, 2015. Seller respectfully requests waiver of the Commission's prior notice requirement to permit such an effective date.



**VI. CONCLUSION**

WHEREFORE, for the reasons stated above, Seller request that (i) the Commission accept for filing Seller's proposed Market-Based Rate Tariff effective March 3, 2015; (ii) the Commission grant Seller's requests for waivers and blanket approvals; and (iii) the Commission grant Seller's request for expedited treatment and issue an order on this Petition by March 3, 2015.

Respectfully submitted,

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January 30, 2015

**ATTACHMENT A**

**U.S. ENERGY AFFILIATES OF CPV BIOMASS**

**Market-Based Rate Authority and Generation Assets of Competitive Power Ventures Holdings, LLC and Its Affiliates**

Filing Entity and its Energy Affiliates	Docket # Where MBR Authority was Granted	Generation Name	Owned by	Controlled by	Date Control Transferred	Location		In-Service Date	Nameplate and/or Seasonal Rating
						Balancing Authority Area	Geographic Region		
CPV Keenan II Renewable Energy Company, LLC	ER10-64-000	Keenan II Project	CPV Keenan II Renewable Energy Company, LLC	CPV Keenan II Renewable Energy Company, LLC	N/A	SPP	SPP	12/2010	152 MW (nameplate)
CPV Biomass, LLC	ER15-___-000	Benson Biomass	Benson Power, LLC	CPV Biomass, LLC	TBD	MISO	Central	5/2007	64 MW (nameplate)
CPV Maryland, LLC	ER13-343-000	St. Charles Energy Center	CPV Maryland, LLC	CPV Maryland, LLC	N/A	PJM	Northeast	Not yet in service	725 (nameplate)
CPV Sentinel, LLC	ER12-911-000	Sentinel Energy Center	CPV Sentinel, LLC	CPV Sentinel, LLC	N/A	CAISO	Southwest	5/2013	800 MW (nameplate)
CPV Shore, LLC	ER13-342-000	Woodbridge Energy Center	CPV Shore, LLC	CPV Shore, LLC	N/A	PJM	Northeast	Not yet in service	725 (nameplate)

**Electric Transmission Assets and/or Natural Gas Pipelines and/or Gas Storage Facilities of Affiliates of  
Competitive Power Ventures Holdings, LLC**

Filing Entity and its Energy Affiliates	Asset Name and Use	Owned by	Controlled by	Date Control Transferred	Location		Size
					Balancing Authority Area	Geographic Region	
CPV Shore, LLC	Generation tie line interconnecting CPV Shore, LLC's generating facility to the PJM-controlled grid.	CPV Shore, LLC	CPV Shore, LLC	N/A	PJM	Northeast	Approx. 4.2 miles of 230 kV line.
CPV Maryland, LLC	Generation tie line interconnecting CPV Maryland's generation facility to the PJM-controlled grid.	CPV Maryland, LLC	CPV Maryland, LLC	N/A	PJM	Northeast	230 kV interconnection is immediately adjacent to the site of CPV Maryland's generation facility.

**ATTACHMENT B**

**PIVOTAL SUPPLIER AND  
MARKET SHARE SCREENS**

**Benson Power, LLC**  
**Part I - Pivotal Supplier Analysis for MISO**

December 2012 to November 2013

Row	Generation	MW	Reference
Seller and Affiliate Capacity			
A	Installed Capacity	64	Nameplate rating from 2012 Form EIA-860 Data - Schedule 3, 'Generator Data' (Operable Units Only)
B	Long-Term Firm Purchases	0.0	
C	Long-Term Firm Sales	0.0	
D	Imported Power	1,602.0	Capacity from first tier markets (Keenan, Shore, Maryland)
Non-Affiliate Capacity			
E	Installed Capacity	144,413.0	Installed capacity provided in MISO Report (p.15), less Row A
F	Long-Term Firm Purchases	3,157.0	MISO Report (p.15)
G	Long-Term Firm Sales	(1,134.0)	MISO Report (p. 16)
H	Imported Power	11,526.0	Summer SIL provided in MISO Report (pp.13, 17), less Row D
I	Balancing Authority Area Reserve Requirement	(2,438.0)	MISO Report (p.16)
J	Amount of Line I Attributable to Seller, if any	0.0	
K	Total Uncommitted Supply (SUM A,B,C,D,E,F,G,H,I,M)	58,504.0	
Load			
L	Balancing Authority Area Annual Peak Load	121,124.0	MISO Report (p.17)
M	Average Daily Peak Native Load in Peak Month	(98,686.0)	MISO Report (p.17)
N	Amount of Line M Attributable to Seller, if any	0.0	
O	Wholesale Load (SUM L,M)	22,438.0	
P	Net Uncommitted Supply (K-O)	36,066.0	
Q	Seller's Uncommitted Capacity (SUM A,B,C,D,J,N)	1,666.0	
	Result of Pivotal Supplier Screen (Pass if Line Q < Line P) (Fail if Line Q > Line P)	PASS	

**Benson Power, LLC**

**Part II - Wholesale Market Share Analysis for MISO**

December 2012 to November 2013

Row		Winter (MW)	Spring (MW)	Summer (MW)	Fall (MW)	Reference
<b>Seller and Affiliate Capacity</b>						
A	Installed Capacity	64.0	64.0	64.0	64.0	nameplate rating from 2012 Form EIA-860 Data - Schedule 3, 'Generator Data' (Operable Units Only)
B	Long-Term Firm Purchases	0.0	0.0	0.0	0.0	
C	Long-Term Firm Sales	0.0	0.0	0.0	0.0	
D	Seasonal Average Planned Outages	0.0	0.0	0.0	0.0	
E	Imported Power	1,602.0	1,602.0	1,602.0	1,602.0	Capacity from first tier markets (Keenan, Shore and Maryland)
<b>Capacity Deductions</b>						
F	Average Peak Native Load in the Season	(83,507.0)	(78,036.0)	(96,986.0)	(82,497.0)	MISO Report (p.9)*
G	Amount of Line F Attributable to Seller, if any	0.0	0.0	0.0	0.0	
H	Amount of Line F Attributable to Others, if any	(83,507.0)	(78,036.0)	(96,986.0)	(82,497.0)	
I	Balancing Authority Area Reserve Requirement	(2,440.0)	(2,439.0)	(2,438.0)	(2,440.0)	MISO Report (p.8)
J	Amount of Line I Attributable to Seller, if any	0.0	0.0	0.0	0.0	
K	Amount of Line I Attributable to Others, if any	(2,440.0)	(2,439.0)	(2,438.0)	(2,440.0)	
<b>Non-Affiliate Capacity</b>						
L	Installed Capacity	144,413.0	144,413.0	144,413.0	144,413.0	Installed capacity provided in MISO Report (p.7), less Row A
M	Long-Term Firm Purchases	3,157.0	3,157.0	3,157.0	3,157.0	MISO Report (p.7)
N	Long-Term Firm Sales	(1,134.0)	(1,134.0)	(1,134.0)	(1,134.0)	MISO Report (p.7)
O	Local Seasonal Average Planned Outages	(7,444.0)	(20,998.0)	(3,857.0)	(15,934.0)	MISO Report (p. 8)
P	Uncommitted Capacity Imports	13,771.0	18,844.0	11,526.0	16,425.0	SIL provided in MISO Report (p.13), less Row E
<b>Supply Calculation</b>						
Q	Total Competing Supply (SUM L,M,N,O,P,H,K)	66,816.0	63,807.0	54,681.0	61,990.0	
R	Seller's Uncommitted Capacity (SUM A,B,C,D,E,G,J)	1,666.0	1,666.0	1,666.0	1,666.0	
S	Total Seasonal Uncommitted Capacity (SUM Q,R)	68,482.0	65,473.0	56,347.0	63,656.0	
T	Seller's Market Share (R/S)	2.43%	2.54%	2.96%	2.62%	
	Results (Pass if < 20%) (Fail if ≥ 20%)	PASS	PASS	PASS	PASS	

\* "2014 Simultaneous Transmission Import Limit Study for MISO Region of Midcontinent Independent System Operator, Inc.", Docket No. AD10-2-004, Accession No. 20141218-5384, filed Dec. 18, 2014 (Public Version) (MISO Report).

## ATTACHMENT C

Consistent with the Commission's practice in other proceedings involving passive investors, Seller provides the following information regarding the Class B and Class C Interests in Benson Power, LLC:

1. Please clarify whether any of the passive interests include voting rights (i.e., common stock or the equivalent of common stock).<sup>1</sup>

The Class B Interests in Seller held by Investors do not confer full voting rights. Holders of Class C Interests do not have any of the voting and approval rights of a Member. The limited consent rights attached to the Class B Interests are described below and in Exhibit 1 to this Attachment.

2. If the passive interests are non-voting, please clarify the following:

- a. Do they represent a separate class of security in Seller's ownership structure?

The upstream ownership of Seller is comprised of three classes of membership interests, the Class A managing interests in Seller and Class B and Class C non-managing interests in Seller.

- i. If so, do such securities confer on the holder limited consent/veto rights over major corporate actions that could affect the value of the holder's investment?

There are limited consent rights attached to the Class B Interests. See Exhibit 1 to this Attachment for the relevant excerpts from a final draft of the Benson Power Limited Liability Company Agreement of (LLC Agreement).

- b. Is there a list describing the major corporate actions over which the holder of the passive or non-voting securities has consent/veto rights?

See Exhibit 1 to this Attachment, which sets forth an exhaustive list of the major corporate actions over which Investors have consent/veto rights.

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<sup>1</sup> As used herein, "voting security" means "any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company." 18 C.F.R. § 366.1 (2014); see also AES Creative Resources, L.P., 129 FERC ¶ 61,239 at P 24 (2009).



- i. If so, please file a publicly available exhaustive list describing the major corporate actions over which the holder of the passive or non-voting securities has consent/veto rights.

See Exhibit 1 to this Attachment, which sets forth an exhaustive list of the major corporate actions over which Investors have consent/veto rights.

- c. Do the holders of the asserted passive or non-voting securities have any power to remove the manager (e.g., the general partner if a partnership, or managing member if a manager-managed limited liability company) of the facility?

The holders of the Class B Interests may remove the managing member of Benson Power for certain actions. See Exhibit 1 to this Attachment for a description of such removal rights.

- i. If so, is their power to remove limited to “cause”, i.e., situations such as criminal activity/fraud on the part of the manager?

The Class B members must have cause to remove the managing member of Seller. See § 6.1 of the LLC Agreement contained in Exhibit 1 to this Attachment for a description of the limited circumstances under which the Class B members may remove the managing member of Seller.

- ii. Or, under what circumstances can they remove the manager?

See Exhibit 1 to this Attachment for a description of the removal rights held by Investors.

- d. If it is asserted that the securities in question confer only limited approval/veto rights, who exercises day-to-day control over Seller’s jurisdictional facilities?

CPV Biomass, through its ownership of 100% of the Class A Interests in Seller, is the manager of Seller and has day-to-day control over Seller and the Facility.

- e. Does the holder of the asserted passive or non-voting securities have any day-to-day input or control over the facility?

Neither of Investors nor any of their affiliates has any day-to-day input or control over Seller’s Facility or the sale of power therefrom.

**EXHIBIT 1 TO ATTACHMENT C**  
**EXCERPTS FROM**  
**LIMITED LIABILITY COMPANY AGREEMENT**  
**OF BENSON POWER, LLC**

## **RELEVANT DEFINITIONS**

“Cause” means, with respect to any Person, (i) such Person’s fraud, willful misconduct or gross negligence, (ii) the breach by such Person of an obligation under this Agreement or any agreement between such Person and the Company or applicable law that could reasonably be expected to result in a Material Adverse Effect, if in the case of this clause (ii) such breach is curable and continues uncured for a period of thirty (30) or more days after such Person obtains knowledge of such breach; provided, however, that if such Person commences efforts to cure such breach within such thirty (30) day period, it may continue to effect such cure for an additional ninety (90) days, so long as such Person provides written notice to the Members that such breach is reasonably capable of being cured and within such period and such Person diligently pursues such cure, or (iii) the occurrence of a Bankruptcy with respect to such Person.

“Change of Control” means, in one or a series of transactions, (a) a sale of all or substantially all of the Membership Interests to a Person or a single affiliated group of Persons that is a Third Party Buyer, (b) the sale of all or substantially all of the assets of the Company to a Third Party Buyer, or (c) a change of control of the Company, in which a Third Party Buyer obtains control of the Company, and in the case of (a), (b) or (c), the Third Party Buyer repays in full, or causes to be repaid in full, all indebtedness of the Company owed to financial institutions that are current or former members of the Company.

“Class A Member” means a Member that holds Class A Units; *provided* that if a Member holds both Class A Units, Class B Units and/or Class C Units, such Member is a Class A Member only to the extent of the Class A Units held by such Member.

“Class A Membership Interest” means with respect to any Class A Member, (a) that Class A Member’s status as a Class A Member, (b) that Class A Member’s share of the income, gain, loss, deduction and credits of, and the right to receive distributions from, the Company with respect to Class A Units; (c) all other rights, benefits and privileges enjoyed by that Class A Member (under the Act, this Agreement, or otherwise) in its capacity as a Class A Member, including that Class A Member’s rights to vote, consent and approve and otherwise to participate in the management of the company, to the extent provided in this Agreement; and (d) all obligations, duties and liabilities imposed on that Class A Member (under the Act, this Agreement or otherwise) in its capacity as a Class A Member, including any obligations to make Capital Contributions.

“Class A Units” means Units representing Class A Membership Interests in the Company having the rights, preferences and designations provided for Class A Units herein.

“Class B Member” means a Member that holds Class B Units; *provided* that if a Member holds Class A Units and/or Class B Units and Class C Units, such Member is a Class B Member only to the extent of the Class B Units held by such Member.

“Class B Membership Interest” means with respect to any Class B Member, (a) that Class B Member’s status as a Class B Member; (b) that Class B Member’s share of the income,

gain, loss, deduction and credits of, and the right to receive distributions from, the Company with respect to Class B Units; (c) all other rights, benefits and privileges enjoyed by that Class B Member (under the Act, this Agreement, or otherwise) in its capacity as a Class B Member, including that Class B Member's rights to vote, consent and approve and otherwise to participate in the management of the Company, to the extent provided in this Agreement; and (d) all obligations, duties and liabilities imposed on that Class B Member (under the Act, this Agreement or otherwise) in its capacity as a Class B Member, including any obligations to make Capital Contributions.

"Class B Units" means Units representing Class B Membership Interests in the Company having the rights, preferences and designations provided for Class B Units herein.

"Class C Member" means a Member that holds Class C Units; *provided* that if a Member holds Class A Units and/ or Class B Units and Class C, such Member is a Class C Member only to the extent of the Class C Units held by such Member.

"Class C Membership Interest" means with respect to any Class C Member, (a) that Class C Member's status as a Class C Member; (b) that Class C Member's share of the income, gain, loss, deduction and credits of, and the right to receive distributions from, the Company with respect to Class C Units; (c) all other rights, benefits and privileges enjoyed by that Class C Member (under the Act, this Agreement, or otherwise) in its capacity as a Class C Member, including that Class C Member's rights to consent and approve and otherwise to participate in the management of the Company, to the extent provided in this Agreement; and (d) all obligations, duties and liabilities imposed on that Class C Member (under the Act, this Agreement or otherwise) in its capacity as a Class C Member, including any obligations to make Capital Contributions.

"Class C Units" means Units representing Class C Membership Interests in the Company having the rights, preferences and designations provided for Class C Units herein.

"CPV" means CPV Biomass Holdings, LLC.

"CPV Disposition" means a Disposition CPV's Membership Interest pursuant to **Section 9.4**.

"Independent" means a Person who a) is not compensated by, employed by, or an officer or director of any Member and who otherwise has no material or pecuniary relationship with the Company, except for receiving compensation as an Independent Director, and b) is not a director, officer or 5% or more owner of a Person other than the Company that owns or controls generation facilities that are interconnected to the transmission system under the control of the Midcontinent Independent System Operator, Inc. or owns or controls any transmission facilities; and c) is not an officer or director of (1) a Public Utility (as that term is defined under Section 201(e) of the FPA) other than the Company, (2) a bank, trust company, banking association or firm authorized by law to underwrite or participate in the marketing of securities of the Company, or (3) any company supplying electrical equipment to the Company, unless the holding of any of the interlocking positions described in clauses (c)(1), (2) and (3) is authorized by FERC.

“Independent Director” has the meaning provided in **Section 6.2(a)**.

“Managing Member” has the meaning provided in **Section 6.1(a)**.

“Material Adverse Effect” means any change (or changes taken together) in, or effect on, the Company or the Project that is materially adverse to the operations or the physical or financial condition of the Company or the Project.

“Member” means each of the parties executing this Agreement, and any additional Person which is admitted to the Company as a member and becomes a party hereto after the Effective Date pursuant to and in accordance with this Agreement, but such term does not include any Person that has ceased to be a member in the Company.

“Membership Interest” means a Class A Membership Interest or a Class B Membership Interest or a Class C Membership Interest. A Member may hold Class A Membership Interests, Class B Membership Interests and Class C Membership Interests.

“Percentage Interest” means, as to each Member, the number of Units held by such Member divided by the total number of Units outstanding.

“Project” means the approximately 55 MW turkey litter and biomass-fueled generating facility located in Benson, Minnesota, and all related personal, intellectual and real property and interests therein.

“Project Contract” means each of the agreements listed on **Schedule 1**, and any other agreement relating to the Project to which the Company is a party from time to time.

“Qualified Transferee” means, with respect to a proposed Disposition of a Class A Membership Interest, an entity that both (a) has (i) a credit rating of at least “BBB-” / “Baa3” or a tangible net worth of at least \$25,000,000 or (ii) a direct or indirect parent with a credit rating of at least “BBB-” / “Baa3” or a tangible net worth of at least \$25,000,000, and in the case of clause (ii) such parent provides an indemnity in favor of the Class B Members reasonably acceptable to the Class B Members, and (b) has operated or managed for a period of at least three (3) years biomass power generation facilities with an aggregate installed nameplate capacity of at least 100 MWs, and is approved by both Independent Directors.

“Required Vote” means Class A Members and Class B Members collectively holding at least 66 2/3% of all then outstanding Class A Units and Class B Units.

“Supermajority Vote” means Class A Members and Class B Members collectively holding at least 98.5% of all then outstanding Class A Units and Class B Units.

“Third Party Buyer” means a Person or a single affiliated group of Persons that do not include the Company or the asset manager of the Project or any of their respective Affiliates, members, managers, shareholder, officers, directors, agents or other representatives.

“Units” means Class A Units, Class B Units and Class C Units.

## **MANAGEMENT OF BENSON POWER**

### 6.1 Managing Member.

(a) Subject to the limitations set forth in this Agreement, the business and affairs of the Company, including the day-to-day management, operations and business of the Company, shall be managed by a Member appointed pursuant to **Section 6.1(b)** or **Section 6.3** (such Member, the “Managing Member”) subject to, to the extent set forth in **Section 6.2**, certain approvals by the Board.

(b) CPV shall be the initial Managing Member. The Member acting as Managing Member shall hold such position until the earlier of (i) such Member’s removal pursuant to this **Section 6.1** or (ii) if the Managing Member is CPV, a CPV Disposition.

(c) Subject to the provisions of this **Article 6**, to the fullest extent permitted by applicable law, the Managing Member shall be authorized to act on behalf of and to bind the Company in all respects, without any further consent, vote or approval of the Members or the Board, and the Managing Member’s powers shall include the authority to negotiate, complete, execute and deliver any and all agreements, deeds, instruments, receipts, certificates and other documents on behalf of the Company, and to take all such other actions on behalf of the Company as the Managing Member may consider necessary, prudent or advisable in connection with the management of the business and affairs of the Company; *provided, however*, that no agreement, deed, instrument or other document to which the Company is a party or by which it is bound shall include restrictions on Dispositions of Membership Interests that differ from those set forth in **Article 9** except with the prior written consent of each Member that would be subject to the additional or different restrictions.

(d) The Managing Member may, but need not, appoint from among employees of an Affiliate of the Managing Member one or more officers of the Company. Each officer shall perform such duties and have such powers as the Managing Member shall designate from time to time. Each officer shall hold office at the pleasure of the Managing Member and until his or her successor shall have been duly appointed and qualified, or until he or she shall resign or shall have been removed by the Managing Member. Any individual may hold any number of offices. An officer may resign as such at any time. Such resignation shall be made in writing and shall take effect at the time specified therein or, if no time is specified, at the time of its receipt by the Managing Member. The acceptance of a resignation shall not be necessary to make it effective, unless expressly so provided in the resignation. Any officer may be removed as such, either with or without cause, at any time by the Managing Member. The Company shall maintain Directors and Officers liability insurance in an aggregate amount of at

least \$1,000,000 (“**D&O Insurance**”).

(e) The Member acting as Managing Member may be removed when Cause exists as determined by, and pursuant to, a Required Vote (excluding any Member that is an Affiliate of Managing Member), and upon such vote the Member acting as the Managing Member shall, subject to **Section 6.1(f)**, be deemed to have been removed and the position of Managing Member shall be deemed vacant. Upon removal, the Managing Member shall transfer its Membership Interest to the successor Managing Member for a purchase price of \$1,000.

(f) Upon the removal of the Member acting as the Managing Member pursuant to **Section 6.1(e)**, or in the event the position is otherwise vacant, the position of Managing Member shall, notwithstanding such removal, remain with such removed Member until such vacancy shall have been filled by (i) another Member, or (ii) a Person that is not a Member but agrees in writing with the Company for the benefit of all of the Members, pursuant to a management or similar agreement on terms and conditions (including standard of care), to perform the responsibilities and obligations of the Managing Member hereunder, in each case by action of both of the Independent Directors; *provided* that no Affiliate of such removed Managing Member may fill such vacancy in the position of Managing Member hereunder.

(g) The Company shall pay the initial Managing Member for its services in managing the operations, affairs and business of the Company a fee of \$100,000 in the first 12 months of the Term and \$50,000 in each of the remaining 12-month periods; *provided, however*, that if the initial Managing Member devotes more than 500 man-hours in managing the Company in any year, the Managing Member shall be compensated for each man-hour above 500 at the hourly billing rates set forth in Schedule II. Each Member shall have the right at all times during normal business hours and at its own expense to examine the man-hour records of the Managing Member pertaining to its services provided to or on behalf of the Company. Such right may be exercised through any agent or employee of such examining Member or by an independent public accountant, attorney or other consultant so designated by such examining Member subject to the confidentiality provisions set forth in **Section 13.10**.

(h) To the fullest extent permitted by Law, the Managing Member and its respective officers, directors, employees and agents shall be exculpated from, and the Company shall indemnify such Persons, from Distributable Cash, from and against, all claims any of them incur by reason of any act or omission performed or omitted by such Person on behalf of the Company in performing the Managing Member’s duties hereunder or relating to the Company’s activities and business consistent with its rights and obligations under law and this Agreement; *provided, however*, that this indemnity does not apply to claims that are attributable to the gross negligence, willful misconduct or fraud of such Person or a breach by the Managing Member or the Class A Member or any of their respective Affiliates of

their covenants or representations set forth in the Asset Management Agreement.

## 6.2 Board of Directors.

(a) Prior to a Change of Control, the Company shall have a board of directors (the “**Board**”) that shall consist of three directors, including the Managing Member and two Independent directors (the “**Independent Directors**”) selected from time to time by the Managing Member. All right, power and authority of each director (as a director) shall be limited to the extent necessary to exercise the approval rights specifically set forth in this Agreement and no director (as a director) shall have any other rights or powers or any authority to bind the Company. Each Independent Director shall be appointed for a term of six months and may be removed prior to expiration of a term by the Managing Member only for Cause and may resign at any time. Each director that was selected as an Independent director shall resign immediately if it ceases to qualify as Independent. Each Independent Director shall resign upon a Change of Control.

(b) The Company shall pay each Independent Director for its services on the Board a fee of \$25,000 per six month term served. All directors shall be named insureds under the D&O Insurance.

(c) The Managing Member shall obtain the prior consent of at least one Independent Director for the actions listed below. To the fullest extent permitted by law, including Section 18-1101(c) of the Act, each director shall consider only the interests of the Company, including the Company’s creditors, in consenting to any of the following:

(i) approval of each annual operating budget for the Company and of any proposed budget line item variance of 10% or more or of proposed variances in the aggregate of 10% or more of the approved budget;

(ii) execution or amendment by the Company of any of the following agreements: any power purchase and sale agreement; any interconnection agreement; any fuel supply or transportation agreement with a term of greater than two years or value greater than \$2.5 million; and any agreement with an asset manager or operator of the Project;

(iii) appointment of officers of the Company;

(iv) removal of the asset manager or operator of the Project for Cause and selection of a replacement asset manager or operator of the Project; and

(v) capital expenditures of \$2,500,000 (individually or in the aggregate).

(d) Consent by an Independent Director with respect to any of the foregoing action shall be given at a duly called meeting of the Board. A meeting



of the Board shall be duly called if notice of the time, date and place of meeting shall have been given to each director by the Managing Member by physical or electronic delivery sent to the address of each director at least 10 days in advance of such meeting; *provided* that no notice need be given to a director who waives notice before or after such meeting or who attends such meeting without protesting at or before its commencement the inadequacy of notice to such director. The directors may also participate in meetings by means of a conference call or similar communications equipment that permits all directors to hear each other. Any consent by the Independent Directors may be given without a meeting if a written consent to such action has been executed by each Independent Director (which may be executed in counterparts) and a copy thereof has been delivered to the Managing Member at the principal place of business of the Company. Unless otherwise specified therein, such written consent shall be deemed effective on the date when copies of counterparts thereof signed by each Independent Director to such action have been received by the Managing Member.

(e) To the fullest extent permitted by Law, each director and its respective officers, directors, employees and agents shall be exculpated from, and the Company shall indemnify such Persons, from Distributable Cash, from and against, all claims any of them incur by reason of any act or omission performed or omitted by such Person on behalf of the Company in performing its duties hereunder or relating to the Company's activities and business consistent with its rights and obligations under law and this Agreement; *provided, however*, that this indemnity does not apply to claims that are attributable to the gross negligence, willful misconduct or fraud of such Person.

6.3 Required Vote. Except to the extent a Member is expressly authorized to act with regard to a matter under this Agreement, no Member, other than a Member acting in its capacity as Managing Member, shall participate in any fashion in the control or management of the business or affairs of the Company, shall have any right or authority to act for or bind the Company, or shall have any right to vote or participate in decisions on any matters. A Required Vote (but excluding, in the case of a vote to remove a Managing Member, the vote of any Member that is, or is an Affiliate of, the Managing Member) shall be required with respect to the following actions:

(a) the incurrence, refinancing, modification or guaranty by the Company, of any indebtedness in excess of \$2,000,000 (on a per occurrence basis) other than loans made by Members in accordance with **Section 4.2** or the imposition on the assets of the Company of any Encumbrance securing an obligation or obligations which individually exceeds \$1,000,000 or in the aggregate exceed \$2,000,000;

(b) the waiver, compromise or forgiveness by the Company of any indebtedness or claim owed, or the commencement, dismissal, termination or settlement of any litigation, tax dispute or litigation, insurance claim, condemnation claim or other matter or claim by the Company, in each case in excess of \$1,000,000 (on a per occurrence basis);

(c) the Disposition of all or substantially all of the assets of the Company or the merger, consolidation, recapitalization, business combination, exchange or similar reorganization involving the Company;

(d) the commencement or filing of any bankruptcy or similar proceeding of, or the liquidation or the dissolution of, the Company, or the appointment of a liquidating trustee of the Company;

(e) the removal of the operator or the asset manager for Cause and the appointment of a new operator or asset manager of the Project;

(f) the removal of the Managing Member for Cause; and

(g) as provided in **Sections 7.1, 8.5** and **9.1(e)**.

6.4 Supermajority Vote. A Supermajority Vote shall be required with respect to the following actions:

(a) the making of any amendment to this Agreement;

(b) causing the Company to engage in any business or activity other than as described in **Section 3.3**;

(c) the making by the Company of (i) any election to be treated as a corporation or any other tax-paying entity for federal or applicable state or local income tax purposes or to be any entity that is not treated as a partnership for federal or applicable state or local income tax purposes, or to be excluded from the application of the provisions of subchapter K of chapter 1 of subtitle A of the Code or any similar provisions of applicable state or local law, or (ii) any other material tax election not referred to in **Section 9.6**, or, (iii) in accordance with **Section 8.9**, (A) any filing of a request for administrative adjustment, or (B) any settlement agreement relating to any Company item of income, gain, loss, deduction or credit for any taxable year of the Company;

(d) the authorization or issuance of (A) any Membership Interest or other equity interests in the Company or (B) any warrants, options or similar rights for, or any security or instrument convertible to a Membership Interest or other equity interests in the Company;

(e) (i) the approval of any Disposition of a Membership Interest that is not a Permitted Transfer, or the admission of any new Member other than a transferee in a Permitted Transfer;

(f) (i) the making of any distributions, whether in cash or in kind, other than as provided in this Agreement, or the purchase, redemption or other retirement of all or part of a Membership Interest;

(g) the making of any determination required or permitted to be made

by the Company accordance with the definitions of the terms “Depreciation” and “Gross Asset Value” under **Section 2.1**;

(h) except as required by law, change the method of tax accounting applicable to the Company to the extent any such change would have an adverse effect on the timing or amount of tax depreciation deductions, including making any election under Code Sections 168(b)(2)(D), 168(b)(3)(D), 168(f)(1), or 168(g)(7) or any election out of bonus depreciation with respect to any asset of the Company; and

(i) as provided in **Section 11.2**.

6.5 Meetings. Except as otherwise set forth in this Agreement, any action to be taken by vote of the Members shall be taken at a duly called meeting of the Members. At least two meetings of Members shall be held during each Fiscal Year. The Managing Member and any other Member may call additional meetings of the Members. A meeting of the Members shall be duly called if notice of the time, date and place of meeting shall have been given to each Member by the Managing Member or such Member calling such meeting by physical or electronic delivery sent to the address of each Member set forth on **Section 13.1** at least 10 days in advance of such meeting; *provided* that no notice need be given to a Member who waives notice before or after such meeting or who attends such meeting without protesting at or before its commencement the inadequacy of notice to such Member. The Members may attend a meeting in person or by proxy, and (except as otherwise provided in this **Section 6.5**) the Members may also participate in meetings by means of a conference call or similar communications equipment that permits all Members to hear each other. Any action required or permitted to be taken at a meeting of the Members may be taken without a meeting if a written consent to such action has been executed by each Member (which consent may be executed in multiple counterparts) whose affirmative vote is required for such action and a copy thereof has been delivered to the Managing Member at the principal place of business of the Company. Unless otherwise specified therein, such written consent shall be deemed effective on the date when copies of counterparts thereof signed by each Member whose affirmative vote is required for such action have been received by the Managing Member.

## **MEMBER VOTING RIGHTS**

1.2 Voting Rights. Only Class A Membership Interests and Class B Membership Interests shall be voting Membership Interests. Class C Membership Interests shall not entitle their holders to have any of the voting or approval rights of a “Member” under this Agreement; *provided, however*, that the provisions of this **Section 1.2** and **Sections 3.11** and **5.2** may not be amended or waived without the prior consent of 100% of the Class C Members, and no Class C Member shall be obligated to advance, contribute or provide additional Capital Contributions to the Company, except if such Class C Member agrees to do so, in its sole discretion.

### 3.7 Units.

(a) Membership Interests shall be represented by Units, divided into Class A Units (in the case of Class A Membership Interests), Class B Units (in the case of Class B Membership Interests) and Class C Units (in the case of Class C Membership Interests). The Membership Interests represented by Class A Units, Class B Units and Class C Units shall have the respective rights, powers and preferences ascribed to Class A Units, Class B and Class C Units in this Agreement.

(b) The class of Membership Interest and number of Units held by each Member shall be as provided in Appendix A. Upon a disposition by any Member in accordance with the provisions of this Agreement of any portion of such Member's Membership Interest, the assignee shall receive from the disposing Member a number of Units of the relevant class equal to the percentage of the Membership Interest so disposed of multiplied by the total number of Units owned by the disposing Member immediately prior to the disposition.

(c) Membership Interests additional to those in effect on the Effective Date may be created only with the prior written consent of a Supermajority Vote.

## **ADDITIONAL MATTERS REQUIRING MEMBER CONSENT**

3.9 Offices. The principal offices of the Company shall be located at \_\_\_\_\_, or at such other place as the Managing Member may, with the prior consent of the Members, determine

7.1 Affiliate Agreements; Conflicts of Interest. Subject to **Section 13.10**, a Member, or an Affiliate of a Member, may engage in and possess interests in other business ventures of any and every type and description, independently or with others, including those in competition with the Company, with no obligation to offer to the Company, any other Member, or any Affiliate of another Member, the right to participate therein. The Company may transact business with any Member or Affiliate thereof, provided the terms and conditions of those transactions are (i) approved by the Managing Member (or in the case of any transaction with an Affiliate of the Managing Member involving payments in excess of \$2,000,000 over the term thereof, approved by a Required Vote), or expressly contemplated in this Agreement, and (ii) no less favorable to the Company than those that could be obtained from an unrelated third party. To the extent that the Company and an Affiliate of any Member is a party to any of the Project Contracts in effect as of the Effective Date, such agreement is hereby deemed to be approved by the Managing Member and all of the Members for purposes of this paragraph. Such Member (whose Affiliate is a party to such agreement) shall treat such Affiliate as an unrelated third party during the course of its conduct and actions required under this Agreement which may affect such Affiliate. If the Managing Member fails to

enforce rights of the Company under agreement with an Affiliate of the Managing Member, the Members may, by a Required Vote, cause the Company to enforce such rights. Subject to the generality of the foregoing, the Members recognize and agree that they and their respective Affiliates currently engage in certain activities involving the generation, transmission, distribution, marketing and trading of electricity and other energy products, or the financing thereof, as well as other commercial activities related to such products (“Outside Activities”). The Members agree that (A) no Member or Affiliate of a Member shall be restricted in its right to conduct, individually or jointly with others, for its own account any Outside Activities, except, prior to the expiration of the PTC Period, any activity which would cause a Member to become a Related Party, and (B) no Member or its Affiliates shall have any duty or obligation, express or implied, to account to, or to share the results or profits of such Outside Activities with, the Company, any other Member or any Affiliate of any other Member. In no event shall the Company enter into an agreement for the supply of electrical equipment or services with any Person of which an Independent Director is an officer or director.

8.5 Taxation. The parties intend that the Company shall be treated as a partnership for federal and state (and local, if applicable) tax purposes. The Company’s federal and state (and local if applicable) income tax returns shall be prepared by the Tax Accountants subject to review by the Managing Member. Subject to **Sections 6.4** and **9.6**, all of the material Company elections for federal and state (and local if applicable) income tax purposes shall be determined by the Tax Matters Partner, subject to override by a Required Vote, except those specifically reserved by the Code to be made by the individual Members.

9.1 Permitted Transfers. A Member shall be permitted to Dispose of all or any part of its Membership Interest to another Person, including a Disposition pursuant to **Section 9.2, 9.3** or **9.4**, provided that such Disposition is first in compliance with all of the following conditions (a “Permitted Transfer”):

(e) in the case of a Disposition by a Managing Member or an Affiliate of the Managing Member other than a Disposition pursuant to **Section 9.4**, the Disposition shall be 100% of the Membership Interests of the Managing Member and its Affiliates, to a transferee that is a Qualified Transferee, and the transferring Member(s) and the Qualified Transferee shall have delivered an asset management agreement that has been approved by a Required Vote;

9.2 Right of First Refusal. Each time on or before [enter date that is 15 months after the Effective Date] a Class B Member or a Class C Member proposes to Dispose of some or all of its Units, such Member shall first offer such Units to the remaining Class B Members and Class C Members in accordance with the following provisions:

(a) the transferring Member shall deliver a written notice (“Option Notice”) to the Managing Member and the remaining Class B Members and Class C Members stating (i) the transferring Member’s bona fide intention to Dispose of its Units, (ii) the number of its Units (the “Transferred Interest”), (iii) the purchase price and terms of payment for which the transferring Member proposes to Dispose of such Units and (iv) the name and address of the proposed transferee.

### 9.3 Right of First Bid.

(a) Any Class B Member or Class C Member proposing to make a Disposition of some or all of its Units on or after [enter date 15 months from the Effective Date], shall provide written notice of its intention to make the Disposition (a “Transfer Notice”) to the Managing Member and to all remaining Class B Members and Class C Members. A Member may not deliver more than two Transfer Notices in any 360-day period.

9.4 CPV Disposition. CPV shall have the right to elect to Dispose of its entire Membership Interest for no compensation upon sixty (60) days’ prior notice to the other Members. During such sixty (60) day period (the “Transfer Period”) CPV shall provide reasonable assistance to the Members to transfer its Membership Interest to a successor acceptable to the other Members. If such transfer has not occurred by the end of the Transfer Period, CPV may transfer all, but not less than all, of its Membership Interest to the Company for no compensation.

### 10.1 Permitted Admissions.

(b) Admission Pursuant to Member Approval. Upon compliance with the terms of **Section 10.1(c)**, a Person which the Members have approved for admission to the Company as an additional Member pursuant to **Section 6.4(d)** shall be admitted as an additional Member with such Membership Interest as the Members shall have approved.

11.2 Dissolution. Except as otherwise provided in this **Section 11.2**, the Company shall be automatically, and without notice, be dissolved upon the happening of the earliest of any of the following events (no event other than those hereinafter listed shall cause or result in the automatic dissolution of the Company):

- (b) the Supermajority Vote of the Members to dissolve the Company;
- (c) any other event upon the occurrence of which dissolution is required by the Act (that the Act does not allow to be waived by agreement of the parties), unless, to the extent permitted by the Act, Members (other than the Member with respect to which such event occurs) by a Supermajority Vote elect in writing, within 90 days of the

date such event occurs, to continue the business of the Company, in which case the Company will not dissolve;

**Benson Power, LLC**  
**Market-Based Rate Tariff**

1. Availability. Benson Power, LLC (Seller) makes electric energy and capacity available under this Tariff to any purchaser for resale. Seller also makes available to any purchaser the ancillary services listed in this Paragraph 1:

RTO/ISO Specific

California: Seller offers regulation service, spinning reserve service, and non-spinning reserve service to the California Independent System Operator Corporation (CAISO) and to others that are self-supplying ancillary services to the CAISO.

MISO: Seller offers regulation service and operating reserve service (which include 10-minute spinning reserve and 10-minute supplemental reserve) for sale to the Midcontinent Independent System Operator, Inc. (MISO) and to others that are self-supplying ancillary services to MISO.

New England: Seller offers regulation and frequency response service (automatic generator control), operating reserve service (which includes 10-minute spinning reserve, 10-minute non-spinning reserve, and 30-minute operating reserve service) to purchasers within the markets administered by the ISO New England, Inc.

New York: Seller offers regulation and frequency response service, and operating reserve service (which include 10-minute non-synchronous, 30-minute operating reserves, 10-minute spinning reserves, and 10-minute non-spinning reserves) for sale to purchasers in the market administered by the New York Independent System Operator, Inc.

PJM: Seller offers regulation and frequency response service, energy imbalance service, and operating reserve service (which includes spinning, 10-minute, and 30-minute reserves) for sale into the market administered by PJM Interconnection, L.L.C. (PJM) and, where the PJM Open Access Transmission Tariff permits, the self-supply of these services to purchasers for a bilateral sale that is used to satisfy the ancillary services requirements of the PJM Office of Interconnection.

Southwest Power Pool: Seller offers regulation service and operating reserve service (which include 10-minute spinning reserve and 10-minute supplemental reserve) for sale to the Southwest Power Pool, Inc. (SPP) and to others that are self-supplying ancillary services to SPP.



### Third Party Provider

Third Party Ancillary Services: Seller offers Regulation and Frequency Response Service, Reactive Supply and Voltage Control Service, Energy and Generator Imbalance Service, Operating Reserve-Spinning, and Operating Reserve-Supplemental. Sales will not include the following: (1) sales to an RTO or an ISO, i.e., where that entity has no ability to self-supply ancillary services but instead depends on third parties; and (2) sales to a traditional, franchised public utility affiliated with the third-party supplier, or sales where the underlying transmission service is on the system of the public utility affiliated with the third-party supplier. Sales of Operating Reserve-Spinning and Operating Reserve-Supplemental will not include sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers, except where the Commission has granted authorization. Sales of Regulation and Frequency Response Service and Reactive Supply and Voltage Control Service will not include sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers, except at rates not to exceed the buying public utility transmission provider's OATT rate for the same service or where the Commission has granted authorization.

2. Applicability: This Tariff is applicable to all sales of energy, capacity, and ancillary services by Seller, which are (a) subject to the jurisdiction of the Commission, and (b) not made pursuant to another tariff on file with the Commission.
3. Rates: All sales shall be made at rates established by agreement between the purchaser and Seller.
4. Other Terms and Conditions: All other terms and conditions shall be established by agreement between the purchaser and Seller.
5. Compliance with Commission Regulations: Seller shall comply with the provisions of 18 C.F.R. Part 35, Subpart H, as applicable, and with any conditions the Commission imposes in its orders concerning Seller's market-based rate authority, including orders in which the Commission authorizes Seller to engage in affiliate sales under this Tariff or otherwise restricts or limits the Seller's market-based rate authority. Failure to comply with the applicable provisions of 18 C.F.R. Part 35, Subpart H, and with any orders of the Commission concerning Seller's market-based rate authority, will constitute a violation of this Tariff.
6. Limitations and Exemptions Regarding Market-Based Rate Authority: The Commission granted Seller in Docket No. ER15-\_\_\_\_-000 the following waivers and blanket authorization: (i) waiver of Parts 41, 101 and 141 of the

Commission's regulations, except for 141.14 and 141.15; (ii) waiver of Subparts B and C of Part 35 of the Commission's regulations, except for Sections 35.12(a), 35.13(b), 35.15 and 35.16; and (iii) blanket approval as to Section 204 of the FPA and Part 34 of the Commission's regulations for all future issuances of securities and debt and assumptions of liabilities.

7. Seller Category. Seller is a Category 1 seller, as defined in 18 C.F.R. 35.36(a), in all regions.
8. Effective Date. This Tariff is effective on such date as set by the Commission.

FERC rendition of the electronically filed tariff records in Docket No. ER15-00936-000  
Filing Data:  
CID: C004708  
Filing Title: MBR Tariff  
Company Filing Identifier: 505  
Type of Filing Code: 400  
Associated Filing Identifier:  
Tariff Title: MBR Tariff  
Tariff ID: 720  
Payment Confirmation:  
Suspension Motion:

Tariff Record Data:  
Record Content Description, Tariff Record Title, Record Version Number, Option Code:  
Benson Power, LLC, MBR Tariff, 0.0.0, A  
Record Narrative Name:  
Tariff Record ID: 1  
Tariff Record Collation Value: 1000000 Tariff Record Parent Identifier: 0  
Proposed Date: 2015-03-03  
Priority Order: 500  
Record Change Type: NEW  
Record Content Type: 1  
Associated Filing Identifier:

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3. Rates: All sales shall be made at rates established by agreement between the purchaser and Seller.

4. Other Terms and Conditions: All other terms and conditions shall be established by agreement between the purchaser and Seller.
5. Compliance with Commission Regulations: Seller shall comply with the provisions of 18 C.F.R. Part 35, Subpart H, as applicable, and with any conditions the Commission imposes in its orders concerning Seller's market-based rate authority, including orders in which the Commission authorizes Seller to engage in affiliate sales under this Tariff or otherwise restricts or limits the Seller's market-based rate authority. Failure to comply with the applicable provisions of 18 C.F.R. Part 35, Subpart H, and with any orders of the Commission concerning Seller's market-based rate authority, will constitute a violation of this Tariff.
6. Limitations and Exemptions Regarding Market-Based Rate Authority: The Commission granted Seller in Docket No. ER15-\_\_\_\_-000 the following waivers and blanket authorization: (i) waiver of Parts 41, 101 and 141 of the Commission's regulations, except for 141.14 and 141.15; (ii) waiver of Subparts B and C of Part 35 of the Commission's regulations, except for Sections 35.12(a), 35.13(b), 35.15 and 35.16; and (iii) blanket approval as to Section 204 of the FPA and Part 34 of the Commission's regulations for all future issuances of securities and debt and assumptions of liabilities.
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8. Effective Date. This Tariff is effective on such date as set by the Commission.

Document Content(s)

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