



based rate tariff by that date. As discussed below, Applicant is submitting this petition in connection with its proposed acquisition of an electric generating unit and related equipment and facilities, including an interest in certain interconnection facilities, as more fully described below. Because the proposed acquisition involves jurisdictional assets, Applicant has made a separate application for Commission authorization of that acquisition pursuant to Section 203 of the FPA and has requested Commission approval by September 23, 2016 in order to facilitate closing of the acquisition by September 30, 2016. Commission action in this proceeding by September 30 is also necessary to facilitate closing on the acquisition by that date.

## **I. COMMUNICATIONS**

All communications and service related to this proceeding should be directed to the following persons:

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## **II. STATEMENT OF FACTS**

Applicant is a Delaware corporation that has recently been formed as a special purpose entity to acquire and own one of the four 515 MW (summer rating) natural gas-fired, combined cycle electric generating units ("Power Block 1") at the Gila River generating facility (the "Facility"), and interests in related common assets including shared interconnection facilities, currently owned by Sundevil Power Holdings, LLC ("Sundevil"). The Facility is located in Maricopa County, Arizona and is connected to the Arizona Public Service Company balancing

authority area (“APS BAA”). Sundevil currently sells capacity, energy, and ancillary services from Power Block 1 at market-based rates.<sup>4</sup>

In July 2012, Sundevil entered into a senior secured credit agreement with Beal Bank USA (“BBUSA”), pursuant to which BBUSA made available certain loans and credit facilities to finance Sundevil’s ownership and operation of Power Block 1 and Power Block 2. To secure Sundevil’s obligation to repay the loans, Sundevil granted first priority liens and security interests for the benefit of BBUSA over substantially all of Sundevil’s assets and property, including its interests in the Facility. The acquisition of Power Block 1 by the Applicant is a direct result of default by Sundevil in repayment of its loans and exercise by BBUSA of its remedies as a secured creditor with an interest in the Facility.

On August 11, 2016, Applicant submitted a joint application together with its affiliate CXA Sundevil Power II, Inc. (“CXA II”)<sup>5</sup> and Sundevil under Section 203 of the FPA (“Section 203 Application”)<sup>6</sup> for CXA I to acquire Power Block 1 from Sundevil and for CXA II to acquire Power Block 2 from Sundevil, in each case together with the corresponding 25 percent undivided co-ownership interest in the related electric interconnection facilities and other common assets of the Facility.

Applicant and CXA II are a wholly-owned, indirect subsidiaries of BBUSA and its parent corporation, Beal Financial Corporation (“Beal”). Beal is a financial institution, which, through its subsidiaries, engages in depository banking, commercial real estate and business lending and financing. Beal is not primarily engaged in energy-related business activities, and none of Beal’s

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<sup>4</sup> *Wildcat Power Holdings, LLC*, Docket No. ER11-3366-000 (Letter Order issued July 5, 2011) (granting market-based rate authority).

<sup>5</sup> CXA II is concurrently submitting its own request for market-based rate authorization. Applicant and CXA II will also each file a notice of self-certification of Exempt Wholesale Generator status in the near future.

<sup>6</sup> The Section 203 Application is pending before the Commission in Docket No. EC16-166-000.

subsidiaries are currently engaged in the generation or sale of electric energy in the APS BAA, or the larger Southwest Region.<sup>7</sup> Applicant's only affiliate that will be engaged in the generation and sale of electric energy is CXA II.

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

Applicant requests authorization to sell energy, capacity, and certain ancillary services at market based rates. The Commission authorizes market-based rates provided that the seller demonstrates that it does not possess, or has adequately mitigated, horizontal and vertical market power. In Order No. 697,<sup>8</sup> the Commission modified its existing four prong analysis<sup>9</sup> of requests for market-based rate authorization, and codified a two prong analysis that examines horizontal and vertical market power.<sup>10</sup> The Commission also eliminated affiliate abuse as a separate prong in the market-based rate analysis and codified affiliate restrictions to be applied on an ongoing basis as a condition to obtaining and maintaining market-based rate authority.<sup>11</sup> In addition, the Commission adopted rules addressing waivers of Commission regulations that typically accompany applications for market-based rates.

#### **A. Applicant Will Not Have Horizontal Market Power**

Pursuant to Order No. 697, the Commission uses two indicative horizontal market power screens, the wholesale Market Share Analysis and Pivotal Supplier Analysis, to assess whether a

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<sup>7</sup> The Southwest Region is comprised of California and NERC region WECC-AZNMSNV.

<sup>8</sup> *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 13 (“Order No. 697”), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g and clarification*, Order No. 697-A, FERC Stats. & Regs ¶ 31,268, *order on reh’g and clarification*, 124 FERC ¶ 61,055, *order on reh’g and clarification*, Order No. 697-B, FERC Stats. & Regs ¶ 31,285 (2008), *order on reh’g and clarification*, Order No. 697-C, FERC Stats. & Regs ¶ 31,291 (2009), Order No. 697-D, FERC Stats. & Regs. ¶ 31,305, *order on reh’g and clarification* (2010), *appeal docketed sub nom. Mont. Consumer Counsel v. FERC*, Nos. 08-71827, *et al.* (9th Cir. filed May 1, 2008).

<sup>9</sup> The four prong analysis included generation market power, transmission market power, other barriers to entry and affiliate abuse/reciprocal dealing.

<sup>10</sup> Order No. 697 at PP 12-22, and 44.

<sup>11</sup> Order No. 697 at P 23.

particular seller possesses market power in a specific market. The Pivotal Supplier Analysis examines whether the seller is pivotal during the peak month of demand (*i.e.*, if demand cannot be met without some amount of supply from the seller). A seller passes the Pivotal Supplier Analysis if its available generating capacity is less than the uncommitted supply in the relevant market. The Market Share Analysis is a seasonal review of a seller's market position based upon seller's uncommitted capacity compared to the uncommitted capacity of the entire market. A seller passes the Market Share Analysis if its share of uncommitted capacity in the relevant market is less than 20 percent in each season.

If a seller does not pass both horizontal market power screens, it is presumed to have horizontal market power, but can rebut this presumption by submitting a Delivered Price Test analysis and other evidence.<sup>12</sup> As described below, Applicant and its affiliates pass both the wholesale Market Share Analysis and the Pivotal Supplier Analysis, and therefore no Delivered Price Test analysis is necessary for this petition.

Before the Applicant can perform the Commission's horizontal market power screens, it must identify the relevant market for analysis. Under Order No. 816,<sup>13</sup> the Commission defined "the relevant geographic market(s) for an [independent power producer ("IPP")] located in a generation-only balancing authority area as the balancing authority areas of each transmission provider to which the IPP's generation-only balancing authority area is directly interconnected."<sup>14</sup> If the generation-only balancing authority area ("BAA") is embedded within a transmission provider's BAA, then that transmission provider's BAA is the only BAA that the

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<sup>12</sup> 18 C.F.R. § 35.37(c)(3) (2015).

<sup>13</sup> *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. by Pub. Utils.*, Order No. 816, 153 FERC ¶ 61,065 (2015) ("Order No. 816"), *order on clarification*, Order No. 816-A, 155 FERC ¶ 61,188 (2016).

<sup>14</sup> Order No. 816 at P 61.

generation-only BAA is interconnected with and the only one for which indicative screens are required.<sup>15</sup> The Facility is located in the generation-only Gila River Maricopa Arizona (“GRMA”) BAA. As explained by the attached affidavit of Julie R. Solomon of Navigant Consulting, Inc. (“Attachment A”), the GRMA BAA has a single interconnection, to the APS system in the APS BAA, as reported in GRMA’s FERC Form No. 714.<sup>16</sup>

Consistent with Order No. 816, and as noted by Ms. Solomon’s affidavit, other generators not directly interconnected to the APS system have been included as part of the APS BAA market for purposes of the horizontal market power analysis she conducted.<sup>17</sup> These facilities – the New Harquahala facility (“Harquahala”) and the Arlington Valley generating facility (“Arlington Valley”) – also are within generation-only BAAs and interconnect with the APS system at the Hassayampa Switchyard. Ms. Solomon’s affidavit analyzes the APS BAA market consistent with Order No. 816, including these other generating facilities, but also performs a sensitivity analysis that allocates to Sundevil, Harquahala, and Arlington Valley a share of the simultaneous import limit for the APS BAA.<sup>18</sup>

Upon the acquisition of Power Block 1 by Applicant, and acquisition of Power Block 2 by its affiliate CXA II, Applicant and CXA II will together control 1,030 MW of capacity (summer rating) in the APS BAA. As demonstrated by Ms. Solomon, this uncommitted capacity

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<sup>15</sup> Order No. 816 at P 48.

<sup>16</sup> Attachment A at 6.

<sup>17</sup> See Order No. 816 at P 63 (“For example, if it were the case that the generation-only balancing authority areas of the Gila River Power Company LLC and Sundevil generation plants are each directly interconnected with the balancing authority area operated by Arizona Public Service Co. (APS), then each of those IPPs would study themselves in the APS balancing authority area, and each would treat all other competing generators from generation-only balancing authority areas directly interconnected with the APS balancing authority area as being in the APS balancing authority area.”); and Attachment A at 8.

<sup>18</sup> Attachment A at 8.

is far less than the 4,539 MW of net uncommitted supply in the APS BAA market.<sup>19</sup> Therefore, Applicant passes the Pivotal Supplier Analysis for the APS BAA.

Applicant similarly passes the Market Share Analysis. As demonstrated by Ms. Solomon, the seasonal uncommitted capacity of the Power Blocks owned by Applicant and CXA II will range from 1,030 MW to 1,106 MW, and total seasonal uncommitted capacity in the APS BAA will range from 5,771 MW to 7,210 MW. The resulting combined market share of Applicant and CXA II will range from 14.6% to 17.8%. Accordingly, Applicant passes the Market Share Analysis because the combined market share of Applicant and its affiliates in the APS BAA will not exceed the 20% threshold in any season.<sup>20</sup>

Based on the results of the horizontal market power screens, summarized above, Applicant and its affiliates do not have horizontal market power in the APS BAA.

#### **B. Applicant Will Not Have Vertical Market Power**

Pursuant to Order No. 697, the Commission determines vertical market power based on an analysis of transmission market power and other barriers to entry.<sup>21</sup> In determining transmission market power, the Commission requires that a public utility with market-based rates, or any of its affiliates, that owns, operates, or controls transmission facilities, have a Commission-approved open access transmission tariff (“OATT”) on file before granting such public utility market-based rate authorization.<sup>22</sup> Applicant and CXA II will each hold joint ownership interests in the Facility-specific electric transmission interconnection equipment

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<sup>19</sup> Attachment A at p. 9. Ms. Solomon’s sensitivity analysis similarly shows that together CXA I and CXA II pass the Pivotal Supplier Analysis for the APS market, with Seller having 583 MW of Uncommitted Capacity but 3,519 MW of Net Uncommitted Supply. *Id.*

<sup>20</sup> Attachment A at p. 10. Similarly, Ms. Solomon’s sensitivity analysis shows market shares ranging from 0.3% to 12.3%, well below the 20% threshold. *Id.*

<sup>21</sup> Order No. 697 at P 399.

<sup>22</sup> Order No. 697 at P 408.

installed at the on-site substation and switchyard from which the Facility is interconnected to the transmission system owned and operated by APS at two points: (1) two 500-kV lines connecting the Facility to APS's Jojoba switching station, which connects to APS's 500-kV Palo Verde-Kyrene transmission line, and (2) a connection to the Panda 230-kV switchyard, which connects to APS's Gila Bend-Liberty 230-kV transmission line. These facilities are limited to those necessary to interconnect the Facility to the APS transmission system and are the same facilities currently owned jointly by Sundevil. Accordingly, Applicant and its affiliates cannot exercise transmission market power.

A seller seeking to demonstrate that it lacks vertical market power must also show that neither it nor its affiliates can erect any other barriers to market entry. In analyzing barriers to entry, a seller must provide the Commission with information regarding inputs to electric power production, which the Commission considers as other barriers to entry.<sup>23</sup> In Order No. 697, the Commission made a distinction between two categories of inputs to electric power production:

- (1) natural gas supply, interstate natural gas transportation (which includes interstate natural gas storage), oil supply, and oil transportation, and
- (2) intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and the transportation of coal supplies such as barges and rail cars.<sup>24</sup>

For the first category, the Commission does not require a description or affirmative statement with regard to ownership or control of, or affiliation with an entity that owns or controls, such assets.<sup>25</sup> With regard to the second category of inputs to electric power production, the Commission adopted a rebuttable presumption that a seller cannot erect barriers to entry with regard to its ownership or control of, or affiliation with an entity that owns or

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<sup>23</sup> Order No. 697 at P 440.

<sup>24</sup> Order No. 697 at P 441.

<sup>25</sup> Order No. 697 at P 442.



controls, such inputs to electric power production.<sup>26</sup> For the second category of inputs, the Commission requires a description of the ownership or control, and an affirmative statement that the applicant has not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.<sup>27</sup>

As shown on Attachment B, Applicant and its affiliates will not own, operate or control any inputs to electric power production that would constitute barriers to entry. With one exception, Applicant and its affiliates do not own, control, or operate any interstate natural gas transportation or distribution facilities,<sup>28</sup> and therefore, could not deny or hinder the ability of gas-fired generators/competitors to access natural gas supplies.

In accordance with Order No. 697, Applicant has not erected barriers to entry into any relevant market and will not erect barriers to entry into any relevant market. Applicant does not have transmission market power and does not create, or is rebuttably presumed not to create, other barriers to market entry, and therefore Applicant lacks vertical market power.

### **C. Waiver of Affiliate Restrictions**

Order No. 697 discontinued the consideration of affiliate abuse as a separate prong in its market-based rate analysis but codified affiliate restrictions applicable on an ongoing basis to sellers with market-based rate authorization.<sup>29</sup> The affiliate restrictions include a prohibition of power sales between a franchised public utility with captive customers and any market-regulated power sales affiliates without first receiving Commission authorization, and requirements that were revised from the Commission's market-based rate "code of conduct." Applicant is not

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<sup>26</sup> Order No. 697 at P 446.

<sup>27</sup> Order No. 697 at P 447.

<sup>28</sup> See Attachment A at 3 describing Applicant's ownership interest in a single pipeline lateral that is not relevant to the competitive analysis.

<sup>29</sup> Order No. 697 at P 467.

affiliated with any franchised public utility. Furthermore, Applicant will not make any wholesale power sales or purchases to any affiliated franchised public utility with captive customers without receiving express Commission authorization for any such sale pursuant to FPA Section 205.

**D. Category 1 and Category 2 Status**

In Order No. 697, the Commission directed market-based rate sellers to include in their tariffs a statement of whether the seller is a Category 1 or Category 2 seller pursuant to Section 36.36(a) of the Commission's regulations.<sup>30</sup> Because Applicant and its affiliates own or control more than 500 MW of generation in the Southwest Region, Applicant is a Category 2 seller in that region. Applicant and its affiliates do not own or control generation over 500 MW in any region other than the Southwest Region, do not own transmission facilities other than generator interconnection facilities, are not affiliated with a franchised public utility, and do not raise other vertical market power issues. Therefore, Applicant respectfully submits that it qualifies as a Category 2 seller in the Southwest Region and as a Category I seller in other regions. Applicant has reflected that fact on its proposed tariff sheets.

**IV. REQUEST FOR AUTHORIZATION TO SELL CERTAIN ANCILLARY SERVICES AT MARKET-BASED RATES**

Applicant also requests authorization to sell ancillary services at market-based rates in the ISO New England Inc., New York Independent System Operator, Inc., PJM Interconnection, L.L.C., Midwest Independent Transmission System Operator, Inc., and California Independent System Operator ("CAISO") markets, and authorization to provide third- party ancillary services similar to the authorization that the Commission has previously granted market-based rate

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<sup>30</sup> See, Order No. 697 at P 917; 18 C.F.R. § 35.36(a).

sellers<sup>31</sup> subject to the limitations on such sales established in Order No. 784.<sup>32</sup> The Tariff contains the relevant provision relating to sales of ancillary services as prescribed by Order No. 697<sup>33</sup> and as modified by Order No. 819.<sup>34</sup>

## V. REPORTING OBLIGATIONS

Applicant commits to abide by the reporting requirements adopted by the Commission in Order No. 652.<sup>35</sup> Applicant will file contract and transaction data for all power sales under the tariff in its Electronic Quarterly Reports filed pursuant to the Commission's filing requirements, as established by Order No. 2001,<sup>36</sup> and as may be amended from time-to-time.

Applicant will also notify the Commission within 30 days after any change in status that would reflect a departure from the characteristics relied upon by the Commission in its evaluation of Applicant's application for market-based rate authority in accordance with Order No. 652.<sup>37</sup>

In accordance with the Commission's Market Behavior Rules, Applicant hereby notifies the Commission that, as of the effective date of the tariff, it will not report transactions to

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<sup>31</sup> See *Central Hudson Gas & Elec. Corp., et al.*, 86 FERC ¶ 61,062, on reh'g, 88 FERC ¶ 61,138 (1999); *AES Redondo Beach, L.L.C.*, 83 FERC ¶ 61,358, order on reh'g, 85 FERC ¶ 61,123 (1998), order on reh'g, 87 FERC ¶ 61,208, order on reh'g, 88 FERC ¶ 61,096 (1999), order on reh'g and clarification, 90 FERC ¶ 61,036.

<sup>32</sup> *Third-Party Provision of Ancillary Servs.; Accounting & Financial Reporting for New Elec. Storage Technologies*, Order No. 784, FERC Stats. & Regs. ¶ 31,349, at P 200-01 (2013), *order on clarification*, Order No. 784-A, 146 FERC ¶ 61,114 (2014). See also *Third-Party Provision of Primary Frequency Response Serv.*, Order No. 819, FERC Stats. & Regs. ¶ 31,375 (2015) ("Order No. 819").

<sup>33</sup> Order No. 697 at P 917; and Attachment. C.

<sup>34</sup> Order No. 819 at P 70.

<sup>35</sup> *Reporting Requirements for Changes in Status for Pub. Utils. with Market-Based Rate Authority*, Order No. 652, FERC Stats. and Regs. ¶ 31,175, order on reh'g, 111 FERC ¶ 61,413 (2005).

<sup>36</sup> *Revised Pub. Util. Filing Requirements*, Order No. 2001, FERC Stats. and Regs. ¶ 31,127; order on reh'g, Order No. 2001-A, 100 FERC ¶ 61,074 (2002).

<sup>37</sup> *Reporting Requirements for Changes in Status for Pub. Utils. with Market-Based Rate Authority*, Order No. 652, FERC Stats. and Regs. ¶ 31,175, order on reh'g, 111 FERC ¶ 61,413 (2005).

publishers of electricity or natural gas price indices. If Applicant begins to report price data to index publishers, Applicant will notify the Commission within fifteen (15) days.

#### **VI. DOCUMENTS INCLUDED WITH THIS FILING**

1. Affidavit of Julie R. Solomon, included as Attachment A;
2. Appendix of Assets, included as Attachment B;
3. Applicant's Market-Based Rate Authority and Generation Assets, included as Attachment C; and
4. Applicant's FERC Rate Schedule No. 1, included as Attachment D.

#### **VII. PROPOSED EFFECTIVE DATE**

In this application, Applicant is seeking authority to make sales of energy, capacity, and certain ancillary services at market-based rates under the proposed Tariff. Applicant requests that the proposed Tariff become effective on September 30, 2016. Applicant and Sundevil desire to complete the sale of Power Block 1 as expeditiously as possible and have requested that the Commission act on the Section 203 Application by September 23, 2016. Pursuant to Section 35.11 of the Commission's regulations, Applicant requests waiver of the notice requirement in order to permit the Tariff to take effect less than 60 days after the date of filing so that the ownership transfer can be completed shortly after the parties receive Commission authorization. Good cause exists to grant the requested waiver based on the facts that (i) the Commission has previously authorized Sundevil to sell at market-based rates the capacity, energy, and ancillary services of the Power Block 1 and Power Block 2; (ii) no increase in market concentration or change in market power will occur as a result of the transfer of Power Block 1 and Power Block 2 from Sundevil to Applicant and CXA II, respectively; and (iii) Applicant and its affiliates have demonstrated the lack of market power.

## VIII. REQUEST FOR WAIVERS AND BLANKET AUTHORITY

Applicant requests waiver of the Commission's regulations as has been granted to other petitioners seeking market-based rate authority and consistent with Order No. 697. Specifically, Applicant requests waiver of:

- (i) accounting and reporting requirements contained in Part 41 (regarding accounts, records, and memoranda); Part 101 (regarding the uniform system of accounts); and Part 141 (regarding statements and reports);<sup>38</sup> and
- (ii) subparts B and C of 18 C.F.R. Part 35 (regarding the filing of rate schedules), except Sections 35.12(a), 35.13(b), 35.15 and 35.16.

Applicant also requests blanket approval under Part 34 of the Commission's regulations of future issuances regarding securities and assumptions of liabilities, subject to objection by an interested party.<sup>39</sup> Applicant further requests waiver of any additional requirements that may be necessary for Applicant's rate schedule to be made effective as requested in this filing.

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<sup>38</sup> See Order No. 697 at P 984 ("We will continue the Commission's historical practice of granting waiver of Parts 41, 101, and 141 of the Commission's regulations to certain entities with market-based rate authority.")

<sup>39</sup> Order No. 697 at P 999.

**IX. CONCLUSION**

For the reasons set forth herein, Applicant respectfully requests that the Commission:

- (i) accept the proposed rate schedule for filing, effective on September 30, 2016, as requested;
- (ii) grant Applicant blanket authority to make sales of energy and capacity under the proposed rate schedule at market-based rates; and (iii) grant appropriate waivers and other blanket authority as requested herein.

Respectfully submitted,

/s/Ted J. Murphy

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Date: August 26, 2016