

171 FERC ¶ 61,074
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Goldman Sachs Renewable Power Marketing LLC

Docket No. ER20-547-001

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION

(Issued April 27, 2020)

1. In this order, we grant Goldman Sachs Renewable Power Marketing LLC (Seller) authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, effective January 2, 2020, as requested. We also grant Seller's request for certain waivers commonly granted to market-based rate applicants.
2. For the reasons discussed below, we also find that Seller is an affiliate of The Goldman Sachs Group, Inc. (Goldman Sachs). Accordingly, we find that Seller meets the criteria for a Category 2 seller in the Northwest region and a Category 1 seller in all other regions and is so designated.¹

¹ See *Refinements to Policies & Procedures for Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 816, 153 FERC ¶ 61,065, at P 320 (2015), *order on reh'g*, Order No. 816-A, 155 FERC ¶ 61,188 (2016); *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, at PP 848-850, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

I. Background

3. On December 9, 2019, as amended on February 27, 2020, pursuant to section 205 of the Federal Power Act (FPA),² Seller filed an application for market-based rate authority with an accompanying tariff providing for the sale of electric energy, capacity, and ancillary services at market-based rates.³

4. Seller states that it is a wholly owned subsidiary of Goldman Sachs Renewable Power Operating Company LLC, which in turn is a wholly owned subsidiary of Goldman Sachs Renewable Power LLC (Renewable Power). Seller explains that management and control of Renewable Power, and subsequently Seller, is held exclusively by Goldman Sachs Renewable Power's Board of Directors (Board).⁴ According to Seller, the Board consists of three directors, who are independent of Goldman Sachs. Seller explains further that Goldman Sachs's ownership in Renewable Power is less than five percent and that, for purposes of the Commission's regulations, Renewable Power thus is not affiliated with Goldman Sachs or any of Goldman Sachs's Commission-jurisdictional entities.⁵ Seller also represents that passive investors with only limited consent or veto rights similar to those recognized by the Commission in *AES Creative Resources, L.P.*⁶ also hold membership interests in Renewable Power.⁷ Seller states that none of the investors in Renewable Power, together with any of their affiliates, directly or indirectly owns or controls 10% or more of the outstanding voting securities of Renewable Power. In addition, Seller explains that Goldman Sachs Asset Management, L.P. (Asset Management) is Renewable Power's investment manager.⁸

5. Seller explains that, through Renewable Power, it is affiliated with several entities that own or control generation facilities in the California Independent System Operator Corporation (CAISO) market, the Balancing Authority of Northern California (BANC)

² 16 U.S.C. § 824d (2018).

³ Seller requests authorization to sell ancillary services in all of the regional transmission organization or independent system operator markets for which the Commission has approved sales of specific ancillary services.

⁴ Seller December 9, 2019 Filing at 3.

⁵ *Id.* at n.6.

⁶ *AES Creative Res., L.P.*, 129 FERC ¶ 61,239 (2009) (*AES Creative*).

⁷ Seller December 9, 2019 Filing at 3 & n.8.

⁸ *Id.* at n.6.

and the PacifiCorp East (PACE) balancing authority area. In addition, Seller represents that all of the output of its affiliates' facilities is sold under long-term power purchase agreements (PPA) with various entities.⁹

II. Notice of Filing and Responsive Pleadings

6. Notice of Seller's December 9, 2019 filing was published in the *Federal Register*,¹⁰ with interventions and protests due on or before December 30, 2019. On December 30, 2019, Public Citizen, Inc. (Public Citizen) filed a motion to intervene. On that same date, Public Citizen filed a protest and, on January 2, 2020, it filed a supplemental protest. On January 3, 2020, the Independent Market Monitor for PJM Interconnection, L.L.C. (Market Monitor) filed a motion to intervene. On January 13, 2020, Seller filed an answer to the protest filed by Public Citizen in which it also opposed the late motion to intervene of Market Monitor. On February 4, 2020, Market Monitor filed another motion to intervene.

7. Notice of Seller's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*,¹¹ with interventions and protests due on or before December 30, 2019. None was filed.

8. On January 31, 2020, Commission staff requested additional information concerning Seller's upstream ownership, the Board, day-to-day decision-making and operations, and the impact that deeming Seller an affiliate of Asset Management would have on Seller's horizontal and vertical market power.¹² On February 27, 2020, Seller filed a response to the data request, which is summarized below.

9. Notice of Seller's February 27, 2020 data request response was published the *Federal Register*,¹³ with interventions and protests due on or before March 13, 2020. On March 13, 2020, Public Citizen filed a protest. On March 26, 2020, Seller filed an answer to Public Citizen's March 13, 2020 protest. On April 6, 2020, Public Citizen filed

⁹ *Id.* at 3-7.

¹⁰ 84 Fed. Reg. 68,933 (Dec. 17, 2019).

¹¹ 84 Fed. Reg. 68,930 (Dec. 17, 2019).

¹² *Goldman Sachs Renewable Power Mktg. LLC*, Docket No. ER20-547-000 (Jan. 31, 2020) (delegated order).

¹³ 85 Fed. Reg. 12,782 (Mar. 4, 2020). *See* Errata Notice Shortening Comment Date, Docket No. ER20-547-001 (Feb. 28, 2020) (shortening comment date to March 13, 2020).

comments in response to Seller's March 26, 2020 answer. On April 23, 2020, Market Monitor filed an untimely motion for leave to answer and answer in support of Public Citizen's April 6, 2020 comments.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene of Public Citizen and Market Monitor serve to make them a party to this proceeding.

11. As noted above, Seller opposes Market Monitor's motion to intervene. Seller states that Market Monitor failed to show any cause for why the time limitation of December 30, 2019 for interventions established in this proceeding should be waived as required by the Commission's rules and, as such, the Commission should reject Market Monitor's untimely motion to intervene filed on January 3, 2020 and deny Market Monitor party status in this proceeding. However, the deadline for interventions in this proceeding was extended to March 13, 2020 in light of Seller's February 27, 2020 data request response.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept the answers filed by Seller and Public Citizen because they have provided information that assisted us in our decision-making process. We reject Market Monitor's April 23, 2020 answer as it is untimely.

B. Substantive Matters

13. As discussed below, we grant Seller's request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates and accept its market-based rate tariff, effective January 2, 2020, as requested.¹⁴ We also grant Seller's request for certain waivers commonly granted to market-based rate applicants.

¹⁴ We note that Seller is not being granted authority to make third-party sales of operating reserves to a public utility that is purchasing ancillary services to satisfy its own Open Access Transmission Tariff (OATT) requirements to offer ancillary services to its own customers. If Seller seeks such authority, it must make the required showing and receive Commission authorization prior to making such sales. *See Third-Party Provision of Ancillary Servs.; Accounting & Fin. Reporting for New Elec. Storage Techs.*, Order No. 784, 144 FERC ¶ 61,056, at PP 200-02 (2013), *order on clarification*, Order No. 784-A, 146 FERC ¶ 61,114 (2014).

1. Affiliation

a. Initial Protests and Answers

14. Public Citizen argues in its first protest that the Commission should find the application deficient because the facts suggest that Seller operates as an affiliate of Goldman Sachs. Public Citizen requests that the Commission order Seller to: (1) provide various corporate documents describing the relationships between Seller and Renewable Power; (2) disclose the identities of the members of the Board, compensation, and selection process; (3) confirm whether Seller has any employees independent of Goldman Sachs; and (4) explain whether Asset Management provides the same investment services to Seller as it does for other Renewable Power entities.

15. Public Citizen, in its January 2, 2020 supplemental protest, requests a hearing and asserts that Seller misrepresents, among other things, that Seller and Goldman Sachs are not affiliates and that the members of the Board are independent directors and independent of Goldman Sachs. Public Citizen asserts that the three members of the Board serve as corporate directors for 61 other companies, 55 of which share a principal address and phone number with Goldman Sachs.

16. Seller, in its January 13, 2020 answer, responded that it is not in dispute that Seller is not affiliated with Goldman Sachs under the Commission's definition of affiliate. Seller states that Goldman Sachs's interest in Renewable Power is capped at 4.9% for other regulatory purposes and that its interests in Renewable Power will never exceed the Commission's 10% affiliate threshold. Seller states that this establishes a rebuttable presumption that Goldman Sachs lacks control over Renewable Power and Seller and that Public Citizen has not presented any facts to rebut this presumption.¹⁵

17. With respect to Renewable Power's relationship with Asset Management, Seller restates that Asset Management is the investment manager to Renewable Power and provides investment and management services to Renewable Power pursuant to a Management Services Agreement. Seller explains that the authority granted to Asset Management under the Management Services Agreement is subject to the policies and control of the Board. As to the directors, Seller represents that the rights of the Board, including the right to manage, control, and conduct the business of Renewable Power, and to delegate any and all of those rights, are articulated in the Amended and Restated Limited Liability Agreement (LLC Agreement) of Renewable Power. Seller also represents that the Board retains the power to replace Asset Management as "Manager" with majority investor consent.

¹⁵ Seller January 13, 2020 Answer at 6 (citing 18 C.F.R. § 35.36(a)(9)(v)).

b. **Data Request Response and Subsequent Protests and Answers**

18. In its February 27, 2020 response, Seller states that the rights or responsibilities that have been delegated to Asset Management or any of its affiliates do not extend to the day-to-day operations of Seller such that Asset Management or any of its affiliates would have control or be deemed to have control over Seller. Seller also states that Asset Management is not permitted to engage in routine management of non-financial activities.¹⁶

19. Seller states that a proposed Board was identified to prospective investors by subsidiaries of Goldman Sachs in the initial private placement memorandum for Renewable Power and that investors in Renewable Power ratified the selection of the Board at the time of their initial investment. Seller states that Asset Management has existing relationships with the same individuals that serve on the Board because they serve in a similar capacity for certain other private companies and private equity funds for which Asset Management serves as investment manager. Seller represents that each fund or company for which the same directors provide services is composed of different shareholders and that the directors separately owe a fiduciary duty to each respective fund or company.¹⁷

20. Seller states that day-to-day decision-making over the public utilities owned by Renewable Power is controlled by unaffiliated third parties hired by Renewable Power. With respect to the marketing of electric energy, Seller states that, in accordance with its investment strategy, Renewable Power typically acquires renewable energy generating facilities where the power produced by such a facility is sold under a long-term PPA.¹⁸

21. Seller adds that Asset Management operates as a separate business division of Goldman Sachs. Seller reiterates that information barriers and other policies within Goldman Sachs separate Asset Management from other businesses within Goldman Sachs and restrict Asset Management's access to information and personnel in other areas of Goldman Sachs. Seller notes that the separate business divisions of Goldman Sachs do not typically share business personnel and none of the business personnel of Asset

¹⁶ Seller February 27, 2020 Response at 3.

¹⁷ *Id.* at 4-5.

¹⁸ *Id.* at 5-6.

Management that provide services to Renewable Power are shared with other divisions of Goldman Sachs.¹⁹

22. Finally, Seller notes that, as a wholly owned subsidiary of Goldman Sachs, Asset Management may be considered affiliated with J. Aron & Company LLC (J. Aron) and Global Atlantic Financial Group Limited (Global Atlantic). Therefore, Seller explains that, if the Commission were to deem Seller to be affiliated with Asset Management, it would by extension be affiliated with J. Aron, Global Atlantic, and their affiliates. Seller states that, even with these affiliations, it would continue to lack horizontal and vertical market power in all relevant geographic markets, but would become a Category 2 seller in the Northwest region.²⁰

23. Public Citizen contends in its March 13, 2020 protest to Seller's February 27, 2020 response that the information provided by Seller makes the case that the Commission must determine Renewable Power and Goldman Sachs to be affiliates for the purposes of the Commission's regulations. Public Citizen states that the LLC Agreement shows that having Goldman Sachs run the day-to-day investment affairs for a private equity fund presents inherent financial conflicts of interest.²¹ Public Citizen argues that Goldman Sachs has a poor track record of enforcing its own internal information barriers and has paid billions of dollars in fines and settlements over the last several years directly related to abuse of such barriers. Public Citizen asserts that the three individuals that serve on the Board serve together on at least an additional 63 boards, with a \$5,000 retainer plus

¹⁹ *Id.* at 6-7.

²⁰ *Id.* at 7-10.

²¹ Public Citizen references section 6.5.10 of the LLC Agreement, which states, in part, the following:

Each Member acknowledges and agrees that such dealings, as well as decisions concerning the allocation of opportunities among the Company on the one hand and Goldman Sachs and its other Affiliates and clients on the other, may give rise to conflicts of interest from time to time to which each Member hereby consents. Each Member hereby acknowledges and agrees that such conflicts will be resolved by Goldman Sachs; that such determinations will be conclusive and absolutely binding upon the Company
.....

Public Citizen March 13, 2020 Protest at 3.

the \$13,000 annual fee, and one individual serves on another 15 boards and is paid at least \$1.1 million a year, excluding expenses.²²

24. In its March 26, 2020 answer, Seller argues that it has provided the Commission with all the facts necessary to find that Seller and Renewable Power are not affiliated with Goldman Sachs because Goldman Sachs does not meet the definition of an affiliate under the Commission's regulations. Seller contends that Public Citizen quotes, out of context, a portion of the excerpted LLC Agreement. Seller states that a review of the entirety of section 6.5.10 of the LLC Agreement shows that it presents a process to resolve any internal conflicts that should arise and that the provision also includes an obligation that any such conflicts be resolved on commercially reasonable terms. In addition, Seller states that Public Citizen erroneously argues that the Commission's affiliate rules were designed to address the inadequacy of relying upon a company's unenforceable internal information barriers.²³ Seller counters that the Commission's affiliate restrictions apply to entities with market-based rate authority and their affiliated franchised public utilities with captive customers, and that neither Seller nor Renewable Power is affiliated with a franchised public utility with or without captive customers.²⁴ Therefore, Seller asserts that such rules do not apply to Goldman Sachs or Seller.²⁵

25. In Public Citizen's April 6, 2020 comments, it argues that the labeling of affiliation here is necessary to prevent market manipulation and ensure just and reasonable rates as well as ensuring captive customers are protected under the Commission's affiliate restriction rules. It argues that failing to do so will open a vast enforcement loophole.

c. Commission Determination

26. As an initial matter, we find that Seller and Goldman Sachs are affiliates. Seller is correct that where a person owns, controls or holds with power to vote, less than 10% of the outstanding voting securities of a specified company, there is a rebuttable presumption of a lack of control.²⁶ However, as discussed below, we find that Asset Management can

²² *Id.* at 2-4.

²³ Seller March 26, 2020 Answer at 2-4.

²⁴ *Id.* at 4 (citing 18 C.F.R. § 35.39 and 18 C.F.R. subpart I).

²⁵ *Id.*

²⁶ "For purposes of paragraph (a)(9), owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control." 18 C.F.R. § 35.36(a)(9)(v).

exercise Renewable Power's voting rights in Seller and therefore Asset Management controls the voting securities in Seller, which makes Asset Management an affiliate of Seller under section 35.36(a)(9)(i). Further, because Asset Management is a wholly owned subsidiary of Goldman Sachs, Goldman Sachs is an affiliate of Asset Management under section 35.36(a)(9)(i). Based on Goldman Sachs's ownership of Asset Management and Asset Management's control of voting securities in Seller, we find that Goldman Sachs is an affiliate of Seller under section 35.36(a)(9)(i); thus, the rebuttable presumption does not apply.²⁷

27. Pursuant to the Management Services Agreement, Asset Management has been granted the authority to “do any and all acts on behalf of the Service Recipients, and *exercise all rights of the Service Recipients* [i.e., Renewable Power and its subsidiaries], *with respect to any Service Recipient's interests in any Person, including, the exercise of voting rights in any Person holding Portfolio Assets . . .*”²⁸ Based on the Management Services Agreement, Asset Management is authorized to exercise all rights of Renewable Power, with respect to Renewable Power's interests in any limited liability company, which includes the exercise of Renewable Power's voting rights in Seller. In *AES Creative*, the Commission established that, for purposes of market-based rate regulations, “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.”²⁹ We interpret Asset Management's authority to exercise *all* rights of Renewable Power's interests in entities such as Seller to constitute authority to manage, direct or control the activities of Seller. Thus, we find that Asset Management controls 10% or more of the outstanding voting

²⁷ An affiliate of a specified company can be “[a]ny person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company.” *Id.* § 35.36(a)(9)(i).

²⁸ Seller January 13, 2020 Answer, Attachment A: Management Services Agreement § 3.2(n) (emphasis added). Under the Management Services Agreement, “Person” means “an individual or a corporation, firm, limited liability company, partnership, joint venture, trust, estate, unincorporated organization, association, government agency or political subdivision thereof or other entity.” “Portfolio Assets” means Projects (including direct or indirect equity interests therein) and any development support or financing arrangements entered into by the YieldCo to fund the development and construction of Projects, or otherwise provide financial or other support to developers with respect to Projects in varying stages of development.” “Project” means any renewable energy asset. Lastly, “YieldCo” means Renewable Power.

²⁹ *AES Creative*, 129 FERC ¶ 61,239 at P 24.

securities of Seller.³⁰ Accordingly, we conclude that Asset Management is an affiliate of Seller under section 35.36(a)(9)(i).

28. In addition, we find that Goldman Sachs is an affiliate of Asset Management under section 35.36(a)(9)(i). Section 35.36(a)(9)(i) specifies that an affiliate is any person that directly or indirectly owns, controls, or holds with power to vote, 10% or more of the outstanding voting securities of the specified company. Because Asset Management is a wholly owned subsidiary of Goldman Sachs, Goldman Sachs is deemed an upstream affiliate of Asset Management under section 35.36(a)(9)(i), and thus is an affiliate of Seller. For this reason, we find that the rebuttable presumption in section 35.36(a)(9)(v) does not apply.

29. We do not find Seller's argument regarding section 6.5.10 of the LLC Agreement to be relevant to Asset Management's control of Seller's voting securities or its resulting affiliation with Seller under section 35.36(a)(9)(i). This provision establishes that Renewable Power's dealings with Goldman Sachs will be resolved on commercially reasonable terms; however, this provision also provides that Asset Management determines what is commercially reasonable.³¹ Nonetheless, this provision does not change the fact that, under the Management Services Agreement, Asset Management has been delegated authority to exercise voting rights with respect to Renewable Power and its subsidiaries, including Seller such that it controls the outstanding voting securities of Seller, as discussed above.

30. For the same reason, we find Seller's reliance on *R.W. Beck Plant Management, Ltd.*³² to be misplaced. In that case, the Commission found a plant manager to be a public utility based on its operation of jurisdictional facilities in its role as the manager of

³⁰ See *Backyard Farms Energy LLC*, 154 FERC ¶ 61,036, at P 21 (2016) ("The real issue, for purposes of determining affiliation under the market-based regulations, therefore, is not whether the Fidelity Accounts are owned by the Fidelity Advisers. Rather, the issue is whether the Fidelity Advisers directly or indirectly own, control, or hold with power to vote, the outstanding voting securities of any public utility or holding company in which the Fidelity Accounts may invest.").

³¹ Seller January 13, 2020 Answer, Attachment B: LLC Agreement § 6.5.10 ("In addition to transactions specifically contemplated by this Agreement, [Asset Management] on behalf of [Renewable Power] is permitted, subject to applicable law, to purchase property (including securities), obtain services or borrow funds from, to sell property (including securities) or provide services to or otherwise to deal with Goldman Sachs; provided, that *any such dealings shall be on commercially reasonable terms, as determined by [Asset Management].*") (emphasis added).

³² 109 FERC ¶ 61,315 (2004) (*Beck*).

a public utility. Seller argues that, because Renewable Power has the Board and the Board may remove Asset Management as the manager of Renewable Power, its situation is different than that of the plant manager in *Beck*. However, as with Seller's argument regarding section 6.5.10 of the LLC Agreement, *Beck* does not speak to Asset Management's control over Seller's voting securities pursuant to the Management Services Agreement.

31. We also are not persuaded by Seller's argument regarding information barriers that exist between Goldman Sachs and Asset Management. Seller represents that Asset Management is a wholly owned subsidiary and business division of Goldman Sachs. As explained above, this alone is sufficient to establish affiliation under the Commission's regulations. Further, Asset Management controls the voting securities of Seller pursuant to the Management Services Agreement. For this same reason, we decline to address other arguments with respect to Goldman Sachs's control of Asset Management or Asset Management's control of Renewable Power.

32. Finally, we agree with Public Citizen that the issue of affiliation is relevant beyond application of the affiliate restrictions. As noted by Seller, affiliation with Goldman Sachs will affect Seller's category status and also potentially affects Seller's vertical and horizontal market-power analyses. In addition, affiliation is relevant in cases where mitigation is offered or required. For these reasons, affiliation is relevant in market-based rate cases, even where a seller and its affiliates do not include any franchised public utilities with captive customers.

2. Market-Based Rate Authorization

33. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.³³

a. Horizontal Market Power

34. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.³⁴ The Commission has stated that passage of both screens establishes a rebuttable presumption

³³ Order No. 697, 119 FERC ¶ 61,295 at PP 62, 399, 408, 440.

³⁴ *Id.* P 62.

that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.³⁵

35. Seller submitted market power analyses for the CAISO market and the PACE and BANC balancing authority areas, which demonstrate that Seller passes both the pivotal supplier and wholesale market share screens in those markets.³⁶

36. As noted above, the January 31, 2020 letter requested further information concerning the impact that deeming Seller an affiliate of Asset Management would have on Seller's horizontal market power. In Seller's February 27, 2020 response, Seller states that, as shown in the recent triennials and notice of change in status submitted by J. Aron and Global Atlantic's affiliates, none of J. Aron, Global Atlantic, or their affiliates has horizontal market power in the relevant geographic markets. Seller states that if the Commission were to deem Asset Management to be affiliated with Seller, and by extension, J. Aron, Global Atlantic and their affiliates, Seller would lack horizontal market power in all relevant geographic markets. Seller states that Seller passes the horizontal market power screens in the CAISO market and the BANC and PACE balancing authority areas. Seller states that because J. Aron, Global Atlantic and their affiliates have zero uncommitted energy and capacity in the relevant geographic markets, Seller's horizontal market power analysis would not be impacted by a deemed affiliation.³⁷

37. Based on Seller's representations, we find that Seller satisfies the Commission's requirements for market-based rates regarding horizontal market power.

b. Vertical Market Power

38. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved

³⁵ *Id.* PP 33, 62-63.

³⁶ Seller's study of the CAISO market relies on Luminant Energy Company LLC's market power analysis, which has been accepted by the Commission. *See Luminant Energy Co. LLC*, 165 FERC ¶ 61,222 (2018). Seller's study of the BANC balancing authority area relies on Calpine Energy Services, L.P.'s market power analysis, which has been accepted by the Commission. *See Calpine Energy Servs., L.P.*, Docket No. ER10-2042-031 (Jan. 23, 2020) (delegated order). Seller's study of the PACE balancing authority area relies on Sweetwater Solar, LLC's market power analysis, which has been accepted by the Commission. *See Sweetwater Solar, LLC*, Docket No. ER19-8-000 (Feb. 14, 2019) (delegated order).

³⁷ Seller February 27, 2020 Response at 9-10.

open access transmission tariff (OATT) on file or that the seller has received waiver of the OATT requirement under 18 C.F.R. § 35.28(d)(1) or satisfies the requirements for blanket waiver under 18 C.F.R. § 35.28(d)(2).³⁸

39. Seller represents that neither Seller nor any of its affiliates owns or controls any transmission facilities, except for the limited and discrete interconnection facilities that qualify for the blanket open access transmission tariff waiver pursuant to section 35.28(d)(2) of the Commission's regulations.³⁹

40. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.⁴⁰ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities, and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).⁴¹ The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.⁴² The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.⁴³

³⁸ See *Open Access & Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, 150 FERC ¶ 61,211, at P 57, *order on reh'g*, Order No. 807-A, 153 FERC ¶ 61,047 (2015) (waiving the OATT requirements of 18 C.F.R. § 35.28, the Open Access Same-Time Information System requirements of Part 37, and the Standards of Conduct requirements of Part 358, under certain conditions, for entities that own interconnection facilities); see also *Oildale Energy, LLC*, 153 FERC ¶ 61,013, at PP 12-14 (2015).

³⁹ Seller December 9, 2019 Filing at 13.

⁴⁰ Order No. 697, 119 FERC ¶ 61,295 at P 440.

⁴¹ Order No. 697-A, 123 FERC ¶ 61,055 at P 176; see also Order No. 816, 153 FERC ¶ 61,065 at PP 207-12.

⁴² Order No. 697, 119 FERC ¶ 61,295 at P 447; see also Order No. 816, 153 FERC ¶ 61,065 at PP 354, 356.

⁴³ Order No. 697, 119 FERC ¶ 61,295 at P 446.

41. Seller represents that neither Seller nor any of its affiliates owns or controls a 10% or greater voting interest in any inputs to electric power production, including intrastate natural gas transportation, intrastate natural gas storage or distribution facilities, physical coal supply sources, or ownership of or control over who may access transportation of coal supplies.⁴⁴

42. In addition, in its February 27, 2020 response, Seller provides information concerning the impact that deeming Seller an affiliate of Asset Management would have on Seller's vertical market power. Seller states that none of Goldman Sachs, J. Aron, Global Atlantic, or any of their affiliates owns or controls a 10% or greater voting interest in electric transmission facilities in the United States, except for limited and discrete interconnection equipment used solely to connect individual generation facilities to the grid. Seller also states that none of Goldman Sachs, J. Aron, Global Atlantic, or any of their affiliates owns or controls a 10% or greater voting interest in any inputs to electric power production in the United States, including intrastate natural gas transportation, intrastate natural gas storage, or distribution facilities, physical coal supply sources, or ownership of or control over who may access transportation of coal supplies.⁴⁵

43. Finally, Seller affirmatively states that it and its affiliates have not erected barriers to entry in the relevant markets and will not erect barriers to entry in the relevant markets.⁴⁶

44. Based on Seller's representations, we find that Seller satisfies the Commission's requirements for market-based rate authority regarding vertical market power.

3. Other Waivers, Approvals, and Authorizations

45. Seller requests the following waivers and authorizations: (1) waiver of the filing requirements of subparts B and C of Part 35 of the Commission's regulations, except sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of the accounting and other requirements of Parts 41, 101 (with the exception of the provisions of Part 101 that apply to hydropower licensees with respect to licensed hydropower projects), and 141 of the Commission's regulations, except sections 141.14 and 141.15; and (3) blanket

⁴⁴ Seller December 9, 2019 Filing at 13.

⁴⁵ Seller February 27, 2020 Response at 10.

⁴⁶ Seller December 9, 2019 Filing at 13.

authorization under section 204 of the FPA⁴⁷ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

46. We grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.⁴⁸ Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects Seller to keep its accounting records in accordance with generally accepted accounting principles.

47. We direct Seller to submit a compliance filing containing revisions to the limitations and exemptions section of its market-based rate tariff to include a citation to this order.⁴⁹

⁴⁷ 16 U.S.C. § 824c (2018).

⁴⁸ We note that the Commission has examined and approved the continued applicability of the waiver of its accounting and reporting requirements in Parts 41, 101, and 141 of the Commission's regulations, as well as the continued applicability of the blanket authorization for the issuance of securities and the assumption of liabilities in Part 34 of the Commission's regulations. *See* Order No. 697, 119 FERC ¶ 61,295 at PP 984-85 (regarding waiver of Parts 41, 101, and 141) and PP 999-1000 (regarding blanket approval under Part 34). However, waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Hydropower licensees are required to comply with the requirements of the Uniform System of Accounts pursuant to 18 C.F.R. Part 101 to the extent necessary to carry out their responsibilities under Part I of the FPA. We further note that a licensee's status as a market-based rate seller under Part II of the FPA does not exempt it from its accounting responsibilities as a licensee under Part I of the FPA. *See* Order No. 816, 153 FERC ¶ 61,065 at PP 345-50; Order No. 697, 119 FERC ¶ 61,295 at P 984 & n.1126 (granting waiver of subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except for 18 C.F.R. §§ 35.12(a), 35.13(b), 35.15, and 35.16); *Seneca Generation, LLC*, 145 FERC ¶ 61,096, at P 23 n.20 (2013) (citing *Trafalgar Power, Inc.*, 87 FERC ¶ 61,207, at 61,798 (1999) (noting that "all licensees are required to comply with the requirements of the Uniform System of Accounts to the extent necessary to carry out their responsibilities under [s]ections 4(b), 10(d) and 14 of the FPA"))).

⁴⁹ *See* Order No. 697, 119 FERC ¶ 61,295, at P 916 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, at P 384 (2008). *See also* *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275 (2007) at P 8. These tariff revisions may be filed the next time Seller makes a market-based rate filing with the Commission.

4. Reporting Requirements

48. An entity with market-based rate authorization must file Electric Quarterly Reports (EQRs) with the Commission, consistent with Orders Nos. 2001⁵⁰ and 768,⁵¹ to fulfill its responsibility under FPA section 205(c)⁵² to have rates on file in a convenient form and place.⁵³ Seller must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.⁵⁴ Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which Seller may be subject to refund, civil penalties, and/or revocation of market-based rate authority.⁵⁵

49. Seller must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.⁵⁶

⁵⁰ *Revised Pub. Util. Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008).

⁵¹ *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, 140 FERC ¶ 61,232 (2012), *order on reh'g*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

⁵² 16 U.S.C. § 824d(c) (2018).

⁵³ *See Revisions to Elec. Quarterly Report Filing Process*, Order No. 770, 141 FERC ¶ 61,120, at P 3 (2012) (citing Order No. 2001, 99 FERC ¶ 61,107 at P 31).

⁵⁴ Order No. 770, 141 FERC ¶ 61,120.

⁵⁵ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b. Forfeiture of market-based rate authority may require a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

⁵⁶ 18 C.F.R. § 35.42; *see also Reporting Requirement for Changes in Status for Pub. Utils. with Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

50. In Order No. 697, the Commission created two categories of sellers.⁵⁷ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888⁵⁸); that are not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.⁵⁹ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.⁶⁰

51. Seller represents that it meets the requirements for a Category 1 seller in all regions because it does not own, operate, or control, and is not affiliated with any entity that owns, operates, or controls, more than 500 MW of generation in any region; does not own, operate, or control, and is not affiliated with any entity that owns, operates, or controls, any transmission facilities in any region other than the limited and discrete equipment necessary to connect individual generation facilities to the transmission grid; is not affiliated with a franchised public utility in any region; and does not present any other vertical market power issues.⁶¹ However, based on its affiliation with Goldman Sachs, as discussed above, we find that Seller does not meet the Category 1 seller requirements in the Northwest region.

⁵⁷ Order No. 697, 119 FERC ¶ 61,295 at P 848.

⁵⁸ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁵⁹ 18 C.F.R. § 35.36(a).

⁶⁰ Order No. 697, 119 FERC ¶ 61,295 at P 850.

⁶¹ Seller December 9, 2019 Filing at 17; Seller's February 27, 2020 Response at 10 n.24.

52. Based on Seller's representations and in accordance with our finding as to Seller's affiliation with Goldman Sachs herein, we designate Seller as a Category 2 seller in the Northwest region and as a Category 1 seller in all other regions. The Commission reserves the right to require an updated market power analysis at any time for any region.⁶² We direct Seller to submit a compliance filing, within 30 days of the date of this order, revising its market-based rate tariff to reflect its designation as a Category 2 seller in the Northwest region.

The Commission orders:

(A) Seller's market-based rate tariff is hereby accepted for filing, effective January 2, 2020, as discussed in the body of this order.

(B) Seller is directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

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

(D) Waiver of Part 101 of the Commission's regulations is hereby granted, with the exception that waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Waiver of Parts 41 and 141 of the Commission's regulations is hereby granted, with the exception of sections 141.14 and 141.15.

(E) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is hereby granted. Seller is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of Seller, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of Seller's issuance of securities or assumptions of liability.

⁶² Order No. 697, 119 FERC ¶ 61,295 at P 853.

(G) Seller is hereby required to file EQRs in compliance with Order Nos. 2001 and 768. If the effective date of Seller's market-based rate tariff falls within a quarter of the year that has already expired, Seller's EQRs for the expired quarter are due within 30 days of the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.