

151 FERC ¶ 61,111
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

PowerMinn 9090, LLC
Fibrominn, LLC
Benson Power, LLC
CPV Biomass Holdings, LLC

Docket No. EC15-76-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued May 14, 2015)

1. On February 18, 2015, PowerMinn 9090 LLC (PowerMinn), Fibrominn LLC (Fibrominn), Benson Power, LLC (Benson), and CPV Biomass Holdings, LLC (CPV Biomass) (collectively, Applicants) filed an application under section 203(a)(1)(A) and 203(a)(1)(D) of the Federal Power Act (FPA),¹ and Part 33 of the Commission's regulations,² requesting authorization for the disposition of jurisdictional facilities that will result from a state court supervised transfer of a 64 MW (nameplate) poultry-litter and other biomass-fueled electric generating facility located in Benson, Minnesota (Facility) from PowerMinn and Fibrominn to Benson (Proposed Transaction). The Commission has reviewed the Proposed Transaction under the Commission's Merger Policy Statement.³ As discussed below, we authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b (2012).

² 18 C.F.R. Pt. 33 (2014).

³ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, 72 Fed.

(continued ...)

I. Background

A. PowerMinn and Fibrominn

2. Applicants state that PowerMinn is a Delaware limited liability company that owns the Facility and leases it to Fibrominn. PowerMinn is an exempt wholesale generator (EWG) under the Public Utility Holding Company Act of 2005 (PUHCA).⁴

3. Applicants state that Fibrominn is a Delaware limited liability company that leases and operates the Facility, which is interconnected with Great River Energy, Inc. and is located within the footprint of the Midcontinent Independent System Operator, Inc. (MISO) regional transmission organization. Fibrominn sells all of the output of the Facility to Northern States Power Company pursuant to a long-term contract. Fibrominn has been granted market-based rate authority, and is an EWG under PUHCA.⁵ The Facility is also a qualifying small power production facility under the Public Utility Regulatory Policies Act of 1978.⁶

4. Applicants state that PowerMinn is wholly owned by PowerMinn Holdings LLC, a Delaware limited liability company which, in turn, is wholly owned by Unagi LLC (Unagi), a Delaware limited liability company. Fibrominn is wholly owned by Fibrominn Holdings LLC, a Delaware limited liability company that is also wholly owned by Unagi.⁷

Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

⁴ Application at 4. *PowerMinn 9090, LLC*, Docket No. EG05-1-000 (Oct. 28, 2004) (delegated letter order).

⁵ *Fibrominn LLC*, Docket No. EG04-103-000 (Oct. 22, 2004) (delegated letter order).

⁶ Application at 4-5. *Notice of Self-Recertification of Qualifying Status for Existing Small Power Production Facility*, Docket No. QF05-26-001 (filed Dec. 15, 2009).

⁷ Application at 5.

5. Applicants state that Unagi is a wholly owned subsidiary of ContourGlobal L.P. (ContourGlobal). ContourGlobal is a multinational energy solutions and power plant development and operation partnership with assets primarily in Africa, the Caribbean, South America, and Europe.⁸

6. Applicants further state that, other than the Facility, none of PowerMinn, Fibrominn, or any of their affiliates own, operate, or control electric generation or transmission facilities in the United States (other than limited equipment necessary to connect the Facility to the transmission grid).⁹

B. Benson

7. Applicants state that Benson is a Delaware limited liability company formed for the purpose of acquiring, owning, and operating the Facility. Benson does not currently own or control any FERC-jurisdictional or power-related assets. Applicants state that Benson intends to operate as an EWG and will self-certify the Facility as a small power production qualifying facility. Applicants further state that Benson intends to obtain market-based rate authorization prior to consummation of the Proposed Transaction.¹⁰

8. According to Applicants, ownership of Benson is divided among three classes of membership interests. The Class A member is the sole managing member (Managing Member), responsible for managing the business and affairs of Benson, including the day-to-day management, operations, and business of the Facility. Applicants state that there will be a board of directors (Board) comprised of the Managing Member and two independent directors. Applicants contend that Class B and Class C members are passive, non-managing members, whose voting rights are limited to those rights necessary to protect their financial investment. As such, Applicants assert that the Class B and Class C members have no authority to manage, control, or direct the operations of Benson or the Facility.¹¹

⁸ *Id.*

⁹ *Id.*

¹⁰ The Commission accepted Benson's market-based rate application on March 11, 2015, effective March 3, 2015, as requested. *Benson Power, LLC*, Docket No. ER15-936-000 (Mar. 11, 2015) (delegated letter order).

¹¹ Application at 6. Applicants state that evidence of the passivity of the Class B and Class C membership interests is fully described in Benson's market-based rate application filed in Docket No. ER15-936-000.

9. Applicants state that the Class A membership interests of Benson are held 100 percent by CPV Biomass, a wholly owned subsidiary of Competitive Power Ventures, Inc. (CPV). The Class B membership 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). The Class C membership interests are held by The Prudential Insurance Company of America and Metropolitan Life Insurance Company (MetLife).¹²

C. CPV

10. Applicants state that CPV is a wholly owned subsidiary of Competitive Power Ventures Holdings, LLC (CPV Holdings). Subsidiaries of CPV Holdings develop, own, and operate gas-fired and renewable generation facilities throughout the United States. Applicants further state that neither CPV Biomass nor its affiliates own or control any generation in the MISO Balancing Authority Area or 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. Applicants state that none of CPV Biomass or any of its affiliates is a public utility with a franchised electric service territory.¹³

D. Prudential

11. According to Applicants, Prudential is a subsidiary of Prudential Financial Inc. (Prudential Financial). Prudential Financial, directly and through numerous subsidiaries, including Prudential, provides insurance and a variety of financial products and services in the United States and internationally. Prudential Financial is not primarily engaged in energy-related business activities. Applicants state that neither Prudential nor any of its affiliates is a franchised public utility.

12. Applicants state that Prudential Financial and its affiliates occasionally hold interests in energy companies in connection with their broker/dealer, financial trading, investing, or market-making activities. Applicants further state that Prudential Financial and its affiliates also occasionally engage in the management of mutual funds and/or

¹² *Id.* at 6-7.

¹³ *Id.* at 7.

other collective investment vehicles as a fiduciary on behalf of persons who hold interests in such funds or other investment vehicles, and such funds or other investment vehicles may buy and sell securities of public utilities and other companies engaged in energy-related activities without exercising control over such public utilities or other companies. They state that these interests are transitory, non-controlling interests that change frequently.

13. Applicants assert that Prudential Financial and its affiliates own various passive, non-controlling interests of five percent or more in entities that engage in the following electric generation and marketing and other energy-related business activities in the United States:

- a. Halsey Street Investments, LLC (Halsey) is an indirect, wholly owned subsidiary of Prudential Financial, which owns passive interests in the following limited liability companies that own the wind-generated, electric power production facilities located in the lower 48 states outside the Electric Reliability Council of Texas region of Texas:
 - i. Trimont Wind I LLC, a 101 MW windfarm located in Martin and Jackson Counties, Minnesota.
 - ii. Elk River Windfarm LLC, a 150 MW wind-powered electric generating facility located in Butler County, Kansas.
 - iii. Shiloh I Wind Project LLC, a 150 MW wind-powered electric generating facility located in Solano County, California (within the California Independent System Operator (California ISO) control area).
 - iv. Flat Rock Windpower LLC, a 231 MW wind-powered electric generating facility in Lewis County, New York (within the New York Independent System Operator control area).
 - v. White Creek Wind I, LLC, an approximately 204 MW wind-powered electric generating facility in Klickitat County, Washington that interconnects with Bonneville Power Authority.
- b. Halsey also owns a passive interest in Cedar Creek Wind Energy, LLC, a 300.5 MW wind-powered generating facility located in Weld County, Colorado in the Public Service Company of Colorado Balancing Authority Area.
- c. Affiliates of Prudential Financial also own passive interests (indirectly, by means of: (i) passive, limited partnership interests in various limited partnerships; (ii) passive, non-managing interests in various limited liability

companies; and (iii) passive, non-managing interests in various grantor and business trusts) in various oil and natural gas reserves.

- d. Affiliates of Prudential Financial also hold indirect, passive interests in Plains End, LLC, Plains End II, LLC, Rathdrum Power, LLC, LSP-Whitewater Limited Partnership, and LSP-Cottage Grove, L.P. (the Polaris Portfolio), each of which is a public utility under the FPA and some of which are in the MISO Balancing Authority Area. Applicants state that Prudential Financial's interest in the Polaris Portfolio is passive and not associated with day-to-day management rights.
- e. Affiliates of Prudential Financial also hold indirect, passive interests in CSOLAR IV South, LLC, a 130 MW solar generating facility located in the California ISO.
- f. Affiliates of Prudential Financial also hold indirect, passive interests in Ada Cogeneration Limited Partnership, a 32.35 MW cogeneration facility located in Ada, Michigan in the MISO Balancing Authority Area.¹⁴

14. Applicants state that Prudential Financial's ownership interest in each of the entities listed above does not in any instance confer a controlling influence over the management or policies of the public utility or an ability to direct the day-to-day decisions of the public utility.¹⁵

15. Additionally, Applicants assert that, aside from the passive interests of Prudential or its affiliates in Trimont Wind I, LSP-Whitewater, and LSP-Cottage Grove facilities, and the transitory, non-controlling interest that may be held by mutual funds or similar collective investment vehicles, Prudential does not own any interests in electric power production facilities in the MISO Balancing Authority Area.¹⁶

E. Hancock

16. Applicants state that Hancock, a Michigan life insurance corporation, is a wholly owned, indirect subsidiary of Manulife Financial Corporation, a Canadian-based financial services company. According to Applicants, none of Hancock or any of its affiliates: (1) is primarily engaged in any energy-related business activities; (2) is a traditional franchised utility; or (3) owns or operates facilities located in the MISO Balancing

¹⁴ *Id.* at 10-11.

¹⁵ *Id.* at 11.

¹⁶ *Id.*

Authority Area, other than passive, non-managing or controlling interests in investment funds of the type described in the following paragraph.¹⁷

17. Hancock or its affiliates own passive, non-managing, limited partnership or limited liability company interests (or similar passive interests) in entities that are engaged directly or indirectly in electric generation and other energy-related businesses. Hancock or its affiliates also own passive, non-managing, limited partnership or limited liability company interests in private investment funds, some of which may have direct or indirect ownership interests in entities that are engaged in electric generation and other energy-related businesses, some of which may be transitory holdings. Applicants assert that management control of such entities, investment companies, and investment funds resides solely with the relevant general partner or managing member who is in no case affiliated with Hancock or its affiliates.¹⁸

F. Nationwide

18. Applicants state that Nationwide is a stock life insurance company domiciled in Ohio. Nationwide is a wholly owned subsidiary of Nationwide Financial Services, Inc. Nationwide is not primarily engaged in energy-related business activities. Applicants state that neither Nationwide nor any of its subsidiaries is a franchised electric utility in North America. None of Nationwide or its affiliates: (1) owns or controls electric generation facilities in the MISO Balancing Authority Area; (2) owns or controls any electric transmission or distribution facilities in the United States; or (3) owns or controls any inputs to electric power production in the relevant market.¹⁹

G. Beneficial

19. Applicants state that Beneficial is not primarily engaged in energy-related business activities. Neither Beneficial nor any of its subsidiaries is a franchised utility in North America. None of Beneficial or its affiliates: (1) owns or controls electric generation facilities in the MISO Balancing Authority Area; (2) owns or controls any electric transmission or distribution facilities in the United States; or (3) owns or controls any inputs to electric power production in the relevant market.²⁰

¹⁷ *Id.*

¹⁸ *Id.* at 12.

¹⁹ *Id.*

²⁰ *Id.* at 12-13.

H. CRT

20. Applicants state that CRT, a Delaware limited liability company, is a broker-dealer registered with the Securities and Exchange Commission. Applicants further state that CRT is not primarily engaged in energy-related business activities. Neither CRT nor any of its subsidiaries is a franchised utility in North America. None of CRT or its affiliates: (1) owns or controls electric generation facilities in the MISO Balancing Authority Area; (2) owns or controls any electric transmission or distribution facilities in the United States; or (3) owns or controls any inputs to electric power production in the relevant market.²¹

I. MetLife

21. According to Applicants, MetLife is an insurance company organized under the laws of the State of New York and a wholly owned subsidiary of MetLife, Inc. MetLife, Inc. is primarily in the insurance business and has subsidiaries involved in other financial activities. None of MetLife or its affiliates is a franchised utility in North America. Except as set forth below, none of MetLife or its affiliates is engaged in energy-related business activities or owns or controls any electric generating facilities, electric transmission or distribution facilities, or any inputs to electric power production in the United States.²²

22. Applicants state that MetLife Capital Limited Partnership, a wholly owned subsidiary of MetLife, Inc., is the beneficiary of, and exercises control over, a trust which owns an approximately 90 percent ownership interest in Long Island Solar Farm, LLC (Long Island Solar), a 32 MW solar-powered electric generation facility in Long Island, New York, with MetLife Renewables Holding, LLC, an affiliate of MetLife, owning the remaining beneficial interests in the trust. Additionally, Applicants state that Greater Sandhill I, LLC, (Greater Sandhill), an affiliate of MetLife, is a QF and owns an approximately 19 MW solar generating facility in Alamosa County, Colorado, within the Balancing Authority Area of Public Service Company of Colorado. Applicants state that all of the electricity generated by Long Island Solar and Greater Sandhill is fully committed under long-term power purchase agreements.²³

²¹ *Id.* at 13.

²² *Id.*

²³ *Id.* at 13-14.

23. Applicants state that MetLife, through the ownership of interests in special-purpose trusts, limited partnerships or limited liability companies, has indirect, passive investments in some non-traditional public utilities. Within the MISO Balancing Authority Area, MetLife Capital Credit L.P. (MetLife Capital Credit) holds a passive 33 percent membership interest in Prairie Rose Wind, LLC, which owns and operates an approximately 220 MW electric generation facility located in Rock and Pipestone Counties, Minnesota, and owns a generation interconnection line located in Rock County, Minnesota, and Minnehaha County, South Dakota. Applicants also assert that MetLife Capital Credit holds 50 percent of the beneficial interests in Lakefield Wind Project OP Trust, which holds 100 percent of the interests in Lakefield Wind Project, LLC, which owns an approximately 205 MW generating facility located in Jackson County, Minnesota. Applicants state that MetLife and its affiliates do not directly or indirectly manage, operate, or control such public utilities; the owner-manager of each such public utility has control over its management and operations.²⁴

24. Applicants state that MetLife and its affiliates may, from time to time, own passive limited partnership interests or similar passive interests in private investment funds, such as private equity funds and hedge funds. Applicants explain that some of those passive limited partnership interests may have direct or indirect ownership interests in entities that own or control facilities used for the generation, sale, distribution, or transmission of energy, or for the production, gathering, storage, liquefaction, sale, transmission, or distribution of natural gas and other inputs to electric generation. Applicants state that management control of such private investment funds resides solely with the relevant general partner/managing member. Applicants state that in no case is any such controlling general partner/managing member affiliated with MetLife or any of its affiliates.²⁵

25. Applicants state that personnel of MetLife or its affiliates may be members of advisory boards of certain private investment funds. Applicants explain that such boards are comprised primarily of other passive investors in such funds, and that their functions are limited. For example, Applicants state that such boards generally screen and approve certain affiliate transactions between the general partner/managing partner or its affiliates, and the relevant fund, as well as approve variations from investment limitations in the funds such as governing documents. Applicants state that neither MetLife nor its affiliates have management, operation, or control over any underlying energy facilities as a result of membership on advisory boards of private investment funds.²⁶

²⁴ *Id.* at 14.

²⁵ *Id.* at 14-15.

²⁶ *Id.* at 15.

26. Applicants state that MetLife and its affiliates also own passive, owner-lessor interests in sale-leaseback and other lease transactions involving entities that may own or control facilities used for the generation, sale, distribution, or transmission of electric energy, or for the production, gathering, storage, liquefaction, sale, transmission, or distribution of natural gas and other inputs to electric generation. Applicants contend that, in sale-leaseback transactions, the Commission has recognized that owner-lessor interests (like those owned by MetLife and its affiliates) are passive and do not equate to operation or control of any underlying energy facilities.²⁷

27. Applicants state that, in the ordinary course of their insurance business, MetLife and its affiliates have their own proprietary investments and provide such investment management services to institutional clients, such as trusts and pension funds, and retail clients through registered variable products. According to Applicants, when MetLife and its affiliates provide investment management services, they typically have discretionary authority to purchase and sell voting securities, as well as delegated authority to vote the proxies for such securities. However, with respect to their own proprietary, non-indexed investments and the related investment management services directly provided by them, Applicants state that MetLife and its affiliates do not collectively own or control, directly or indirectly, 5 percent or more of the voting securities of any entity that owns or controls facilities used for the generation, sale, distribution, or transmission of electric energy, or for the production, gathering, storage, liquefaction, sale, transmission, or distribution of natural gas and other inputs to electric generation.²⁸

J. Proposed Transaction

28. As noted, the Facility is currently owned by PowerMinn and leased and operated by Fibrominn. Applicants explain that the note holders have commenced a receivership proceeding under Minnesota law regarding PowerMinn and Fibrominn. The receivership proceeding will include, among other things, the appointment of a receiver by the court and the sale of PowerMinn's property subject to the receivership proceeding which includes the Facility. Currently, it is anticipated that Benson will be the purchaser of PowerMinn's property, including the Facility, through the receivership sale. Following the consummation of the Proposed Transaction, PowerMinn and Fibrominn will be

²⁷ *Id.*

²⁸ *Id.* at 16.

dissolved, Benson will become the owner and operator of the Facility and CPV Biomass will become the managing member of Benson. Applicants state that Fibrominn intends to cancel its market-based rate tariff subsequent to the Proposed Transaction.²⁹

29. Applicants state that the jurisdictional facilities affected by the Proposed Transaction consist of various books and records, the interconnection equipment associated with the Facility, and related agreements associated with the Facility.³⁰

II. Notice of Filing and Responsive Pleadings

30. Notice of the Application was published in the *Federal Register*, 80 Fed. Reg. 9706 (2015), with interventions and protests due on or before March 11, 2015.

31. Norton Herrick, Elayne Herrick, Howard Herrick, Michael Herrick, and Evan Herrick (collectively, the Herricks) filed a motion to intervene and comments and an amended motion to intervene and comments. PowerMinn and Fibrominn filed an answer.

III. Discussion

A. Procedural Matters

32. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motion to intervene serves to make the Herricks a party to this proceeding.

33. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014) prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept PowerMinn and Fibrominn's answer because it has provided information that assisted us in our decision-making process.

²⁹ *Id.* at 2, 16-17. Applicants state that details of the Proposed Transaction are set forth in the Asset Purchase Agreement among PowerMinn, Fibrominn, and the noteholders party thereto, dated January 28, 2015, which is attached to the application as confidential Exhibit I. Applicants further state that a chart depicting the upstream ownership of the Facility after the Proposed Transaction is attached to the application as Exhibit C.

³⁰ *Id.* at 17.

B. Substantive Matters**1. Standard of Review Under FPA Section 203**

34. FPA section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.³¹ The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.³² FPA section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."³³ The Commission's regulations establish verification and informational requirements for entities that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.³⁴

2. Analysis of the Proposed Transaction**a. Effect on Competition****i. Applicants' Analysis**

35. Applicants assert that the Proposed Transaction will have no adverse effect on competition because it raises no horizontal or vertical market power concerns. Applicants explain that Benson is a newly-formed company that does not currently own or control any Commission-jurisdictional or power-related assets. Neither the Class A Managing Member of Benson nor the independent directors of the Board currently own or control any electric generation in the MISO Balancing Authority Area. Applicants further assert that, since the holders of Class B and Class C membership interests in Benson hold only passive, non-managing equity interests and have no day-to-day management or control over Benson, the Class B and Class C members should not be considered affiliates of Benson. The Proposed Transaction will result in Benson owning or controlling 64 MW in the MISO Balancing Authority Area. The output from the

³¹ 16 U.S.C. § 824b(a)(4) (2012).

³² Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

³³ 16 U.S.C. § 824b(a)(4) (2012).

³⁴ 18 C.F.R. § 33.2(j) (2014).

Facility is committed under a long-term power purchase agreement with Northern States Power Company. Therefore, Applicants contend that the Proposed Transaction will have no adverse effect on horizontal market power in the MISO Balancing Authority Area.

36. Applicants argue that, even assuming the Proposed Transaction results in an affiliation between Benson and the non-managing members, there would be no adverse effect on competition in the relevant MISO Balancing Authority Area. Applicants explain that the Proposed Transaction will not result in any new combination of electric generating assets that could have an impact on the competitive situation in the relevant market. Therefore, Applicants maintain that the Proposed Transaction will not have an adverse effect on horizontal market power.³⁵

37. Applicants also assert that the Proposed Transaction raises no vertical market power concerns. First, Applicants note that the Proposed Transaction does not involve any transmission facilities, other than limited interconnection equipment necessary to connect the Facility to the grid, or any inputs to electricity products or electric power production. Second, Applicants state that none of Benson, CPV Biomass, the non-managing members of Benson, or any of its affiliates owns or controls any electric transmission facilities, except for limited interconnection facilities necessary to connect individual generating facilities to the grid, facilities for which the Commission has granted a waiver of the requirement to file an OATT, or transmission facilities that are subject to a Commission accepted OATT. Third, Applicants state that none of Benson, CPV Biomass, the non-managing members of Benson, or any of their affiliates own or control any inputs to electricity products or electric power production, as defined in sections 33.4 and 35.6 of the Commission's regulations, in the relevant market.³⁶

ii. Commission Determination

38. We agree with Applicants that the Proposed Transaction will not have an adverse effect on competition. The Proposed Transaction will not have an adverse effect on horizontal competition because neither Benson nor CPV Biomass currently owns or controls any Commission-jurisdictional electric generation in the MISO Balancing Authority Area. In addition, we note that the Proposed Transaction will only result in Benson owning or controlling 64 MW in the MISO Balancing Authority Area, all of which is committed under a long-term power purchase agreement with Northern States Power Company. As Applicants note, none of Benson, CPV Biomass, the non-managing members of Benson, or any of their affiliates own or control any electric transmission

³⁵ Application at 19-20.

³⁶ *Id.* at 20-21.

facilities other than limited facilities necessary to interconnect the generation facilities to the transmission grid.

b. Effect on Rates

i. Applicants' Analysis

39. Applicants assert that the Proposed Transaction will have no adverse effect on rates because, after the Proposed Transaction, Benson intends to continue selling the entire output of the Facility to Northern States Power Company under the existing long-term power purchase agreement and pursuant to its market-based rate authority. Applicants further contend that the terms and conditions of the wholesale power sales will not change as a result of the Proposed Transaction. Additionally, Applicants contend that the Proposed Transaction does not involve transmission rates or transmission customers. Applicants therefore maintain that the Proposed Transaction will have no adverse effect on wholesale ratepayers or transmission customers.³⁷

ii. Commission Determination

40. We find that the Proposed Transaction will not have an adverse effect on rates. Applicants represent that Benson intends to continue selling the entire output of the Facility to Northern States Power Company under the existing long-term power purchase agreement and pursuant to its market-based rate authority.³⁸ In addition, the Proposed Transaction does not involve transmission rates or transmission customers.

c. Effect on Regulation

i. Applicants' Analysis

41. Applicants assert that the Proposed Transaction will not have an adverse effect on regulation because the Proposed Transaction will not impair the ability of the Commission or any state regulatory authority to regulate Applicants or any of their affiliates. Applicants state that Benson will be an EWG under PUHCA, which is authorized to sell electric capacity, energy, and ancillary services at market-based rates,

³⁷ *Id.* at 21.

³⁸ The Commission accepted Benson's market-based rate application on March 11, 2015, effective March 3, 2015, as requested. *Benson Power, LLC*, Docket No. ER15-936-000 (Mar. 11, 2015) (delegated letter order).

and that the Facility will also continue to be a qualifying small power production facility.³⁹

ii. Commission Determination

42. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Proposed Transaction will not create a regulatory gap at the federal level, and no state has alleged that it lacks the authority to review the Proposed Transaction or raised concerns about the effect of the Proposed Transaction on state regulation.

d. Cross-Subsidization

i. Applicants' Analysis

43. Applicants assert that the Proposed Transaction falls within the “safe harbor” adopted by the Commission for certain classes of transactions that are unlikely to raise cross-subsidization concerns. Applicants state that none of the parties to the Proposed Transaction is a traditional public utility that has captive ratepayers in the United States or is affiliated with a traditional public utility that has captive customers in the United States or that owns or provides transmission service over the jurisdictional transmission facilities in the United States and therefore the Proposed Transaction falls within the safe harbor established by the Commission.⁴⁰

44. Even though Applicants assert that the Proposed Transaction falls within the safe harbor, they also provide the verifications required by the Commission under Exhibit M. Specifically, Applicants verify that, based on facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate

³⁹ Application at 21.

⁴⁰ *Id.* at 22.

company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review under sections 205 and 206⁴¹ of the FPA.

ii. Commission Determination

45. We find, based on Applicants' representations, that the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company by a utility company, or in a pledge or encumbrance of utility assets for the benefit of an associate company. As Applicants note, the Proposed Transaction does not involve a franchised public utility with captive customers, and therefore falls within the safe harbor established by the Commission.

IV. Other Issues

A. Issues Raised by the Herricks

46. The Herricks request that the Commission, as part of the approval of the Proposed Transaction, require that Applicants clarify to the Herricks the legal status of certain production tax credits associated with the Facility. The Herricks state that the current ownership structure described in the application follows a sale of PowerMinn Holdings LLC (the parent of PowerMinn) by the Herricks to Unagi in August 2006. The Herricks explain that the purchase price paid by Unagi to the Herricks for the membership interests in PowerMinn was comprised of three parts: (a) a base price paid at closing; (b) a deferred payment which was paid on the fourth and fifth anniversaries of the closing date; and (c) a "Section 45 Payment," related to production tax credits associated with the Facility, equal to 50 percent of the "Net Economic Benefits" realized from any production tax credits associated with the Facility. The Herricks contend that this Section 45 Payment was to be paid within three days of the filing by Unagi, its direct or indirect owners, or any Affiliate (as that term is defined in the Powerminn PSA) of Unagi or its owners of a federal income tax return claiming production tax credits. However, the Herricks maintain that no payments have been made to the Herricks despite the availability of such credits, and the Herricks have no means of ascertaining, by whom, or to what extent, production tax credits may have been claimed. As such, the Herricks argue that the Section 45 Payment remains due to the Herricks at the time any production tax credits related to the Facility are realized.⁴²

⁴¹ 16 U.S.C. § 824e (2012).

⁴² Amended Motion to Intervene and Comments of the Herricks at 2-3.

47. The Herricks state that the Application does not reflect the Section 45 Payment due to them and does not address the status of production tax credits associated with the Facility. As such, the Herricks argue that the Proposed Transaction could potentially extinguish their rights. The Herricks state that the Commission cannot authorize the Proposed Transaction in its current form without requiring Applicants to address the Herricks' rights within the scope of the Proposed Transaction by requiring Applicants to clarify the current legal status of the production tax credits related to the Facility.⁴³

B. PowerMinn and Fibrominn's Answer

48. PowerMinn and Fibrominn argue that the Herricks intervened in this proceeding to protect their claimed right to a contractual payment attributable to production tax credits under Section 45 of the Internal Revenue Code. They contend that if the right exists at all, it arises out of the Purchase and Sale Agreement dated as of August 12, 2006, between the Herricks and PowerMinn Holdings, LLC and Unagi LLC (the 2006 Purchase and Sale Agreement) by which Unagi LLC acquired PowerMinn. PowerMinn and Fibrominn maintain that the 2006 Purchase and Sale Agreement is not included in the proposed sale of Fibrominn's assets to Benson.⁴⁴

49. PowerMinn and Fibrominn state that the transfer of Fibrominn's assets is pursuant to a receivership proceeding conducted pursuant to Minn. Stat. § 576.21-53 (2014). They point out that the Herricks were served with notice of the receivership and had the right to file a claim or interpose an objection in that proceeding, but elected not to participate. The state district approved the sale on March 25, 2015, subject to Commission approval.⁴⁵

50. PowerMinn and Fibrominn state that the Herricks have other remedies if they believe that they are entitled to the Section 45 Payment, and that the 2006 Purchase and Sale Agreement affords them the right to retain a nationally recognized independent public accounting firm to verify whether Section 45 Tax Credits (as defined in the 2006 Purchase and Sale Agreement) have been claimed. Additionally, PowerMinn and Fibrominn assert that if the Herricks believe that the 2006 Purchase and Sale Agreement has been breached, they can bring a breach of contract claim under New York law in the state and federal courts of New York, as provided for in that agreement.⁴⁶

⁴³ *Id.* at 3.

⁴⁴ PowerMinn and Fibrominn Answer at 1-2.

⁴⁵ *Id.* at 2.

⁴⁶ *Id.* at 3.

51. PowerMinn and Fibrominn conclude that the Herricks know that their Section 45 claim is irrelevant to this section 203 proceeding. They contend that the Herricks have not provided the Commission with anything that substantiates that their claim is properly within the scope of this proceeding and that, if the Commission grants the Herricks' motion to intervene, it should nevertheless deny the Herricks the relief requested.⁴⁷

C. Commission Determination

52. We find that the Herricks' protest raises issues that are unrelated to the Proposed Transaction and, therefore, outside the scope of our analysis of the Proposed Transaction under FPA section 203. The matters referred to by the Herricks relate to tax credits under the Internal Revenue Code, not to the effects of the Proposed Transaction on competition, rates, regulation or a prohibited cross-subsidization in energy markets.

V. Other Considerations

53. Order No. 652 requires that sellers with market-based rate authority 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.⁴⁸ To the extent that the foregoing authorization results in a change in status, Applicants are advised that they must comply with the requirements of Order No. 652.

54. Information and/or systems connected to the bulk power system involved in this Proposed Transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215.⁴⁹ Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information database, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cyber security standards.

⁴⁷ *Id.*

⁴⁸ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). See 18 C.F.R. § 35.42 (2014).

⁴⁹ 16 U.S.C. § 824o (2012).

The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

(B) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in authorizing the Proposed Transaction.

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

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

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

(F) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(G) Applicants shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.