

167 FERC ¶ 61,140
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Clearway Energy Group LLC
Clearway Energy, Inc.

Docket No. EC19-68-000

ORDER GRANTING BLANKET AUTHORIZATION

(Issued May 16, 2019)

1. On March 18, 2019, Clearway Energy Group LLC (Clearway Group) and Clearway Energy, Inc. (Clearway Energy) (together, Applicants) filed an application pursuant to section 203 of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations² requesting blanket authorization under FPA section 203(a)(1) for direct or indirect transfers of interests in certain public utilities that are Exempt Wholesale Generators (EWG) and/or Qualifying Facilities (QF) from Clearway Group or its upstream owner, GIP III Zephyr Acquisition Partners, L.P. (GIP III Zephyr), to Clearway Energy (Requested Blanket Authorization).³ We grant the Requested Blanket Authorization, subject to Applicants' proposed limitations and conditions.

¹ 16 U.S.C. § 824b (2012), *amended by* "An Act to amend section 203 of the Federal Power Act," Pub. L. No. 115-247, 132 Stat. 3152 (2018).

² 18 C.F.R. pt. 33 (2018).

³ Clearway Group and Clearway Energy, Application for Blanket Authorization, Docket No. EC19-68-000 (filed Mar. 18, 2019) (Application).

(continued ...)

I. Background

A. Description of Applicants

1. Clearway Group and Relevant Affiliates

2. Applicants state that Clearway Group was formed as a vehicle for NRG Energy, Inc.'s (NRG Energy) sale of its renewables business, Clearway Renew LLC, and its interests in Clearway Energy to GIP III Zephyr (Zephyr Transaction).⁴ Applicants explain that Clearway Group, through various subsidiaries, owns wind, solar, and thermal generation and distributed and community solar-powered generation, has renewable projects in development, and provides asset management services to operating renewable projects.⁵

3. Applicants state that, as a result of the consummation of the Zephyr Transaction, all of Clearway Group's membership interests are owned by GIP III Zephyr. GIP III Zephyr is controlled by its general partner, Global Infrastructure GP III, LP, which is, in turn, managed by its general partner, Global Infrastructure Investors III, LLC (Global Infrastructure III). The sole member of Global Infrastructure III is GIM Participation Funding Holding, L.P. (GIMP Funding), which is owned by individuals who also own the interests in Global Infrastructure Management Participation, LLC (GIMP).⁶ Applicants explain that the limited partnership interests in GIP III Zephyr are held by Global Infrastructure Partners III-A/B AIV 3, L.P., Global Infrastructure Partners III-C Intermediate AIV 3, L.P., Global Infrastructure Partners III-C2 Intermediate AIV, L.P., and GIP III Friends & Family Fund, L.P. (collectively, GIP III Funds).⁷ The GIP III Funds, which are independent funds organized as limited partnerships that invest in infrastructure assets globally, are managed by Global Infrastructure Management, LLC, whose sole member is GIMP.

⁴ *NRG Yield, Inc.*, 163 FERC ¶ 62,101 (2018).

⁵ Application at 2.

⁶ *Id.* at 3 (citing CPV Fairview, LLC, Application for Market-Based Rate Authorization, Docket No. ER17-1531-000 (filed May 2, 2017)).

⁷ *Id.*

2. Clearway Energy

4. Applicants explain that Clearway Energy was originally formed by NRG Energy to own a portfolio of renewable and conventional generation and thermal infrastructure assets in the United States. Applicants state that various assets, including interests in public utilities, were transferred from NRG Energy to Clearway Energy before an initial public offering (IPO) of shares of Clearway Energy's Class A common stock. These transfers continued after the IPO pursuant to a blanket authorization (Yield Blanket Authorization).⁸

5. Applicants state that Clearway Group owns all of the shares of Class B and Class D common stock of Clearway Energy, which represent in the aggregate approximately 55 percent of the voting interests, but no economic interest, in Clearway Energy. The shares of Class A and Class C common stock of Clearway Energy, which currently represent in the aggregate approximately 45 percent of the voting interests and all of the economic interests in Clearway Energy, are publicly traded on the New York Stock Exchange. Applicants state that they are not aware of any investor or investor group that currently owns, controls or holds with power to vote an amount of Clearway Energy's Class A and/or Class C shares that would equate to 10 percent or more of its outstanding voting securities.⁹

6. Applicants explain that Clearway Energy's interests in operating assets are held through Clearway Energy Operating LLC (Clearway Operating) and that all of the membership interests of Clearway Operating are owned by Clearway Energy LLC (Clearway LLC). Clearway Energy is the managing member of Clearway LLC and owns

⁸ See *NRG Energy, Inc.*, 147 FERC ¶ 61,261 (June 2014 Order), *modified*, 149 FERC ¶ 61,075 (2014), *amended*, 152 FERC ¶ 61,062 (2015), *amended*, 157 FERC ¶ 61,147 (2016), *reauthorizing and extending*, 159 FERC ¶ 62,345 (2017), *terminated*, 165 FERC ¶ 61,164 (2018) (November 2018 Order). Applicants explain that, before the consummation of the Zephyr Transaction, the interests in Clearway Energy and Clearway LLC were owned by NRG Energy. In the June 2014 Order, the Commission granted a request by NRG Energy and Clearway Energy for the Yield Blanket Authorization, a blanket authorization under section 203(a)(1) of the FPA for the direct and indirect transfers of voting interests in public utilities from NRG Energy to Clearway Energy, for a three-year term beginning on June 27, 2014, subject to certain limitations and conditions. In the November 2018 Order, the Commission granted NRG Energy and Clearway Energy's request to terminate the Yield Blanket Authorization because the conditions to using that blanket authorization could no longer be met with the consummation of the Zephyr Transaction. Application at 6-8.

⁹ Application at 4.

(continued ...)

all of the Class A and Class C membership interests of Clearway LLC, which currently represent in the aggregate approximately 55.7 percent of the economic interests in Clearway LLC. Clearway Group owns all of the Class B and Class D membership interests of Clearway LLC, which currently represent in the aggregate approximately 44.3 percent of the economic interests in Clearway LLC.¹⁰

II. Proposed Transactions and Request for Blanket Authorization

7. Applicants state that the transfer of voting interests in public utilities from Clearway Group or GIP III Zephyr to Clearway Energy (Proposed Transactions) are an important part of both Applicants' business plans going forward.¹¹ Applicants add that Clearway Group has granted Clearway Energy a right of first refusal on certain renewable generation assets and that Clearway Energy expects that Clearway Group will continue to provide it with access to a renewable development platform supporting its growth in the future.¹²

8. Applicants request blanket FPA section 203(a)(1) authorization for direct or indirect transfers of interests in public utilities from Clearway Group or GIP III Zephyr to Clearway Energy, subject to the same limitations and conditions established for the Yield Blanket Authorization. Specifically, Applicants propose the following limitations and conditions:

- The blanket authorization would apply only to transfers of voting interests in public utilities that are EWGs and/or QFs and would not apply to transfers of voting interests in any traditional public utility that (1) has captive customers; (2) owns transmission facilities (other than limited transmission facilities used to interconnect generating facilities with the transmission grid); or (3) provides transmission service.

¹⁰ *Id.* at 4-5.

¹¹ *Id.* at 8-9.

¹² *Id.* at 9. Applicants note that, although GIP III Zephyr was primarily formed to acquire and hold Clearway Group's membership interests, it may also acquire interests in operating companies other than through Clearway Group. In the one instance in which GIP III Zephyr has done so to date, Clearway Energy has an option to acquire the interests in that operating company from GIP III Zephyr for a period of 18 months. *Id.* at n.30.

- The blanket authorization would apply only when: (1) Clearway Group owns at least 50 percent of Clearway Energy's outstanding voting securities; and (2) neither Clearway Group nor Clearway Energy has actual or constructive notice that any investor, individually or together with its affiliates, owns an amount of Clearway Energy's Class A and/or Class C shares that would equate to 10 percent or more of Clearway Energy's outstanding voting securities.
- The blanket authorization would be subject to the following reporting conditions designed to facilitate ongoing Commission oversight:
 - Clearway Group and Clearway Energy will notify the Commission within 10 days of the date on which a transaction pursuant to the blanket authorization is consummated;
 - Within 60 days of the end of each calendar quarter, Clearway Group and Clearway Energy will submit an informational report identifying each investor (or affiliated group of investors) that, as of the end of the quarter, owned five percent or more of the outstanding shares of Clearway Energy's Class A or Class C common stock, showing the percentages of (a) the investor's/investor group's Class A shares to the total outstanding shares of Class A common stock, (b) the investor's/investor group's Class C shares to the total outstanding shares of Class C common stock, and (c) the investor's/investor group's Class A and Class C shares to the aggregate number of outstanding shares of Class A, B, C and D common stock;
 - The blanket authorization would be effective for a three-year term from the date of the Commission's order, subject to extension; and
 - Clearway Group and Clearway Energy will inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts upon which the Commission relies in granting the requested blanket authorization.
- In addition, the blanket authorization would only apply to transfers of interests in public utilities from GIP III Zephyr to Clearway Energy when GIP III Zephyr directly or indirectly owns 100 percent of the voting securities of Clearway Group. This condition ensures that transfers from GIP III

Zephyr to Clearway Energy are indistinguishable in effect from transfers from Clearway Group to Clearway Energy.¹³

III. Notice of Filings

9. Notice of the Application was published in the *Federal Register*, 84 Fed. Reg. 11,081 (2019), with interventions and protests due on or before April 8, 2019. None was filed.

IV. Discussion

A. FPA Section 203 Standard of Review

10. FPA section 203(a)(4) requires the Commission to approve proposed dispositions, consolidations, acquisitions, or changes in control if the Commission determines that the proposed transaction will be consistent with the public interest.¹⁴ The Commission's analysis of whether a proposed 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.¹⁵ FPA section 203(a)(4) also requires the Commission to find that the proposed transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the

¹³ *Id.* at 9-10.

¹⁴ 16 U.S.C. § 824b(a)(4). Applicants explain that they will obtain all state and other regulatory approvals as may be required in connection with any particular Proposed Transaction, but cannot, at this time, identify the entire universe of other regulatory approvals that may potentially be required with respect to the Proposed Transactions. Application at Ex. L.

¹⁵ *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,111 (1996) (cross-referenced at 77 FERC ¶ 61,263) (*Merger Policy Statement*), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); *see also FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 (2007) (*Supplemental Policy Statement*), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000) (cross-referenced at 93 FERC ¶ 61,164), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315 (2005), *order on reh'g*, Order No. 669-A, 115 FERC ¶ 61,097, *order on reh'g*, Order No. 669-B, 116 FERC ¶ 61,076 (2006).

(continued ...)

benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”¹⁶ The Commission’s regulations establish verification and informational requirements for entities that seek a determination that a proposed transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹⁷

B. Analysis of Requested Blanket Authorization

11. As discussed below, we grant Applicants’ Requested Blanket Authorization, subject to Applicants’ proposed limitations and conditions, and authorize the Proposed Transactions.

1. Effect on Competition

a. Applicants’ Analysis

12. Applicants argue that the Proposed Transactions will have no horizontal or vertical market power impacts. According to Applicants, as the Commission found in granting the Yield Blanket Authorization, with the proposed limitations and conditions, the public utilities involved will be controlled by Clearway Group or GIP III Zephyr “both before and after the Proposed Transactions take place,” and the Proposed Transactions will not result in a public utility “becoming affiliated with any additional entities with which it was not [already] affiliated”¹⁸

13. Applicants assert that the Proposed Transactions are “essentially internal corporate reorganizations, which, as the Commission has recognized . . . , do not involve any consolidation of ultimate control and thus ‘are unlikely to cause anticompetitive effects.’”¹⁹ However, Applicants indicate that, “[b]ecause the [Proposed] Transactions involve some degree of external (i.e., non-Clearway Group) ownership, it is not clear whether they would be considered ‘internal corporate reorganizations’”²⁰ Accordingly, Applicants argue that, as the Commission found regarding the transactions

¹⁶ 16 U.S.C. § 824b(a)(4).

¹⁷ 18 C.F.R. § 33.2(j) (2018).

¹⁸ Application at 11 (quoting June 2014 Order, 147 FERC ¶ 61,261 at P 24).

¹⁹ *Id.* at 11-12 (footnotes omitted); *see also* 18 C.F.R. § 33.1(c)(6).

²⁰ Application at 11 n.35 (citations and emphasis omitted).

(continued ...)

under the Yield Blanket Authorization, the Proposed Transactions will not have an adverse effect on horizontal or vertical competition.²¹

b. Commission Determination

14. Applicants have demonstrated that, under the Requested Blanket Authorization, the Proposed Transactions will not have an adverse effect on horizontal or vertical competition because the public utilities transferred from Clearway Group or GIP III Zephyr to Clearway Energy will be controlled by Clearway Group or GIP III Zephyr both before and after the Proposed Transactions take place.²² Applicants' proposed limitations and conditions limit the Requested Blanket Authorization so that it will not apply when a Proposed Transaction would result in a change in control over a public utility and its Commission-jurisdictional facilities. Rather, the Requested Blanket Authorization would only apply to Proposed Transactions occurring when Clearway Group owns at least 50 percent of Clearway Energy's outstanding voting securities, and neither Clearway Group nor Clearway Energy have actual or constructive notice that any investor, individually or together with its affiliates, owns an amount of Clearway Energy's Class A and/or Class C common stock that would equate to 10 percent or more of Clearway Energy's outstanding voting securities. Similarly, none of the Proposed Transactions will result in a public utility becoming affiliated with any additional entities with which it was not affiliated prior to the transaction. Thus, under the Requested Blanket Authorization, no change in market concentration would occur, and no new vertical combinations of assets would be created.

15. We remind Applicants that, if the circumstances the Commission is relying upon to grant the Application materially change, the Requested Blanket Authorization will not cover subsequent transactions until Applicants obtain approval based on the new circumstances. Accordingly, we conclude that the Proposed Transactions under the Requested Blanket Authorization, subject to Applicants' proposed limitations and conditions, will not have an adverse effect on horizontal or vertical competition.

2. Effect on Rates

a. Applicants' Analysis

16. Applicants assert that the Proposed Transactions will not adversely affect rates. Applicants explain that the public utilities whose interests would be transferred pursuant to the Proposed Transactions have market-based rate authorization or make Commission-jurisdictional wholesale sales at cost-based rates pursuant to rate schedules on file with

²¹ *Id.* at 12.

²² *Id.* at 11-12.

the Commission. Applicants argue that the only cost-based rate schedules potentially implicated by any of the Proposed Transactions are the rate schedules under which an affected public utility might receive cost-based compensation for reactive power, black start, reliability must-run or similar generation-based services. However, Applicants state that such rate schedules would not allow for the automatic pass-through of transaction-related costs without an FPA section 205 filing. In addition, Applicants explain that neither the Applicants nor any of their affiliates is a traditional utility with captive retail or wholesale customers or provides unbundled transmission and that, by its terms, the Requested Blanket Authorization would not apply to any transfers of interests in such entities. Accordingly, as with the transactions under the Yield Blanket Authorization, Applicants contend that the Proposed Transactions will not have an adverse effect on rates.²³

b. Commission Determination

17. Based on Applicants' representations, we find that the Proposed Transactions under the Requested Blanket Authorization, subject to Applicants' proposed limitations and conditions, will not adversely affect rates. Applicants state that the public utilities whose interests would be transferred pursuant to the Proposed Transactions will continue to make Commission-jurisdictional sales of electric energy, capacity, and ancillary services at market-based rates or at cost-based rates pursuant to other rate schedules on file with the Commission that Applicants state would not allow for the automatic pass-through of transaction-related costs without an FPA section 205 filing.

3. Effect on Regulation

a. Applicants' Analysis

18. Applicants contend that the Proposed Transactions will not have any adverse effect on the effectiveness of federal or state regulation. Specifically, Applicants assert that wholesale sales of the output of the transferred public utilities' generation facilities will remain subject to the Commission's ratemaking jurisdiction, as they are today. Applicants state, similarly, that the Proposed Transactions will not affect the ability of any state authority to regulate retail rates.²⁴

²³ *Id.* at 12-13.

²⁴ *Id.* at 13.

(continued ...)

b. Commission Determination

19. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.²⁵ As to whether a proposed transaction will have an effect on state regulation, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.²⁶ Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transactions under the Requested Blanket Authorization, which is subject to Applicants' proposed limitations and conditions.

4. Cross-Subsidization

a. Applicants' Analysis

20. According to Applicants, the Commission has recognized three classes of transactions that are unlikely to present cross-subsidization concerns and, as a result, has adopted three "'safe harbors' for meeting the Section 203 cross-subsidization demonstration, absent concerns identified by the Commission or evidence from intervenors that there is a cross-subsidy problem based on the particular circumstances presented."²⁷ Applicants assert that the Proposed Transactions fall within the safe harbor for transactions that do not involve a franchised public utility with captive customers.²⁸ Applicants contend that, under such circumstances, the Commission has recognized that "there is no potential harm to customers."²⁹

21. Applicants verify that, based on the facts and circumstances known to Applicants or that are reasonably foreseeable, the Proposed Transactions will not result in, at the time of any particular Proposed Transaction or in the future: (1) transfers of facilities

²⁵ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

²⁶ *Id.*

²⁷ Application at 13 (quoting *Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 16).

²⁸ *Id.* at 13-14 (citing *Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 17).

²⁹ *Id.* at 14 (quoting *Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 17).

(continued ...)

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) new issuances of securities by traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances 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) new affiliate contracts between non-utility associate companies and traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review pursuant to FPA sections 205 and 206.³⁰

b. Commission Determination

22. We find that Applicants have provided adequate assurance that the Proposed Transactions under the Requested Blanket Authorization, subject to Applicants' proposed limitations and conditions, will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets from the benefit of an associate company.

C. Other Considerations

23. Information and/or systems connected to the bulk system involved in this transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215.³¹ 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 cybersecurity standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

³⁰ *Id.* at Ex. M; *see also* 16 U.S.C. §§ 824d, 824e.

³¹ 16 U.S.C. § 824o.

(continued ...)

24. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. The approval of the Proposed Transactions is based on such examination ability. In addition, applicants subject to the Public Utility Holding Company Act of 2005³² (PUHCA 2005) are subject to the record-keeping and books and records requirements of PUHCA 2005.

25. 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.³³ To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the requirements of Order No. 652.

The Commission orders:

(A) The Proposed Transactions under the Requested Blanket Authorization are hereby authorized, as discussed in the body of this order, effective for a three-year term from the issuance date of this order.

(B) Applicants will file, on an informational basis and within 60 days of the end of each calendar quarter, a quarterly report that identifies each investor (or affiliated group of investors) that, at of the end of the quarter, owns five percent or more of the outstanding shares of Class A or Class C common stock, showing the percentages of Class A and/or Class C shares to (1) the total outstanding shares of Class A and/or Class C common stock and (2) the aggregate number of outstanding shares of Class A, B, C and D common stock, as discussed in the body of this order.

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

³² 42 U.S.C. § 16451 *et seq.* (2012).

³³ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097, *order on reh'g*, 111 FERC ¶ 61,413 (2005). See 18 C.F.R. § 35.42 (2018).

(D) 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 not pending or may come before the Commission.

(E) 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.

(F) Applicants are subject to audit to determine whether they are in compliance with the representations, conditions and requirements upon which the authorizations are herein granted and with applicable Commission rules, regulations and policies. In the event of a violation, the Commission may take action within the scope of its oversight and enforcement authority.

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

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.