172 FERC ¶ 61,032
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Brookfield Asset Management Inc. Docket No. EL20-40-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued July 16, 2020)

1. On April 7, 2020, Brookfield Asset Management Inc. (Brookfield) filed a petition under Rule 207(a) of the Commission's Rules of Practice and Procedure[1] and sections 366.3(b)(1), 366.3(d), and 366.4(b)(3) of the Commission's regulations[2] requesting that the Commission issue a declaratory order granting Brookfield and its current and future subsidiaries that are holding companies (collectively, Brookfield Companies) a waiver from certain regulations under the Public Utility Holding Company Act of 2005 (PUHCA 2005)[3] following the acquisition by certain Brookfield Companies of indirect voting securities in Arcadia Fuel Cell, Inc. (Arcadia). Additionally, Brookfield requests that the Commission confirm that the Brookfield Companies would remain eligible for a waiver in the event that certain Brookfield Companies become holding companies with respect to an additional electric utility company, Catalyst Old River Hydroelectric Limited Partnership (Catalyst). In this order, we grant the petition as discussed below.

I. Background

2. Brookfield states that it is a global alternative asset manager with over $540 billion of assets under management across real estate, infrastructure, renewable power, private equity, and credit. Brookfield states that it initially notified the Commission of its status as a holding company on June 15, 2006, and concurrently filed a FERC-65A exemption

[1] 18 C.F.R. § 385.207 (2019).

[2] 18 C.F.R. §§ 366.3(b)(1), 366.3(d), and 366.4(b)(3) (2019).

[3] 42 U.S.C. §§ 16451-63 (2018).

notification in accordance with section 366.4(b) of the Commission's regulations.[4] Brookfield states that subsequently, certain Brookfield Companies became investors in a transmission-only company. As a result, Brookfield states that it relinquished its FERC-65A exemption and filed a FERC-65B waiver notification on December 22, 2009.[5] Brookfield states that in 2012, it incorrectly relinquished its FERC-65B waiver based upon its acquisition of Smoky Mountain Transmission LLC (Smoky Mountain). Brookfield states that it discovered its error recently as a result of an internal audit and filed a revised FERC-65 to amend its 2012 FERC-65 and correct the record.[6]

3. Brookfield notes that on September 26, 2019, a subsidiary company of Brookfield, TerraForm Power, Inc. (TerraForm), indirectly acquired Arcadia, which caused certain Brookfield Companies to become holding companies with respect to Arcadia. Brookfield states that Arcadia owns and operates facilities that generate electricity using fuel cell technology. Brookfield states that with the exception of Arcadia, the public-utility company subsidiaries of TerraForm are all Exempt Wholesale Generators (EWGs) and/or owners of Qualified Facilities (QFs) but Arcadia is not an EWG because it sells energy at retail. Brookfield notes that Arcadia also is not an owner or operator of QFs because its fuel cells are designed to use natural gas as a fuel. Brookfield states that TerraForm petitioned the Commission for an exemption from the requirements of sections 366.2, 366.21, 366.22, and 366.23 of the Commission's regulations. The Commission granted TerraForm's petition in an order issued on November 21, 2019.[7]

4. Additionally, Brookfield notes that certain Brookfield Companies may in the future acquire securities conferring 100% voting control over Catalyst, which would cause them to become holding companies of Catalyst. Brookfield states that certain Brookfield Companies own passive, non-voting securities in Catalyst, which currently leases and operates the Sidney Murray hydroelectric generation facility in Louisiana. Brookfield states that one of its subsidiaries, Brookfield Power US Holding America Co. (Brookfield America), is party to an agreement pursuant to which it may elect, or be required under certain circumstances beyond its control, to indirectly acquire 100% voting control over all of the general partnership interests of Catalyst in the future (Catalyst Transaction). Brookfield states that once the option is exercised, certain Brookfield Companies will be holding companies with respect to Catalyst. Brookfield notes that Catalyst is neither an EWG nor an owner or operator of a QF, so the Brookfield Companies that become holding companies with respect to Catalyst as a result of the

[4] Petition at 3 (citing Docket Nos. HC06-10-00 and PH06-93-000).

[5] *Id*. (citing Docket Nos. PH10-3-000 and PH10-4-000).

[6] *Id*. at 4.

[7] *TerraForm Power, Inc.*, 169 FERC ¶ 61,115 (2019).

Catalyst Transaction will not automatically qualify for an exemption from federal regulation under PUHCA 2005 pursuant to section 366.3(a) of the Commission's regulations.[8]

II. Petition

5. Brookfield requests that the Commission grant the Brookfield Companies a waiver from the requirements of sections 366.21, 366.22, and 366.23 of the Commission's regulations implementing PUHCA 2005[9] (PUHCA Regulations) that would otherwise apply to the Brookfield Companies as a result of the acquisition of Arcadia, and confirm that the Brookfield Companies would retain such waiver in the event of the acquisition of Catalyst.

6. Brookfield states that following the acquisition of Arcadia, the Brookfield Companies no longer qualify for a categorical waiver pursuant to section 366.3(c) of the Commission's regulations and therefore must seek an individual waiver from the Commission. Brookfield argues that the books, accounts, memoranda, and other records of the Brookfield Companies are not relevant to any Commission jurisdictional rates and thus it is appropriate to grant the waiver request.[10]

7. Brookfield states that, with the exception of Smoky Mountain,[11] the public utilities in the Brookfield holding company system are all EWGs or QFs, none of which has captive customers. Brookfield states that holding companies with only EWGs and QFs are exempt from PUHCA 2005 under section 1266(a) of PUHCA 2005 and section 366.3(a) of the Commission's regulations. While holding companies of Smoky Mountain are not subject to the same exemption, Brookfield notes that the Commission has established a waiver for

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[8] Petition at 8-9.

[9] 18 C.F.R. §§ 366.21, 366.22, 366.23 (2019). Section 366.21 establishes accounts and records-related requirements for holding companies. Section 366.22 establishes accounts and records-related requirements for holding company service companies. Section 366.23 establishes reporting requirements for holding company centralized service companies.

[10] Petition at 10.

[11] Brookfield states that Smoky Mountain is an independent transmission-only utility that owns 86 miles of transmission lines connected to the Duke Carolinas transmission system in North Carolina and to the Tennessee Vallee Authority transmission system in Tennessee. *Id*. at 6.

investors in transmission-only companies.[12] Brookfield also argues that there is no significant potential for Smoky Mountain's transmission service customers to subsidize Commission-jurisdictional wholesale sales as a result of the acquisition of Arcadia. In this regard, Brookfield states that Arcadia is engaged exclusively in non-jurisdictional retail power sales, and Smoky Mountain has no customers other than its affiliate Brookfield Smoky Mountain Hydropower LP. Brookfield argues that, under these circumstances, the Commission may adequately address any potential cross-subsidization concerns through its Federal Power Act (FPA) ratemaking authority over Smoky Mountain.

8. Brookfield states that certain Brookfield Companies are also holding companies with respect to Wind Energy Transmission Texas, LLC (WETT).[13] Brookfield indicates that neither WETT nor Arcadia is a public utility with jurisdictional rates. Brookfield states that WETT operates exclusively within the market administered by ERCOT and is an independent transmission-only entity. Brookfield argues that WETT and Arcadia have no customers that would benefit from requiring the Brookfield Companies to comply with the requirements of sections 366.21, 366.22, and 366.23 of the Commission's regulations.[14]

9. Brookfield notes that its holding company system includes several natural gas companies.[15] However, Brookfield states that it has no control over the day-to-day operations of those companies. Additionally, Brookfield states that Arcadia is not a customer of the natural gas companies and operates outside of their service territories. Accordingly, Brookfield argues there is no potential for cross-subsidization and that the books and records of the Brookfield Companies are not necessary for protection of the customers of the natural gas companies.[16]

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[12] *Id*. at 11 (citing *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, 113 FERC ¶ 61,248, at P 140 (2005)).

[13] Brookfield states that WETT operates approximately 375 miles of electric transmission lines located solely within the market operated by the Electric Reliability Council of Texas, Inc. (ERCOT). *Id*. at 6.

[14] 18 C.F.R. §§ 366.21, 366.22, and 366.23.

[15] Petition at 12. Brookfield lists Natural Gas Pipeline Company of America LLC, Kinder Morgan Illinois Pipeline LLC, Horizon Pipeline Company L.L.C. and Tres Palacios Gas Storage LLC as natural gas companies within its holding company system.

[16] *Id.*

10. Brookfield states that the Brookfield Companies will remain subject to PUHCA 2005 in the same manner as they have been historically prior to the acquisition of Arcadia – i.e., the waiver will not diminish the Commission's prior oversight of the Brookfield Companies under PUHCA 2005. Brookfield also argues that a waiver will not diminish the Commission's authority under the FPA or Natural Gas Act to review the books and records of the Brookfield Companies related to jurisdictional rates or to review the rate recovery in jurisdictional rates of any associate and affiliated company's non-power goods and services costs.

11. Brookfield also requests a waiver if certain Brookfield Companies become holding companies with respect to an additional electric utility company, Catalyst. Brookfield maintains that the potential Catalyst acquisition could result from circumstances beyond Brookfield's control, requiring certain Brookfield Companies to acquire securities conferring 100% voting control over Catalyst at a future date. Brookfield states that this would cause these Brookfield Companies to become holding companies of Catalyst. Brookfield states that Catalyst is a public utility with jurisdictional rates on file with the Commission in the form of two long-term purchase power agreements with unaffiliated third parties.

12. Brookfield maintains that, because all of Catalyst's power sales are made at wholesale pursuant to power purchase agreements (PPAs) at fixed negotiated rates that are not based on the cost of service, Catalyst does not have any captive customers that would benefit from requiring the Brookfield Companies to comply with the PUHCA 2005 filing requirements. Moreover, Brookfield argues, the PPAs provide no mechanism for adjusting the rates and Catalyst cannot change the rates under the PPAs without prior Commission review and approval under section 205 of the FPA. As such, Brookfield explains that the additional regulation of the Brookfield Companies with respect to Catalyst is not necessary or appropriate for the protection of Catalyst customers.

III. Motion to Lodge

13. On May 26, 2020, Brookfield filed a motion to lodge new information regarding the potential addition of Catalyst to the Brookfield Companies holding company system. Brookfield states in its motion that subsequent to filing the instant petition, a Brookfield subsidiary, Brookfield America, elected to indirectly acquire 100% of the voting control over Catalyst, subject to the receipt of prior Commission authorization pursuant to section 203 of the FPA. Brookfield states that Catalyst and Brookfield America filed a joint application for FPA section 203 authorization in Docket No. EC20-64-000 on May 7, 2020. In addition, Brookfield notes that Catalyst filed an application for market-based rate authority in Docket No. ER20-1806-000 on May 12, 2020.

14. Brookfield explains in its motion that neither the section 203 application nor the application for market-based rate authority affect the waiver requested in the petition. Brookfield argues that the books, accounts, memoranda, and other records of the Brookfield Companies remain not relevant to Catalyst's jurisdictional rates. Brookfield states that all of Catalyst's power sales currently are made at wholesale pursuant to two long-term PPAs with unaffiliated third parties.[17] Brookfield states that "in the event that [Catalyst] makes future power sales pursuant to the market-based rate authority requested in Docket No. ER20-1806-000, such sales will be made at negotiated rates that are subject to ongoing Commission review."[18] Brookfield argues that Catalyst thus does not and will not have any captive customers. Brookfield also reaffirmed that the acquisition of Catalyst will not raise any cross-subsidization concerns. Accordingly, Brookfield argues that in light of these circumstances, it is not necessary for the protection of jurisdictional ratepayers to require the Brookfield Companies to comply with additional PUHCA 2005 requirements as a result of the acquisition of Catalyst.

IV. Notice of Filing

15. Notice of Brookfield's petition was published in the *Federal Register*, 85 Fed. Reg. 20,681 (April 14, 2020), with interventions and protests due on or before May 7, 2020. None was filed.

V. Discussion

16. Section 366.3(b)(1)(i) of the Commission's regulations authorizes the Commission to grant exemptions and waivers from the PUHCA Regulations if it "finds that the books, accounts, memoranda, and other records of any person are not relevant to the jurisdictional rates of a public utility or natural gas company."[19]

17. Based on the representations made by Brookfield, we find, pursuant to section 366.3(b)(1) of the Commission's regulations, that the Brookfield Companies' books, accounts, memoranda, and other records are not relevant to any Commission-jurisdictional rates and thus it is appropriate to grant a waiver for the Brookfield Companies from the requirements of the PUHCA Regulations in 18 C.F.R. §§ 366.21, 366.22, and 366.23 with respect to both Arcadia and Catalyst.

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[17] Motion to Lodge at 3 (citing *Catalyst Old River Hydroelectric L.P.*, 36 FERC ¶ 61,200 (1986)).

[18] *Id.*

[19] 18 C.F.R. § 366.3(b)(1)(i).

18. With respect to Arcadia, we find the waiver is appropriate despite the Brookfield Companies' affiliation with entities that own jurisdictional transmission facilities.[20] Brookfield states that Arcadia is engaged exclusively in non-jurisdictional retail power sales. Brookfield notes that Smoky Mountain is an independent transmission-only entity and has no franchised service territory or captive customers. Brookfield states that Smoky Mountain has no customers other than its affiliate, Brookfield Smoky Mountain Hydropower LP, which uses its lines to interconnect its generation, so there is no significant potential for Smoky Mountain's customers to subsidize Commission-jurisdictional wholesale sales as a result of the affiliation with Arcadia.[21] Brookfield notes that neither Arcadia nor WETT is a public utility with jurisdictional rates and WETT operates solely in ERCOT. Thus, Arcadia and WETT have no customers that would benefit from requiring the Brookfield Companies to comply with the PUHCA Regulations. We also find that the jurisdictional rates of the Brookfield Companies' natural gas companies are not affected by the addition of Arcadia to the Brookfield holding company system. Brookfield notes that Arcadia operates outside of the service territory of the natural gas companies. Therefore, we find there is no potential for cross-subsidization between Arcadia and the Brookfield Companies' natural gas companies.

19. We also grant the petition with respect to the intended acquisition of Catalyst by Brookfield America.[22] We find that the books and records of the Brookfield Companies are not relevant to Catalyst's jurisdictional rates. Brookfield notes that Catalyst has two long-term PPAs on file with the Commission with unaffiliated third parties, and that both are at wholesale as fixed negotiated rates not based upon the costs of service. Thus, Catalyst has no captive customers that would benefit from PUHCA 2005 compliance. Catalyst's filing requesting authorization to make sales at market-based rates also does not affect the waiver request, as any sales made would be at market-based rates subject to Commission review and would not involve captive customers.[23] For these reasons, we

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[20] *See TerraForm Power, Inc.*, 169 FERC ¶ 61,115 at P 13.

[21] *See, e.g.*, *Alcoa Corp.*, 160 FERC ¶ 61,089, at P 19 (2017).

[22] Because a Brookfield affiliate has sought approval under section 203 of the FPA to acquire Catalyst, we do not need to address the petition's request for an ongoing waiver predicated upon a potential future addition of Catalyst to the Brookfield Companies' holding company system. We note that if the acquisition of Catalyst by Brookfield America is not consummated, this would constitute a change in circumstances for the purposes of the waiver.

[23] *See Bloom Energy Corp.*, 153 FERC ¶ 61,025, at P 26 (2015) (finding that the acquisition of market-based rate authority does not affect the exemption of the non-traditional utilities at issue under PUHCA 2005). We note Brookfield's acknowledgement

find that there is no potential for Smoky Mountain or WETT's transmission customers to subsidize Catalyst's jurisdictional wholesale sales. We also find that there is no potential for cross-subsidization between Catalyst and Brookfield's natural gas companies, as Catalyst does not use natural gas to operate its hydroelectric facility.

20. Finally, as Brookfield states, the waiver granted herein will not diminish the Commission's oversight of the Brookfield Companies under PUHCA 2005 that existed prior to the acquisitions of Arcadia and Catalyst. We note that the Commission still has authority under the FPA and Natural Gas Act to review books and records related to the Brookfield Companies' jurisdictional rates or rate recovery.

The Commission orders:

The petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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that any cost-based sales by Catalyst would be a change of circumstances for the purposes of its waiver. *See* Petition at 14 n.25.