

169 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

TerraForm Power, Inc.

Docket No. EL19-94-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
AND DENYING WAIVER

(Issued November 21, 2019)

1. On August 22, 2019, TerraForm Power, Inc. (TerraForm) filed a petition under Rule 207(a) of the Commission's Rules of Practice and Procedure¹ and sections 366.3(b)(1), 366.3(d), and 366.4(b)(3) of the Commission's regulations² requesting that the Commission issue a declaratory order granting TerraForm and its current and future subsidiaries that are holding companies (TerraForm HoldCos) an exemption from certain regulations under the Public Utility Holding Company Act of 2005 (PUHCA 2005)³ that would otherwise apply with respect to the TerraForm HoldCos' direct or indirect ownership of public utility companies that own, control, and/or operate fuel cell generating facilities that generate electricity, which is then sold at retail (Fuel Cell Subsidiaries).⁴ In addition, the TerraForm HoldCos request the Commission either: (1) confirm that the Commission's requirements to report a notification of change in fact apply only with respect to an additional electric utility company that is a public utility; or (2) waive any requirement to report an additional electric utility company that is not also a public utility. In this order, we grant the TerraForm HoldCos an exemption from certain PUHCA 2005 requirements but deny waiver

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 *et seq.* (2018).

⁴ Petition at 1. TerraForm explains that the fuel cells convert natural gas or renewable energy biogas into electricity using a direct electrochemical reaction rather than combustion. *Id.* at n.5.

of the requirement to file a notification of material change in fact regarding an additional electric utility company that is not also a public utility.

I. Background

2. TerraForm explains that the TerraForm HoldCos indirectly own and operate a portfolio of utility-scale wind and solar projects, as well as distributed generation and behind-the-meter solar projects throughout the United States. TerraForm states that Brookfield Asset Management, Inc. (Brookfield) indirectly holds approximately 65 percent of the Class A voting common stock of TerraForm, which is publicly traded.⁵

3. TerraForm states that each public-utility company⁶ subsidiary of the TerraForm HoldCos is either a qualifying facility (QF) and/or an exempt wholesale generator (EWG) and thus is exempt from certain PUHCA 2005 requirements pursuant to the Commission's regulations.⁷ TerraForm explains that all of the EWGs and some of the QFs sell power at wholesale and are public utilities under the Federal Power Act. TerraForm also states that some of the QFs own, control, and/or operate solar photovoltaic facilities that sell energy only at retail.⁸

4. In addition, TerraForm explains that certain TerraForm HoldCos will indirectly own, control, and/or operate the Fuel Cell Subsidiaries as part of their retail operations. TerraForm states that these Fuel Cell Subsidiaries cannot become EWGs because they will sell energy at retail to commercial and industrial customers under contracts negotiated with such customers. TerraForm explains that, although the facilities of such Fuel Cell Subsidiaries could potentially be QFs to the extent they use gas from landfills or biomass facilities as fuel, they will not qualify as QFs to the extent they use natural gas as a fuel. TerraForm thus maintains that the exemption under the Commission's

⁵ *Id.* at 2.

⁶ Public-utility company means “an electric utility company or a gas utility company” and electric utility company means “any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale.” 18 C.F.R. § 366.1 (2019).

⁷ Petition at 2-3 (citing 18 C.F.R. §§ 292.602(b), and 366.3(a) (2019)).

⁸ *Id.* at 3.

regulations for EWGs and QFs would not be available to the TerraForm HoldCos with respect to the Fuel Cell Subsidiaries that may use natural gas as a fuel.⁹

II. Petition

5. TerraForm requests that the Commission grant the TerraForm HoldCos an exemption from the requirements of section 366.2, 366.21, 366.22, and 366.23 of the Commission's regulations implementing PUHCA 2005¹⁰ (PUHCA Regulations) because they qualify for an exemption under section 366.3(b)(1)(i) of the Commission's regulations with respect to the Fuel Cell Subsidiaries.¹¹ Specifically, TerraForm argues that the books, accounts, memoranda, and other records of the TerraForm HoldCos are not relevant to the jurisdictional rates of any public utility or natural gas company.

6. TerraForm asserts first that the Fuel Cell Subsidiaries are not public utilities as defined in PUHCA 2005 because, although they own facilities that generate electricity for sale and thus would be considered "electric utility companies" under PUHCA 2005, they sell the output of their facilities at retail, and they do not have any rates that are subject to the Commission's jurisdiction.¹² TerraForm also maintains that the Fuel Cell

⁹ *Id.*

¹⁰ 18 C.F.R. §§ 366.2, 366.21, 366.22, and 366.23 (2019). Section 366.2 provides for Commission access to the books and records of a holding company and each of its associate companies. 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.

¹¹ *See* Petition at 3-4; *see also* 18 C.F.R. § 366.3(b)(1)(i) (exempting additional persons or classes of transactions if "[t]he Commission 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").

¹² TerraForm states that, in addition to the Fuel Cell Subsidiaries, there are other subsidiaries in the holding company system of the TerraForm HoldCos that generate electricity for sale but only sell at retail. TerraForm explains that these other subsidiaries are also not "public utilities" as defined in PUHCA 2005. Petition at 4 & n.15. Under PUHCA 2005, "public utility" means "any person who owns or operates facilities used for transmission of electric energy in interstate commerce or sales of electric energy at wholesale in interstate commerce." 18 C.F.R. § 366.1.

Subsidiaries do not have franchised service territories or captive customers.¹³ TerraForm next argues that the only public utilities in the holding company system of the TerraForm HoldCos are EWGs and QFs and, as to those public utilities, the TerraForm HoldCos rely on the exemption for EWGs and QFs under the Commission's regulations. Lastly, TerraForm contends that there are no natural gas companies as defined in PUHCA 2005 in the holding company system of the TerraForm HoldCos. TerraForm therefore argues that the TerraForm HoldCos qualify for the exemption in section 366.3(b)(1)(i) of the Commission's regulations because their books, account, memoranda, and other records are not relevant to the jurisdictional rates of any public utility or natural gas company.¹⁴

7. According to TerraForm, the Commission's policy is to grant exemptions for holding companies that own non-traditional utilities, but that this exemption is available only when the non-traditional utility is not affiliated with persons that provide jurisdictional transmission service.¹⁵ TerraForm explains that the TerraForm HoldCos are affiliated with entities that provide Commission-jurisdictional transmission service and, therefore, the Fuel Cell Subsidiaries will also be affiliated with these same entities.¹⁶ TerraForm represents that the TerraForm HoldCos are affiliated with four EWGs that provide limited jurisdictional transmission services over facilities classified as interconnection customer's interconnection facilities.¹⁷ TerraForm also represents that, through Brookfield, the TerraForm HoldCos are affiliated with Smoky Mountain Transmission LLC (Smoky Mountain), which owns transmission lines connecting the Duke Energy Carolinas' transmission system in North Carolina to the Tennessee Valley Authority transmission system, and Wind Energy Transmission Texas, LLC (Wind Energy), which owns transmission facilities that are wholly located in the Electric

¹³ Petition at 4.

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 5; *see also* 18 C.F.R. § 366.3(b)(2)(ii) (providing that "Commission-jurisdictional utilities that have no captive customers and that are not affiliated with any jurisdictional utility that has captive customers, and that do not own Commission-jurisdictional transmission facilities or provide Commission-jurisdictional transmission service and that are not affiliated with persons that own Commission-jurisdictional transmission facilities or provide Commission-jurisdictional transmission services, and holding companies that own or control only such utilities" meet the requirements of section 366.3(b)(1) of the Commission's regulations).

¹⁶ Petition at 6.

¹⁷ *Id.* at 6-7.

Reliability Council of Texas, Inc. TerraForm adds that Smoky Mountain provides transmission service under an open access transmission tariff to an affiliate.¹⁸

8. TerraForm argues, however, that affiliation with these entities does not provide a basis to deny the TerraForm HoldCos' request for an exemption from the PUHCA Regulations. First, TerraForm contends that, except for Smoky Mountain and Wind Energy, all of the companies providing limited transmission services over their interconnection customer's interconnection facilities are themselves EWGs and, therefore, independently provide the TerraForm HoldCos with an exemption from the PUHCA Regulations. TerraForm maintains that, although the TerraForm HoldCos are affiliated with Brookfield, the TerraForm HoldCos do not have ownership interests in either Smoky Mountain's or Wind Energy's transmission facilities. TerraForm thus asserts that the TerraForm HoldCos only have ownership interests in, and thus continue to be holding companies exclusively with respect to, EWGs and QFs. Second, TerraForm argues that nothing about these limited transmission services or the addition of the Fuel Cell Subsidiaries to the TerraForm HoldCos' portfolio should impede the Commission from maintaining the TerraForm HoldCos' exemption from the PUHCA Regulations. Lastly, TerraForm contends that, although the Fuel Cell Subsidiaries will also be affiliated with Smoky Mountain and Wind Energy, granting an exemption to the TerraForm HoldCos based on their ownership of the Fuel Cell Subsidiaries will not disturb the Commission's oversight of those holding companies with direct or indirect ownership interests in Smoky Mountain and Wind Energy. TerraForm maintains that the Commission can conclude that the Fuel Cell Subsidiaries are also non-traditional utilities and there is no benefit to the Commission's administration of PUHCA 2005 and its oversight of jurisdictional rates to deny the TerraForm HoldCos' requested exemption.¹⁹

9. In addition, the TerraForm HoldCos request that the Commission clarify that the requirement to file a notification of a material change in the facts when they acquire any additional public-utility company does not apply when the additional public-utility company is part of their retail operations. TerraForm explains that their retail operations are limited to retail sales to an onsite customer typically involving small solar generation facilities (and now the Fuel Cell Subsidiaries) that could potentially be subject to frequent additions based on individual retail customer preferences. TerraForm states that the FERC-65 notice required to be filed by holding companies that lack an exemption for ownership or control of EWGs or QFs does not require the identification of any electric utility companies that are not also public utilities.²⁰ TerraForm argues that the FERC-65 notice was intended in part to serve an informational purpose and, therefore, the

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 8-9.

²⁰ *Id.* at 9-10; *see also* 18 C.F.R. § 366.4(a)(2) (2019).

requirement for holding companies that enjoy an exemption or waiver to report any new public-utility subsidiary would serve the same purpose. TerraForm argues that it follows that the change-in-fact reporting requirement would also apply only to the information required to be included in the FERC-65 notice, i.e., only those public-utility company subsidiaries that also are public utilities. As a result, TerraForm requests that the Commission clarify that the requirement to make a change-in-fact report when the TerraForm HoldCos acquire a new electric utility company applies only to the extent that such new electric utility companies also are public utilities. Alternatively, TerraForm requests that, if the Commission determines that the TerraForm HoldCos are required to report new electric utility companies that are also not public utilities, the Commission grant waiver of this requirement with respect to the TerraForm HoldCos' retail operations (i.e., new electric utility companies that are not also public utilities).²¹

III. Notice of Filing

10. Notice of TerraForm's petition was published in the *Federal Register*, 84 Fed. Reg. 45,486 (2019), with interventions and protests due on or before September 23, 2019. None was filed.

IV. Discussion

11. Section 366.3(b)(1)(i) of the Commission's regulations authorizes the Commission to grant exemptions 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."²²

12. Based on the representations made by TerraForm, we find, pursuant to section 366.3(b)(1) of the Commission's regulations, that the TerraForm HoldCos' books, accounts, memoranda, and other records are not relevant to any Commission-jurisdictional rates and thus it is appropriate to exempt the TerraForm HoldCos from the requirements of the PUHCA Regulations with respect to the Fuel Cell Subsidiaries. TerraForm represents that the Fuel Cell Subsidiaries will be making only non-jurisdictional retail sales, and thus would not have customers that would benefit from the Commission's access to the TerraForm HoldCos' books and records. TerraForm also represents that the only public utilities in the TerraForm HoldCo system are EWGs and QFs, which under PUHCA and the PUHCA Regulations otherwise entitle the TerraForm HoldCos to a PUHCA exemption, and that there are no natural gas companies within the TerraForm HoldCos' holding company system.

²¹ Petition at 10.

²² 18 C.F.R. § 366.3(b)(1)(i).

13. We find that it is appropriate to exempt the TerraForm HoldCos from the requirements of the PUHCA Regulations despite the TerraForm HoldCos' affiliation with entities that own jurisdictional transmission facilities. TerraForm maintains that, except for Smoky Mountain and Wind Energy, all of the companies provide only limited transmission service over an interconnection customer's interconnection facilities and that they are EWGs and QFs, which otherwise exempt the TerraForm HoldCos from the PUHCA Regulations. Although the TerraForm HoldCos are affiliated with Smoky Mountain and Wind Energy, TerraForm explains that the Fuel Cell Subsidiaries will make only retail sales and do not have franchised service territories or captive customers, and the only public utilities in the holding company system are EWGs and QFs. Therefore, there is no significant potential for transmission service customers to subsidize Commission-jurisdictional wholesale sales.²³ In addition, Smoky Mountain's transmission facilities are subject to a Commission-jurisdictional open access transmission tariff, and the Commission has access to the books, accounts, memoranda, and other records concerning Smoky Mountain's jurisdictional transmission rates under section 301 of the Federal Power Act.²⁴ Finally, we note that granting the requested exemption will not change the Commission's oversight of those holding companies with direct or indirect ownership interests in Smoky Mountain and Wind Energy.

14. Although we grant the requested exemption from the PUHCA Regulations for the TerraForm HoldCos, we deny the request for waiver of the requirement to file a notification of a material change in the facts when they acquire any additional public-utility company. In an order clarifying filing requirements associated with the Commission's PUHCA Regulations, the Commission explained:

If a holding company that has previously filed an exemption or waiver notification, i.e., FERC 65A or FERC 65B, or that has received an exemption or waiver through a declaratory order, becomes a holding company with respect to an *additional* public-utility company or holding company of any public-utility company (i.e., obtains the power to vote 10 percent or greater of the voting securities of an *additional* company), that holding company should file with the Commission a notification of material change in facts that describes the additional public-utility company or holding company of any public-utility company and otherwise complies with the requirements of section 366.4(d)(1) of the

²³ See, e.g., *Alcoa Corp.*, 160 FERC ¶ 61,089, at P 19 (2017).

²⁴ 16 U.S.C. § 825 (2018).

Commission's regulations by selecting one of the three possible courses of action set forth in that section. This filing should be made *whether or not* a change has occurred with respect to the basis on which the exemption or waiver was granted.²⁵

15. Thus, while TerraForm is correct that the FERC-65 filing requirements serve an informational purpose,²⁶ “the addition of a new subsidiary company that is a public-utility company or holding company of a public utility-company represents a material fact that should be reported to the Commission.”²⁷ This requirement includes public-utility companies that may not be public utilities under PUHCA 2005, such as new electric utility companies that are part of the TerraForm HoldCos' retail operations. Accordingly, although we have found that the TerraForm HoldCos qualify for an exemption from the PUHCA Regulations, they must nevertheless follow the notification requirements of section 366.4(d)(1)²⁸ of the Commission's regulations regarding new subsidiary companies that are public-utility companies or holding companies of a public-utility company.

The Commission orders:

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

(B) The request for waiver of the obligation to notify the Commission of any material change in facts is hereby denied, as discussed in the body of this order.

²⁵ *Material Changes in Facts that Require Notifications Under Commission Regulations Under the Public Utility Holding Company Act of 2005*, 125 FERC ¶ 61,208, at P 5 (2008) (2008 Guidance Order) (emphasis in original), *clarification denied*, 130 FERC ¶ 61,071 (2010).

²⁶ Petition at 10.

²⁷ 2008 Guidance Order, 125 FERC ¶ 61,208 at P 5.

²⁸ 18 C.F.R. § 366.4(d)(1).

(C) In accordance with the requirements of the Commission's regulations, the TerraForm HoldCos are required to notify the Commission of any material change in facts that may affect its exemption. The TerraForm HoldCos may not rely upon the exemption if they fail to conform with any material facts or representations presented in TerraForm's petition.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.