

131 FERC ¶ 61,213
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Sun Edison LLC

Docket No. EL09-31-001

ORDER GRANTING REHEARING

(Issued June 3, 2010)

1. On December 8, 2009, Sun Edison LLC (SunEdison) filed a request for rehearing of the declaratory order issued in this proceeding.¹ In this order, we grant rehearing.

2. In its petition for declaratory order, SunEdison asked the Commission to confirm that certain of its subsidiaries' sales do not constitute the sale of electric energy at wholesale in interstate commerce or the transmission of electric energy in interstate commerce for purposes of the Federal Power Act (FPA),² nor involve jurisdictional rates for purposes of the Public Utility Holding Company Act of 2005 (PUHCA 2005).³ SunEdison also requested waiver from the Commission's regulations implementing PUHCA 2005.

3. The Commission's November 19 Order provided the confirmations requested by SunEdison, i.e., the Commission found that such sales do not constitute the sale of electric energy at wholesale in interstate commerce or the transmission of electric energy in interstate commerce under the FPA, nor do they involve jurisdictional rates under PUHCA 2005. However, the Commission denied the requested waiver stating "because qualifying facilities (QFs) are already exempt from those provisions of our regulations for which SunEdison seeks waiver, and because QF status for facilities like those at issue here is easy to establish, we see no need to grant the waiver requested."⁴ On rehearing,

¹ *Sun Edison LLC*, 129 FERC ¶ 61,146 (2009) (November 19 Order).

² 16 U.S.C. § 791a, *et seq.* (2006); 16 U.S.C. § 824(d) (2006) (defining the "sale of electric energy at wholesale").

³ 42 U.S.C. §§ 16451-63 (2006).

⁴ 129 FERC ¶ 61,146 at P 2.

SunEdison argues that it based its request for waiver in part on a section of the regulations which, if the Commission makes certain findings, is not discretionary. SunEdison further claims that the Commission made the required findings, and therefore the Commission was required to grant SunEdison's requested waiver. As discussed below, we will grant rehearing, and pursuant to 18 C.F.R. § 366.3(b)(1) (2009), grant exemption from the requirements of 18 C.F.R. § 366.2 (2009) and the accounting, record-retention and reporting requirements of 18 C.F.R. §§ 366.21, 366.22, and 366.23 (2009).

Background

4. SunEdison constructs, finances, installs, operates and maintains solar-powered electric generation facilities. The majority of these installations are located in the United States.⁵
5. In its petition, SunEdison described its primary businesses within the United States as: (1) the delivery and sale of solar-generated electricity directly to end-use consumers for their immediate consumption, which SunEdison calls its "Retail Operations;" and (2) the sale at wholesale of solar-generated electricity to load-serving entities, which SunEdison calls its "Wholesale Operations." SunEdison stated that it neither owns nor controls transmission or distribution facilities beyond its project-specific interconnection facilities.
6. In its petition, SunEdison stated that its Wholesale Operations were not the subject of this petition. Rather, SunEdison said that its Retail Operations were the focus of the instant petition. SunEdison's Retail Operations involve the installation of photovoltaic panels, inverters and associated equipment on property controlled by an electric energy customer, such as a large retail store, hospital, school or a manufacturing plant. SunEdison, through subsidiaries, finances (with debt or through financial leases), installs, owns or controls, operates and maintains these facilities. SunEdison sells the electric energy output to the on-site end-use customer. Contractual arrangements with the customer govern how and when the solar facilities are installed and maintained, the interconnection of the solar facilities to the customer's electric system, and the sale of electric energy generated by the solar facilities to the customer for direct use by that customer on those same premises.

⁵ SunEdison stated that it also has a growing business in solar power installations outside the United States. SunEdison explained that these foreign activities are undertaken by "foreign utility companies" for purposes of the FPA and PUHCA 2005 and are the subject of a Notification of Self-Certification of Foreign Utility Company Status in Docket No. FC08-6-000, and were not the subject of the instant petition.

7. SunEdison further described its Retail Operations as comprising more than 38 MW of generating capacity, installed in more than 150 locations in nine states, with an average capacity of approximately 250 kW. SunEdison stated that these solar photovoltaic facilities sell their output directly to on-site commercial, industrial and governmental end-use customers. According to SunEdison, these projects typically supply less than 30 percent of the end-use customer's average electrical consumption.

8. SunEdison stated that it filed its petition for declaratory order and request for waiver because its Retail Operations "are drowning in Commission-related paperwork." SunEdison explained that it has filed a QF self-certification not only for each operational Wholesale Operations installation (totaling 2 filings to date), but also for every Retail Operations installation (totaling 250 self-certifications and self-recertifications to date). SunEdison stated that it filed the self-certifications and self-recertifications for its Retail Operations facilities, even though the sales of electric energy from those facilities are not subject to regulation under the FPA, for two reasons: (1) to assure SunEdison's investors and lenders that SunEdison's Retail Operations will not be subject to utility-type regulation under Part II of the FPA; and (2) to obtain the automatic exemption from the PUHCA 2005 regulations provided pursuant to section 366.3(a) of the Commission's regulations.⁶

9. SunEdison asked the Commission to make certain findings concerning the Commission's jurisdiction, and also asked the Commission to grant waiver, or an exemption, from certain record keeping requirements and from making certain filings applicable to holding companies and holding companies' associated service companies. SunEdison claimed that granting its requests would reduce the administrative burdens on SunEdison by making clear that it would need only to make QF self-certification filings for its Wholesale Operation projects, but not for Retail Operations, and that it would not need to make filings pursuant to the Commission's regulations implementing PUHCA 2005.

10. Among other things, the Commission made the jurisdictional findings:

SunEdison also asks the Commission to declare that the rates for its sale of electric energy to end-use customers do not constitute "jurisdictional rates." "Jurisdictional rates," for purposes of PUHCA 2005 and our regulations implementing PUHCA 2005, means "rates accepted, established or permitted by the Commission for the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public

⁶ 18 C.F.R. § 366.3(a) (2009).

consumption for domestic, commercial, industrial, or any other use.”⁷ Because we have found that, where the end-use customer makes no net sale to the local load-serving utility with which it has a net metering arrangement, the sale of electric energy by SunEdison to the end-use customer in such circumstances does not constitute a sale for resale (and also would not involve transmission in interstate commerce), and in such circumstances the sales are not subject to the Commission’s jurisdiction under Part II of the FPA, we find that the rates for these sales would not be “jurisdictional rates” for purposes of PUHCA 2005 and our regulations implementing PUHCA 2005.^[8]

11. The Commission, however, denied SunEdison’s request for waiver of its PUHCA 2005 regulations, finding that Sun Edison’s justification for the waiver, i.e., the necessity of making QF certification filings in order to be exempt from the PUHCA 2005 regulations would be burdensome to SunEdison, did not justify waiver. The Commission’s QF self-certification process, in particular, was designed to be quick and easy, and many of SunEdison’s facilities (those 1 MW and smaller) claiming QF status were likely to be (and would be) exempt from the requirement that they make a QF certification filing in order to claim QF status (and, in turn, the exemption from PUHCA 2005 that comes with QF status).⁹

Discussion

12. On rehearing, SunEdison claims that the Commission, pursuant to either section 366.3(b)(1)(i) or section 366.3(b)(1)(ii) of the Commission’s regulations,¹⁰ should have granted waiver of sections 366.2, 366.21, 366.22 and 366.23 of the Commission’s regulations.¹¹ SunEdison argues that the exemption provided for in section 366.3(b)(1) is not discretionary and must be granted if the Commission makes certain findings. Those findings are “that the books, accounts, memoranda, and other records of any person are

⁷ 18 C.F.R. § 366.1 (2009); *see* 42 U.S.C. § 16451(10) (2006).

⁸ 129 FERC ¶ 61,146 at P 20.

⁹ *Id.* P 21-22 & n.18; *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Order No. 732, 75 *Fed. Reg.* 15,950 (March 30, 2010), FERC Stats. & Regs. ¶ 31,306, at P 34-38 (2010).

¹⁰ 18 C.F.R. § 366.3(b)(1)(i), (ii) (2009).

¹¹ *Id.* §§ 366.2, 366.21, 366.22 and 366.23 (2009).

not relevant to the jurisdictional rates of a public utility or gas company”¹² or that “any class of transactions is not relevant to the jurisdictional rates of a public utility or natural gas company.”¹³ SunEdison asserts that the Commission made sufficient findings in the November 19 Order to require the Commission to find that SunEdison is exempt from the relevant PUHCA 2005 regulations.

13. We agree that section 366.3(b)(1) requires exemption upon the Commission finding that “the books, accounts, memoranda, and other records of any person are not relevant to the jurisdictional rates of a public utility or gas company” or that “any class of transactions is not relevant to the jurisdictional rates of a public utility or natural gas company,” and that the Commission made the required findings.¹⁴ Accordingly, we will grant SunEdison’s request for rehearing, and we will grant exemption from sections 366.2, 366.21, 366.22 and 366.23 as long as SunEdison is a holding company solely by reason of its ownership and sales of electricity from QFs, exempt wholesale generators, foreign utility companies or solar facilities engaged solely in retail sales as described in its application.

The Commission orders:

(A) SunEdison’s request for rehearing is hereby granted, as discussed in the body of this order.

(B) SunEdison is hereby granted exemption from sections 366.2, 366.21, 366.22 and 366.23 of the Commission’s regulations, pursuant to section 366.3(b)(1), as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹² *Id.* § 366.3(b)(1)(i).

¹³ *Id.* § 366.3(b)(1)(ii).

¹⁴ 129 FERC ¶ 61,146 at P 18-20.