

121 FERC ¶ 61,304
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Babcock & Brown Holdings, Inc.

Docket No. EL07-96-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued December 28, 2007)

1. On September 12, 2007, Babcock & Brown Holdings, Inc. (BBH) filed a petition for a declaratory order, requesting that the Commission find that BBH's subsidiary TransBay Cable LLC (TBC), which is constructing a transmission line that has not yet begun commercial operation, is not currently a "public utility" for purposes of the Public Utility Holding Company Act of 2005 (PUHCA 2005), and will not be a public utility under PUHCA 2005 until it begins providing transmission service.¹ In addition, BBH requests that, until TBC becomes a public utility, BBH's service companies be declared exempt from the accounting, record-retention and reporting requirements of PUHCA 2005. Finally, BBH asks that, even after TBC becomes a public utility, BBH's service companies be declared exempt.

2. We find that BBH is not at present a holding company as a result of its ownership of TBC, and BBH and its subsidiaries are not at present subject to the accounting, record-retention and reporting requirements of PUHCA 2005.

¹ Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005) (PUHCA 2005). Although BBH uses the Federal Power Act term "public utility" throughout its petition, we note that holding company status under PUHCA 2005 is triggered by ownership of a "public-utility company" rather than ownership of a "public utility." While these terms appear to be similar, they have different meanings. In our discussion below, we will interpret BBH's petition to intend to refer to the term "public-utility company" instead of "public utility" when it is referring to status under PUHCA 2005.

I. Background

A. Entities

3. While the corporate structure is complex, and the relationships between the various companies no less complex, the essentials are as follows: BBH explains that it develops and finances electric generation projects in the United States.² BBH states that it typically sells its projects when they begin commercial operation.

4. BBH states that it indirectly owns TBC, which is currently pursuing the development, financing, construction, and operation of a 55-mile, high voltage, direct current transmission line. In its September petition, BBH states that construction is expected to begin in late 2007 and the transmission line is expected to enter service in 2010. While BBH claims that TBC is not currently a public utility under PUHCA 2005, BBH acknowledges that, upon commercial operation of the line, TBC will become a participating transmission owner (PTO) whose facilities will be operated by the California Independent System Operator Corporation (CAISO). Before TBC begins commercial operation, BBH intends to sell TBC out of the BBH holding company system;³ BBH anticipates that ownership of all assets in the project, except transmission rights, will be transferred to a municipality in the CAISO control area under an option agreement with the municipality. BBH states that, as a result of TBC's being a PTO and TBC's retaining ownership of the transmission rights, TBC will have all the responsibilities of a PTO and will also have the right to the financial benefits resulting from transmission customers' use of the line. In addition, BBH adds that TBC will be responsible for operation and maintenance of the line.⁴

5. BBH states that, while the line has not yet been built, TBC has filed an Operating Memorandum pursuant to section 205 of the Federal Power Act (FPA),⁵ in which it set forth the rate principles and obligations associated with the development, financing, and operation of the line; the rate principles assume that TBC will charge cost-based rates. The Commission accepted the Operating Memorandum.⁶ BBH acknowledges that, as a result of that filing, the Commission arguably could consider TBC a "public utility" for

² BBH explains that it is a wholly-owned subsidiary of Babcock & Brown International Pty Ltd. (BBIPL).

³ Petition at 7-8.

⁴ *Id.*

⁵ 16 U.S.C. § 824d (2000).

⁶ *Trans Bay Cable LLC*, 112 FERC ¶ 61,095 (2005), *order on clarification*, 114 FERC ¶ 61,031 (2006).

purposes of the FPA.⁷ On June 14, 2006, BBH thus filed a FERC-65 notifying the Commission of BBH's status as a non-exempt holding company for purposes of PUHCA 2005, based on its ownership of TBC.

6. BBH has a service company, Babcock & Brown Power Operating Partners LLC (BBPOP) that, as relevant here, currently provides financial, accounting, and recordkeeping services to wind farms in the BBH holding company system.⁸ The wind farms, BBH notes, do not have captive customers. BBH states that it has another service company, B&B Regulated Services LLC (BBRS), that provides accounting, administrative, construction, engineering, technical and other services to TBC. BBH contends that BBRS is not a centralized service company, however. In addition, within its holding company system, BBH has one other service company relevant for present purposes, Babcock & Brown Engineering and Construction Services LLC (BBECS). BBH states that BBECS may qualify as a centralized service company in the future, by providing engineering and construction services to public utilities between the time they receive market-based rate authorization from the Commission and the time they are sold from the BBH holding company system; BBECS, however, will not provide services to TBC.

B. Petition for Declaratory Order

7. BBH requests a declaratory order stating that BBH's subsidiary TBC is not currently a "public utility" under PUHCA 2005, and will not become one until it begins providing transmission service.⁹ BBH states that previously the Securities and Exchange Commission (SEC) had exempted entities, such as power marketers, that only owned "paper facilities" from Public Utility Holding Company Act of 1935 (PUHCA 1935)¹⁰ requirements. BBH argues that, because the Commission indicated that it would follow

⁷ Petition at 8 n.15, citing *D.E. Shaw Plasma Power, L.L.C.*, 102 FERC ¶ 61,265 at P 3 (2003); *Ocean State Power*, 38 FERC ¶ 61,140 at 61,378 (1987).

⁸ BBH develops wind farms, and at the time they became operational or shortly thereafter typically sells them to Babcock & Brown Wind Partners Limited (BBW) or other investors. BBH's parent company, BBIPL, owns approximately 12 percent of BBW. BBPOP provides services to the wind farms owned by BBH and BBW.

The wind farms that are currently in operation qualify as Exempt Wholesale Generators, see Pub. L. No. 109-58, § 1289, 119 Stat. 594, § 1262(6) (2005), and/or a Qualifying Facility, see 16 U.S.C. § 824a-3 (2000). Petition at 6-7, 16, Attachments A and B.

⁹ Petition at 18-19, 26.

¹⁰ 15 U.S.C. § 79a *et seq.* (2000) (repealed by PUHCA 2005).

SEC precedent in establishing regulations implementing PUHCA 2005,¹¹ the Commission should find that TBC is not currently a “public utility” for purposes of PUHCA 2005. BBH also notes that the Commission has exempted power and natural gas marketers from the definition of “public-utility company” for purposes of PUHCA 2005, and should apply the same logic to TBC that similarly will own only paper facilities.¹²

8. In addition, BBH requests that the Commission find that BBH’s subsidiary BBRS, which provides services only to TBC, need not comply with the Commission’s books and records and accounting requirements, sections 366.2, 366.21, 366.22, and 366.23 of the Commission’s regulations,¹³ both before and after TBC becomes a public utility under PUHCA 2005.¹⁴

9. Further, BBH seeks a similar exemption for two of its other subsidiaries, BBPOP and BBECs. BBH argues that none of the entities to which BBPOP and BBECs provide services have captive customers; none of the entities to which BBPOP and BBECs provide services charge cost-based rates; as a result of these two facts, the Commission’s concerns in imposing accounting and reporting requirements on centralized service companies would not be furthered by applying those requirements to BBPOP and

¹¹ See, e.g., *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, FERC Stats. & Regs. ¶ 31,197 (2005), *order on reh’g*, Order No. 667-A, FERC Stats. & Regs. ¶ 31,213, *order on reh’g*, Order No. 667-B, FERC Stats. & Regs. ¶ 31,224 (2006), *order on reh’g*, Order No. 667-C, 118 FERC ¶ 61,133 (2007).

¹² Petition at 19-20, 26. As a corollary, BBH asks that the Commission find that, until TBC becomes a public utility, BBH’s subsidiaries are similarly exempt. *Id.*

¹³ 18 C.F.R. §§ 366.2, 366.21, 366.22, 366.23 (2007). Broadly speaking, section 366.2 requires holding companies and their associate companies to maintain and make available to the Commission their books, accounts, memoranda, and other records relevant to associated public utility or natural gas company costs, as necessary to protect customers with respect to jurisdictional rates. Sections 366.21 and 366.22 require holding companies and service companies to maintain and make available to the Commission books, accounts, memoranda, and records in sufficient detail to permit examination, audit and verification, as necessary to protect utility customers with respect to jurisdictional rates. Section 366.23 requires centralized service companies to file annual reports with the Commission and other service companies to file annual descriptions of their functions.

¹⁴ Petition at 19-26.

10. BBECS; and the cost and burden of requiring BBPOP and BBECS to comply with Order No. 684¹⁵ outweigh any benefit that would result from compliance.¹⁶

II. Notice

11. Notice of the petition was published in the *Federal Register*, 72 Fed. Reg. 54,019 (2007), with protests or motions to intervene due on or before October 12, 2007. None was filed.

III. Discussion

12. The requirements of Part 366 of the Commission's regulations¹⁷ apply in the first instance to holding companies. As relevant here, holding companies own, control, or hold with the power to vote 10 percent or more of the outstanding voting securities of a "public-utility company."¹⁸ A public-utility company is defined to include an "electric utility company,"¹⁹ and an "electric utility company" is defined as a company "that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale," but expressly does not include a company that "engage[s] only in the marketing of electric energy."²⁰

13. For BBH to be a holding company as a result of its ownership of TBC, TBC must be a "public-utility company" which means that TBC must be an "electric utility company." We find, as explained below, that at present TBC is not an electric utility company and so is likewise not a public-utility company. That, in turn, means that BBH is not at present a holding company as a result of its ownership of TBC, and BBH and its subsidiaries are not at present subject to the requirements of Part 366.

14. While TBC may be a "public utility" under the FPA, it is not an "electric utility company" under PUHCA 2005. The FPA defines a public utility as "any person who

¹⁵ *Financial Accounting, Reporting and Records Retention Requirements Under the Public Utility Holding Company Act of 2005*, Order No. 684, FERC Statutes and Regulations ¶ 31,229 (2006).

¹⁶ Petition at 19-26.

¹⁷ 18 C.F.R. Part 366 (2007).

¹⁸ 18 C.F.R. § 366.1 (2007).

¹⁹ *Id.*

²⁰ *Id.*

owns or operates facilities subject to the jurisdiction of the Commission.”²¹ Section 201(b) of the FPA provides for Commission jurisdiction over all facilities for the transmission of electric energy in interstate commerce and for the wholesale sale of electric energy in interstate commerce, with certain exceptions not applicable here.²² However, the Commission has found that FPA jurisdiction can attach when an entity voluntarily submits to Commission jurisdiction by filing for Commission review and acceptance of its rates and when the Commission accepts that voluntary rate filing even though the relevant facilities have not yet been energized and service has not yet been provided.²³ On this basis, BBH acknowledges that TBC is a public utility under the FPA.²⁴

15. In contrast, we find that the determination whether a company is an “electric utility company” under PUHCA 2005 should not depend on whether a company has filed rates for Commission review and acceptance under the FPA. Rather, we find that, as relevant here, until such time as facilities are, in fact, “used for the . . . transmission . . . of electric energy for sale,” a company should not be considered an electric utility company. Here, TBC as yet has no operational transmission facilities; BBH states in its September petition that construction of its transmission facilities is expected to begin in late 2007 and the facilities will not enter service until mid or late 2010.²⁵ Accordingly, TBC is not as yet an electric utility company and so is likewise not a public-utility company. As a result, BBH’s ownership of TBC does not make BBH a holding company, and does not subject BBH or its subsidiaries to the requirements of Part 366.²⁶

16. At this time, it is premature to address BBH’s status when TBC’s transmission facilities enter service. The actual holding company structure that will be in place when

²¹ 16 U.S.C. § 824(e) (2000), amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1295(a)(2), 119 Stat. 594 (2005).

²² 16 U.S.C. § 824(b) (2000), amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1295(a)(1), 119 Stat. 594 (2005).

²³ *E.g.*, *Multitrade Limited Partnership*, 63 FERC ¶ 61,252 at 62,691-92 (1993).

²⁴ Petition at 8 n.15, *citing D.E. Shaw Plasma Power, L.L.C.*, 102 FERC ¶ 61,265 at P 3 (2003); *Ocean State Power*, 38 FERC ¶ 61,140 at 61,378 (1987). We note that TBC, as a public utility under the FPA, is subject to, among other things, the Commission’s regulations regarding maintenance of accounts in accordance with the Uniform System of Accounts, regarding record retention, and regarding reporting requirements. *See* 18 C.F.R. Parts 101, 141, 225 (2007); 18 C.F.R. § 382.201 (2007).

²⁵ Petition at 8.

²⁶ This is consistent with the SEC’s treatment under PUHCA 1935.

TBC's transmission facilities go into service, and any attendant risk of cross-subsidization that may need to be considered in evaluating proposed exemptions or waivers, is not sufficiently certain. Therefore, we decline to address the petition's request for exemption or waiver after TBC's transmission facilities go into service. If it is necessary for the Commission to address the matter at that time,²⁷ BBH may file a new petition for a declaratory order at that time.

The Commission orders:

Babcock & Brown's petition for declaratory order is hereby granted in part, and dismissed in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁷ For example, it is possible that BBH may sell TBC before the facilities enter service, or that TBC may be neither the owner nor the operator of the facilities at the time they enter service. Either would moot the matter entirely.