

148 FERC ¶ 61,196
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Bloom Energy Corporation

Docket No. EL14-68-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued September 18, 2014)

1. On June 19, 2014, Bloom Energy Corporation (Bloom) filed a petition for declaratory order, under Rule 207(a) of the Commission's Rules of Practice and Procedure and sections 366.3(b)(1), 366.3(d), and 366.4(b)(3) of the Commission's regulations,¹ requesting that the Commission exempt Bloom and its subsidiaries from certain of the Commission's regulations under the Public Utility Holding Company Act of 2005 (PUHCA 2005).² In this order, we grant Bloom's petition.

I. Background

2. Bloom states that it develops, builds, and installs solid-oxide fuel cells – known as Bloom Energy Servers – that generate electric energy. Bloom states that it regularly sells Bloom Energy Servers to third parties, who use them to generate electric energy for their own use in commercial and industrial applications. According to Bloom, these transactions do not involve activities that cause Bloom or its subsidiaries to be subject to Commission jurisdiction under PUHCA 2005. Bloom also states that it sometimes sells Bloom Energy Servers to indirect subsidiaries of Bloom, which in turn use them to provide energy services to third party industrial and commercial customers. Bloom acknowledges that these indirect subsidiaries are public-utility companies under PUHCA

¹ 18 C.F.R. §§ 385.207(a), 366.3(b)(1), 366.3(d), and 366.4(b)(3) (2014).

² 42 U.S.C. § 16451 *et seq.* (2012).

2005,³ and it states that they make Bloom and certain of its intermediate subsidiaries holding companies that are subject to PUHCA 2005.

3. Bloom describes these public utility companies as falling into two groups. The first consists of exempt wholesale generators (EWGs)⁴ that have market-based rate authorization and that Bloom asserts are otherwise exempt from the Commission's books and records requirements under PUHCA 2005 through the exemption for holding companies that only own, control, or hold EWGs, qualifying facilities (QFs), or foreign utility companies (FUCOs) provided in section 366.3(a) of the Commission's regulations.⁵ The second consists of subsidiaries that provide retail energy services to commercial and industrial customers under contracts negotiated with those customers but that, according to Bloom, do not have franchised service territories, captive customers, or any rates (including any cost-based rates) that are subject to the Commission's jurisdiction or the jurisdiction of any state public utility commission. Bloom notes that these subsidiaries do not qualify for an exemption as EWGs because they do not make sales exclusively at wholesale.⁶ Bloom states that to the extent that they use gas from landfills or from biomass facilities as a fuel, these subsidiaries have the potential to benefit from an exemption from PUHCA 2005 under 18 sections 292.602 and 366.3(a)(1) of the Commission's regulations as owners of qualifying small power production facilities.⁷ However, these subsidiaries currently are using natural gas as a fuel.

4. Bloom explains that, to date, it and its subsidiaries have qualified for a waiver of applicable Commission accounting, record retention, and reporting regulations under PUHCA 2005 because less than 13 percent of their applicable public-utility company

³ The Commission's regulations define a "public utility company" under PUHCA 2005 as "an electric utility company or a gas utility company." 18 C.F.R. § 366.1 (2014). An "electric utility company" is "any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale," but it does "not include persons that engage only in marketing of electric energy." *Id.* The definition of the term "gas utility company" under PUHCA 2005 is not relevant here.

⁴ *See id.* §§ 366.1, 366.7.

⁵ *Id.* § 366.3(a).

⁶ *Id.* § 366.1.

⁷ *Id.* §§ 292.602, 366.3(a).

revenues are derived from activities outside a single state.⁸ Bloom states that its activities currently are concentrated in California, but expansion of projects that Bloom and its subsidiaries sponsor outside California may eventually cause their public-utility company revenues outside of California to exceed 13 percent of their total public-utility company revenues. Bloom states that if and when this occurs, it and its subsidiaries would no longer qualify for the single-state holding company waiver.

5. Bloom states that it is filing the instant request for an exemption to ensure that it and its subsidiaries continue to qualify for a waiver or exemption from regulation under PUHCA 2005. Bloom states that an exemption or waiver is important to provide regulatory certainty for it and its subsidiaries and to facilitate their financing activities. According to Bloom, investors often require representations and covenants that Bloom and its subsidiaries have and will maintain exemptions from Commission regulations under PUHCA 2005.

II. The Petition

6. Bloom requests that the Commission issue a declaratory order finding that it and its current and future subsidiaries are exempt from sections 366.2, 366.21, 366.22, and 366.23 of the Commission's regulations (Applicable Regulations)⁹ because they meet the standard provided in section 366.3(b)(1)(i) of the Commission's regulations. Section 366.3(b)(1)(i) authorizes the Commission to exempt PUHCA 2005's requirements any person if "[t]he Commission finds that the books, accounts, memoranda, and other

⁸ Under section 366.3(c)(1) of the Commission's regulations, 18 C.F.R. § 366.3(c)(1) (2014), a holding company is eligible for a waiver of the accounting, record-retention, and reporting requirements of sections, 366.21, 366.22, and 366.23 of the Commission's regulations "if the holding company system derives no more than 13 percent of its public-utility company revenues from outside a single state. . . ," and "for purposes of this waiver, revenues derived from exempt wholesale generators, foreign utility companies and qualifying facilities will not be considered public-utility company revenues." *Id.*

⁹ *Id.* §§ 366.2, 366.21, 366.22, 366.23 (2014). Section 366.2 provides for Commission access to 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.

records of any person are not relevant to the jurisdictional rates of a public utility or natural gas company.”¹⁰

7. Bloom states that it does not have any subsidiaries that are natural gas companies, and thus Bloom and its subsidiaries do not have any books and records that are relevant to the jurisdictional rates of any natural gas company. Bloom also states that its only public utility subsidiaries that have Commission-jurisdictional rates are EWGs with market-based rate authorization, and their books and records will have no effect on the market-based rates of those EWGs because these rates are not based on the costs of Bloom or its subsidiaries but rather are negotiated between the EWGs and their customers based on market conditions. Bloom further states that none of its subsidiaries will have a franchised service area or any captive customers, and no such subsidiaries (other than EWGs or QFs with Commission-jurisdictional market-based rates) will make sales at rates (including cost-of-service rates) that are subject to Commission or state public utility commission regulation. Bloom maintains that as a result, it and its subsidiaries have no ability to pass their costs through to any captive customers that are subject to cost-based rates.

8. Bloom asserts that its petition receives further support from another exemption set forth in the Commission’s regulations, the exemption that applies to “non-traditional utilities.” These entities consist of

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 services 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.¹¹

9. Bloom states that although the term “Commission-jurisdictional utilities” is not defined, one possible interpretation is that it means “public utilities” that are jurisdictional under section 201 of the Federal Power Act.¹² Bloom states that if this interpretation is correct, then the only “Commission-jurisdictional utilities” in the Bloom holding company system are EWG subsidiaries with market-based rates. This definition

¹⁰ *Id.* § 366.3(b)(1)(i).

¹¹ Bloom Petition at 9 (quoting 18 C.F.R. § 366.3(b)(2)(ii) (2014)).

¹² 16 U.S.C. § 824 (2012).

would not include public-utility companies under PUHCA 2005 that provide energy services to commercial and industrial customers under arrangements that may be considered to be retail sales. Bloom adds that it and its subsidiaries are concerned about relying on the non-traditional utilities exemption without a declaratory ruling on the scope of the term “Commission-jurisdictional utilities.”

10. Bloom argues that regardless of whether all of its public-utility company subsidiaries technically are covered by the non-traditional utilities exemption, they clearly fall within the purpose of this exemption. Bloom states that it and its subsidiaries have no captive customers and do not own Commission-jurisdictional transmission facilities or provide Commission-jurisdictional transmission services, nor are they affiliated with persons that have captive customers or that own Commission-jurisdictional transmission facilities or provide Commission-jurisdictional transmission services. Bloom maintains that the purpose of the non-traditional utilities exemption was to create a broader exemption than the exemption for entities that are holding companies solely as a result of their interests in entities that are EWGs, QFs or FUCOs, and it captures entities that do not have captive customers and that are not otherwise included in the EWG/QF/FUCO exemption. Bloom concludes that it is appropriate to interpret the term “Commission-jurisdictional utilities” broadly for purposes of applying the non-traditional utilities exemption or otherwise to provide an exemption from the Applicable Regulations.

III. Notice of Filing and Responsive Pleadings

11. Notice of Bloom’s petition was published in the *Federal Register*, 79 Fed. Reg. 36,510 (2014), with interventions and protests due on or before July 21, 2014. None was filed.

IV. Discussion

12. Section 366.3(b)(1)(i) of the Commission’s regulations authorizes the Commission to grant exemptions from the Applicable 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.”¹³

13. We find that Bloom’s subsidiaries that could be QFs if they used gas from landfills or biomass facilities as fuel meet the criteria for non-traditional utilities under section 366.3(b)(2)(ii), and thus satisfy the requirements of section 366.3(b)(1)(i). Bloom represents that the subsidiaries in question have no captive customers, are not affiliated

¹³ 18 C.F.R. § 366.3(b)(1)(i) (2014).

with any jurisdictional utility that has captive customers, own no Commission-jurisdictional transmission facilities, provide no Commission-jurisdictional transmission services, and are not affiliated with persons that own Commission-jurisdictional transmission facilities or provide Commission-jurisdictional transmission service. These representations support a finding that that these subsidiaries are non-traditional utilities under section 366.3(b)(2)(ii), and thus satisfy the requirements of section 366.3(b)(1)(i).¹⁴

14. Moreover, Bloom represents that its only subsidiaries that have Commission-jurisdictional rates are EWGs,¹⁵ and they possess market-based rate authorization. These rates are negotiated between the EWGs and their customers based on market conditions, and are not based on the costs of Bloom or its subsidiaries.

15. Bloom also represents that none of its subsidiaries will have a franchised service area or any captive customers, and none of its subsidiaries (other than EWGs or QFs with Commission-jurisdictional market-based rates) will make sales at rates (including cost-of-service rates) that are subject to Commission or state public utility commission regulation. As a result, Bloom and its subsidiaries are not able to pass their costs through to any captive customers that are subject to cost-based rates.

16. Based on the information and representations contained in Bloom's petition, we find that Bloom and its current and future subsidiaries are holding companies solely with respect to EWGs and non-traditional utilities, as described above, and thus are exempt from the Applicable Regulations.¹⁶

¹⁴ *See id.* § 366.3(b)(1), (2)(ii).

¹⁵ *See id.* § 366.3(a).

¹⁶ This exemption is subject to the requirements of sections § 366.4(d) and (e) of the Commission's rules, which require Bloom to notify the Commission of any material change in facts that may affect the exemption and which specify that Bloom and its subsidiaries may no longer be able to rely on the exemption if they fail to conform with any material facts or representations presented in their petition. 18 C.F.R. § 366.4(d)-(e) (2014).

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.