

151 FERC ¶ 61,123  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Avista Corporation

Docket No. EL15-19-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued May 14, 2015)

1. On November 10, 2014, Avista Corporation (Avista) filed a petition for declaratory order under Rule 207 of the Commission's Rules of Practice and Procedure, and sections 366.3(b)(1)(i) and 366.3(d) of the Commission's regulations,<sup>1</sup> requesting exemption from certain requirements under the Public Utility Holding Company Act of 2005 (PUHCA 2005).<sup>2</sup> In this order, we find that PUHCA 2005, by its terms, exempts Avista from these requirements, and we grant Avista's petition.

**I. Background**

2. Avista states that it is an investor-owned utility that engages in, among other things, the production, transmission, and distribution of electric energy in Washington and Idaho, and in the local distribution of electric energy in Washington, Idaho, and Oregon. Avista is a public utility under the Federal Power Act (FPA), and it owns Spokane Energy, LLC, which, at the time the petition was filed, was a public utility whose sole purpose is to hold an agreement for long-term purchase and sale of firm capacity.<sup>3</sup> Avista states that Spokane Energy, LLC does not own any transmission or generation facilities. Avista states that it became a holding company under PUHCA 2005

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

<sup>2</sup> 42 U.S.C. §§ 16451-63 (2012).

<sup>3</sup> The Commission authorized Spokane Energy, LLC to assign the long-term purchase and sale firm capacity agreement to Avista. *Spokane Energy LLC*, 151 FERC ¶ 62,046 (2015). As a result, Spokane Energy, LLC is no longer a public utility under either the FPA or PUHCA 2005, and is no longer relevant to our analysis of Avista's petition.

as a result of acquiring Alaska Energy and Resources Company (Alaska Energy), the owner of Alaska Electric Light and Power (Alaska Light and Power), which is an electric utility company under PUHCA 2005.<sup>4</sup> Avista states that it completed this acquisition on July 1, 2014.

## II. Petition

3. Avista states that the issue its petition presents is whether Avista and its associate companies qualify for an exemption under section 366.3(b)(1)(i) of the Commission's regulations, which provides for exemptions from certain requirements of the Commission's regulations under PUHCA 2005.

4. Avista notes that section 366.2 of the Commission's regulations generally provides that, unless otherwise exempted by Commission rule or order, each holding company and associate company within the holding company system must maintain and make available to the Commission "such books, accounts, memoranda, and other records as the Commission determines are relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates."<sup>5</sup> Avista states that section 366.3(b)(1)(i) of the Commission's regulations provides an exemption from these requirements if the Commission finds that the books, accounts, memoranda, and other records are not relevant to the jurisdictional rates of a public utility or natural gas company.<sup>6</sup>

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<sup>4</sup> Alaska Energy also owns AJT Mining Properties; and Snettisham Electric Company. Snettisham Electric Company is currently a single purpose entity that holds an option agreement that gives it an option to purchase the Snettisham hydroelectric project from the Alaska Industrial Development and Export Authority.

<sup>5</sup> Petition at 5 (quoting 18 C.F.R. § 366.2(a) (2014)). The Commission's accounting and recordkeeping requirements under PUHCA 2005 are set forth in sections 366.21, 366.22, and 366.23 of the Commission's regulations. 18 C.F.R. §§ 361.21-.23 (2014); *see also* 18 C.F.R. pt. 367 (2014).

<sup>6</sup> Avista also notes that an exemption from any such requirements will not "limit[] the Commission's authority under the FPA or the [Natural Gas Act]." Petition at 5 (quoting *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, at P 204 (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)).

5. Avista maintains that the books, accounts, memoranda, and other records of its non-public utility associate companies, including Alaska Energy and Alaska Light and Power, are not relevant to the jurisdictional rates of Avista because no improper cross-subsidization exists between and among, any public utility and any associate company within Avista's holding company system. Avista states that any costs associated with a non-public utility company in the Avista holding company system are allocated to that company and are not included in jurisdictional rates. Consequently, Avista requests an exemption from sections 366.21, 366.22, and 366.23 of the Commission's regulations.<sup>7</sup>

6. Avista adds that as part of its acquisition of Alaska Energy, it sought authorizations from the state public utility commissions of Washington, Idaho, Oregon, Montana, and Alaska. Avista states that it represented in its applications that there would be no cross-subsidization between Avista and its subsidiary companies, including Alaska Light and Power. It also represented that Alaska Energy and Alaska Light and Power will continue to operate as separate entities, and that Alaska Light and Power will operate as a stand-alone utility, continuing its electric utility operations with its existing management team.<sup>8</sup>

7. Avista states that its state commissions issued the necessary approvals for the acquisition of Alaska Energy. It also states that some state commissions conditioned their approval upon additional controls. For example, the Public Utility Commission of Oregon conditioned its approval upon Avista agreeing to further ring fencing controls. Avista states that, in accordance with the conditions that certain state commissions have required, it agreed to: (i) maintain a capital structure of no less than 40 percent common equity; (ii) not ask for rate recovery in Oregon of any costs associated with Alaska Energy, including premium or goodwill; and (iii) not ask for rate recovery in Oregon for any Alaska Energy acquisition transaction costs or acquisition period incremental executive bonuses.<sup>9</sup>

8. Avista states that all costs associated with the due diligence and other activities related to its acquisition of Alaska Energy prior to closing the acquisition on July 1, 2014 were tracked and assigned to a non-utility account. Avista states that following the acquisition, to the extent it incurs any costs (e.g., employee time, plant, etc.) to support Alaska Energy or Alaska Light and Power, it will track and assign those costs to Alaska Energy or Alaska Light and Power, respectively. Avista also states that, to the extent any

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<sup>7</sup> Petition at 5-6.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 8.

associate company, including Alaska Energy and Alaska Light and Power, incurs any costs (employee time, plant, etc.) to support any Avista operations, such costs will also be tracked and assigned to Avista. Avista expects assignment of costs both to and from Alaska Light and Power to be small because Alaska Light and Power will continue to operate as a stand-alone utility.<sup>10</sup>

9. Avista states that by instituting this direct assignment protocol, it has taken steps to ensure that any costs associated with Alaska Energy and its subsidiaries will be properly tracked and assigned to the appropriate entity. According to Avista, there will as a result be no improper cross-subsidization between and among, on the one hand, Avista and, on the other hand, any of the non-public utility associate companies within Avista's holding company system. In addition, Avista states that any costs associated with a non-public utility company within Avista's holding company system will be allocated to such entity and will not be included in any public utility's jurisdictional rates.<sup>11</sup>

10. Finally, Avista states that the exemption it seeks will not affect the Commission's independent ability to obtain access to any books and records under the FPA and the Natural Gas Act and will not affect any applicable state commission's ability to access books and records pursuant to such state commission's authority.<sup>12</sup>

### **III. Notice of Filing**

11. Notice of Avista's petition was published in the *Federal Register*, 79 Fed. Reg. 69,459 (2014), with interventions and protests due on or before December 10, 2014. None was filed.

### **IV. Discussion**

12. We find that PUHCA 2005, by its terms, exempts Avista and its holding company system from the statute's books and records requirements. Consequently, Avista and its holding company system are also exempt from sections 366.21, 366.22, and 366.23 of the Commission's regulations, which implement the books and records requirements of PUHCA 2005. To explain why this is the case, we must consider how the relevant provisions of PUHCA 2005 apply in Avista's case.

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<sup>10</sup> *Id.* at 8-9.

<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.* at 10.

13. Sections 366.21, 366.22, and 366.23 of the Commission's regulations implement the requirements of section 1264 of PUHCA 2005. The scope of those regulations is thus dependent on the scope of the requirements that section 1264 establishes. Section 1264(a) of PUHCA 2005 requires that

each holding company and each associate company thereof shall, maintain, and shall make available to the Commission, such books, accounts, memoranda, and other records as the Commission determines are relevant to costs incurred by a *public utility or natural gas company* that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.<sup>13</sup>

14. The facts that Avista presents in its petition show that Avista and its holding company system are exempt from the requirements of section 1264, and thus from sections 366.21, 366.22, and 366.23 of the Commission's regulations, by operation of the statute itself. In brief, the reason that Avista and its holding company system are exempt from these requirements is that the requirements pertain to costs incurred by a public utility or natural gas company that is an associate company of a holding company, and Avista, the holding company in this case, has no associate companies that are public utilities or natural gas companies, as defined in PUHCA 2005.

15. An "associate company" of a holding company under PUHCA 2005 is a company in which the holding company, directly or indirectly, owns, controls, or holds with power to vote 10 percent or more of the outstanding voting securities.<sup>14</sup> PUHCA 2005 defines a "holding company" as "any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company. . . ."<sup>15</sup> Avista

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<sup>13</sup> 42 U.S.C. §16452(a) (2012) (emphasis supplied).

<sup>14</sup> *See id.* § 16451(2) (defining an "associate company" of a company" as "any company in the same holding company system with such company"); § 16451(9) (defining "holding company system" as a "holding company, together with its subsidiary companies"); and § 16451(16)(A) (defining "subsidiary company" of a holding company" as "any company, 10 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company").

<sup>15</sup> *Id.* § 16451(8)(A)(i).

became a holding company through its acquisition of Alaska Energy, a holding company, and its indirect acquisition Alaska Light and Power, which qualifies as a public-utility company under PUHCA 2005 because it is an electric utility company under the statute.<sup>16</sup> However, while Alaska Light and Power is a public-utility company, it is not a public utility under PUHCA 2005.

16. PUHCA 2005 defines a “public utility” as “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.”<sup>17</sup> Alaska Light and Power is located in Alaska, and it therefore does not own or operate facilities used for transmission of electric energy in interstate commerce or sales of electric energy at wholesale in interstate commerce.<sup>18</sup> Avista has no other associate companies that are public utilities under PUHCA 2005, and it has no associate companies that are natural gas companies under the statute. Consequently, Avista has no books and records that “are relevant to costs incurred by a public utility or natural gas company that is an associate company”<sup>19</sup> of Avista and thus no books and records to which the requirements of PUHCA 2005 and sections 366.21, 366.22, and 366.23 of the Commission’s regulations apply.

17. Avista is itself a public utility under PUHCA 2005, and its rates are subject to the jurisdiction of the Commission. However, the books and records requirements of PUHCA 2005 do not apply to Avista. To be subject to PUHCA 2005 requirements, books and records must be “relevant to costs incurred by a public utility or natural gas company that is an associate company of [a] holding company . . . .”<sup>20</sup> While Avista is both a public utility and a holding company under PUHCA 2005, it is not an associate company of a holding company. Its books and records therefore do not fall within the requirements of PUHCA 2005. This does not, however, create any regulatory gap.

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<sup>16</sup> *See id.* § 16451(14) (defining a “public-utility company” as “an electric utility company or a gas utility company”) and § 16451(5) (defining an electric utility company as “a company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale”).

<sup>17</sup> *Id.* § 16451(13).

<sup>18</sup> *See, e.g., Electricity Market Transparency Provisions of Section 220 of the Federal Power Act*, 140 FERC ¶ 61,232, at P 23 (2012) (noting that utilities located entirely in Alaska are electrically isolated from the contiguous United States).

<sup>19</sup> 42 U.S.C. § 16452(a) (2012).

<sup>20</sup> *Id.*

Avista is subject to the books and records maintenance and access requirements set forth in section 301 of the FPA.<sup>21</sup> These are comparable to those applicable under PUHCA 2005 and include authority to examine the books and records of Alaska Energy and Alaska Light and Power.<sup>22</sup> Indeed, the Commission has stated that “PUHCA 2005 is primarily a ‘books and records access’ statute and does not give the Commission any new substantive authorities.”<sup>23</sup> The Commission’s authority under section 301 of the FPA to access the books and records of both Avista and companies in the Avista holding company system demonstrates this point.

18. Finally, we note that while Avista is exempt from section 1264 of PUHCA 2005 and related Commission requirements, Avista remains subject to the authority that state commissions have under PUHCA to access its books and records and those of other companies in the Avista holding company system.<sup>24</sup> Moreover, as a holding company, Avista remains subject to the requirements of sections 366.4(d) and (e) of the Commission’s rules. These sections require Avista to notify the Commission of any material change in facts that may affect its exemption and specify that Avista 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.<sup>25</sup>

The Commission orders:

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

(B) In accordance with the requirements of the Commission’s regulations, Avista is required to notify the Commission of any material change in facts that may

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<sup>21</sup> 16 U.S.C. § 825 (2012).

<sup>22</sup> *See id.* § 825(c). In fact, the Commission’s regulations under PUHCA 2005 require public utilities under that statute to use the same record retention requirements as those that apply to public utilities under the FPA. *See* 18 C.F.R. § 368.2 (2014).

<sup>23</sup> Order No. 667, FERC Stats. & Regs. ¶ 31,197 at P 4.

<sup>24</sup> *See* 42 U.S.C. § 16453 (2012).

<sup>25</sup> 18 C.F.R. § 366.4(d)-(e) (2014).

affect its exemption. Avista and its subsidiaries may not rely upon the exemption if they fail to conform with any material facts or representations presented in Avista's petition.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.