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FERC Orders Prior Authorization for a Subcategory of Locational Exchanges of Power

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On February 16, 2012, FERC issued two orders regarding locational exchanges of wholesale electric power, the implications of which will require prior authorization for a subset of future locational exchanges. FERC also indicated that its decisions might result in modifications to the EQR reporting requirements. In June 2010, in docket number EL10-71, Puget Sound Energy, Inc. filed a petition requesting that FERC confirm that "locational exchanges" of electric power, a kind of off-setting power sale, are permissible wholesale power transactions and not transmission transactions subject to an OATT ("Puget Petition"). Puget described locational exchanges as commonplace, particularly in the Pacific Northwest. FERC's Order in response to the Puget Petition, 138 FERC ¶ 61,121 (2012), ("Order" or "Puget Order") made two key rulings:

1. FERC rejected both of Puget's proposed definitions of locational exchanges, and instead adopted the following description of what it called "simultaneous exchanges":

   Simultaneous exchanges occur when a pair of simultaneously arranged (i.e., part of the same negotiations) wholesale power transactions between the same counterparties in which party A sells an electricity product to party B at one location and party B sells a similar electricity product to party A at a different location have an overlapping delivery period. The simultaneous exchange is the overlapping portion (both in volume and delivery period) of these wholesale power transactions.

2. Applying that definition, FERC ruled that the marketing function of a transmission provider may not conduct simultaneous exchanges involving its affiliated transmission provider system "absent prior Commission authorization as evaluated on a case-by-case basis."

In reaching these conclusions, FERC rejected Puget's narrower definition of a locational exchange as transactions "with the same delivery period" because that definition "unduly restrict[ed] the category of transactions relevant to the analysis" of the issues presented by this type of transaction. Instead, FERC emphasized that any overlapping *portions* of such transactions would be subject to its prior authorization requirements. FERC's definition of simultaneous exchanges "encompasses the types of transactions identified in Puget's Petition as locational exchanges as well as additional transactions in which the delivery periods overlap but are not identical." FERC also rejected Puget's contention that locational exchanges are categorically wholesale power sales, as opposed to transmission transactions. At the center of FERC's concern is that "when such transactions involve the marketing function of a transmission provider, they may appear to enable the marketing function to effectively provide service on its transmission provider's system without the reservation of service on that system," thereby "circumventing Commission regulations involving open access transmission service." FERC did not agree with Puget's contention that its previous orders in *Utah Associated Municipal Power Systems v. Pacificorp*, 83 FERC ¶ 61,337 (1998), *reh'g*, 87 FERC ¶ 61,044 (1999) (*UAMPS* Orders), did not control in this situation. The *UAMPS* Orders "suggest broader concerns related to simultaneous exchange-like transactions and separation of functions between the marketing function and the transmission function of the transmission provider." FERC favorably commented on its decision in *El Paso Electric Co.*, 115 FERC ¶ 61,312 (2006), in which FERC approved a simultaneous exchange-like transaction involving marketing function affiliates because, in that case, "the Commission identified facts indicating the presence of competitive alternatives to the marketing function affiliate in that particular simultaneous exchange transaction." FERC was careful to state that the basis for its Puget Order "may not have been sufficiently clear" from previous orders. Therefore, FERC "will not impose [the prior authorization] obligation upon simultaneous exchanges that are or have been effective prior to the date" of the Puget Order. But all subsequent transactions involving the marketing function of a transmission provider conducting simultaneous exchange transactions involving that transmission provider's system must seek prior FERC authorization. In addition, FERC will later "consider ways to enhance the transparency of these arrangements, including potential modifications to the EQR reporting requirements." Because it addressed locational exchanges in its Puget Order, FERC determined that there was no basis for considering the issue through a more general rulemaking process and therefore terminated the separate proceeding it had established in docket number RM11-9. 138 FERC ¶ 61,122 (2012).