

110 FERC ¶ 61,161  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Puget Sound Energy, Inc.  
Encogen Northwest, L.P.

Docket No. EC05-32-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued February 15, 2005)

**I. Introduction**

1. On December 29, 2004, Puget Sound Energy, Inc. (Puget) and Encogen Northwest, L.P. (Encogen) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)<sup>1</sup> requesting Commission authorization of a proposed intra-corporate transfer of jurisdictional facilities that will occur as a result of Puget's acquisition of a generating facility (Facility) owned by Encogen. Encogen is an indirect, wholly-owned subsidiary of Puget (proposed 2005 transaction). Applicants state that Puget acquired Encogen and, indirectly, ownership of the Facility, including its related jurisdictional facilities, in a 1999 transaction.<sup>2</sup> The jurisdictional facilities involved in the proposed 2005 transaction, which are the same as those conveyed in the 1999 transaction, are interconnection facilities that connect the Facility to a Puget substation.

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<sup>1</sup> 16 U.S.C. § 824b (2000).

<sup>2</sup> Applicants seek Commission authorization only for the proposed 2005 transaction. The Commission notes that Applicants did not seek Commission authorization for the 1999 transaction.

2. The Commission has reviewed the proposed 2005 transaction under the Commission's Merger Policy Statement<sup>3</sup> and will authorize it, since it will not have an adverse effect on competition, rates or regulation and is consistent with the public interest. We also find that Puget's acquisition of Encogen in 1999 was a disposition of jurisdictional facilities that required prior approval under section 203. As discussed below, Applicants' failure to seek such prior approval is a violation of section 203 of the FPA. We take such violations seriously, and we expect public utilities that are planning transactions that may be jurisdictional to come to the Commission for guidance before consummating questionable transactions. Our findings are discussed below.

## II. Background

### A. Description of the Parties

3. Puget, a public utility, owns and operates generation and transmission facilities used for wholesale sales and transmission service. Puget also provides retail electric and natural gas service in the State of Washington.

4. Encogen was formed in 1990 as a limited partnership to construct and own the Facility, a 170 megawatt generating facility. In 1990, Encogen executed a long-term power purchase contract with Puget under which Puget agreed to purchase the entire output of the Facility through 2008.

### B. The 1999 Transaction

5. In 1999, Puget bought Encogen in exchange for cash and assumption of the prior owners' debts. As a result, Encogen became an indirect, wholly-owned subsidiary of Puget. The Washington Utilities and Transportation Commission (WUTC) approved the 1999 transaction, and also permitted the Facility to be included in Puget's retail rate base; in other words, it allowed Puget to treat the Facility as though it owned it directly.<sup>4</sup>

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<sup>3</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996); FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001) (Merger Filing Requirements).

<sup>4</sup> See *Order Approving Accounting Treatment and Securities Assumption Authorization*, Petition of Puget Sound Energy, Inc., WUTC Docket No. UE991498, October 27, 1999.

Applicants state that since the 1999 transaction, the Facility has been operated at Puget's direction and its output has been used to meet Puget's native load obligations. All of Encogen's costs are paid directly by Puget and Encogen receives no compensation from Puget for use of the Facility.

### **C. The Proposed 2005 Transaction**

6. Puget proposes to acquire Encogen's Facility and to terminate the existence of Encogen and the two Puget subsidiaries that own Encogen. As a result, Puget will take direct ownership of the Facility. Puget will not pay Encogen any compensation for the Facility.<sup>5</sup>

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

7. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 1884 (2005), with comments, protests, or interventions due on or before January 18, 2005. None were filed.

### **IV. Discussion**

8. Section 203 of the FPA requires *prior* Commission approval for a sale, lease, or other disposition, or a direct or indirect merger or consolidation by a public utility of the whole or any part of "facilities subject to the jurisdiction of the Commission..." The requirement to obtain the Commission's approval applies if the facilities are subject to the jurisdiction of the Commission and the transaction directly or indirectly would result in a change of control of the facilities.

#### **A. Consistency with Public Interest**

9. Section 203(a) of the FPA provides that the Commission must approve a disposition of facilities if it finds that the disposition "will be consistent with the public interest." The Commission's analysis of whether a disposition is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation. As discussed below, we find that the proposed 2005 transaction is consistent with the public interest.

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<sup>5</sup> In a related filing in Docket No. ER05-421-000, Encogen submitted a cost-based tariff providing for the sale of capacity and energy from the Facility to Puget and requested an effective date of November 1, 1999. The Commission will act by separate order on this filing.

### **1. Effect on Competition**

10. Applicants state that with respect to the proposed 2005 transaction, the transfer of ownership of the Facility to Puget will have no effect on market concentration and thus raises no horizontal market power concerns. As Encogen owns no transmission facilities other than those necessary to connect the Facility to Puget's transmission facilities, and also owns no inputs into electric generation, Applicants also assert that the proposed 2005 transaction does not present vertical market power concerns. With respect to the 1999 transaction, the Commission notes that before that transaction, Puget purchased all of the output of the Facility. Therefore, we conclude that Puget's acquisition of Encogen would not have raised market concentration in 1999, and we find that the proposed 2005 transaction, as preceded by the 1999 transaction, does not adversely affect competition.

### **2. Effect on Rates**

11. Applicants assert that the proposed 2005 transaction will not adversely affect rates. They state that none of Puget's existing wholesale rate schedules or transmission rates will change as a result of the transfer and note that the Facility is already included in Puget's retail rate base. No entity has claimed to the contrary. We find that the proposed 2005 transaction does not adversely affect rates.

### **3. Effect on Regulation**

12. As explained in the Merger Policy Statement and the Merger Filing Requirements, the Commission's primary concern with the effect on regulation of a transaction involves possible changes in the Commission's jurisdiction when a registered holding company is formed, thus invoking the jurisdiction of the Securities and Exchange Commission. Neither the 1999 transaction nor the proposed 2005 transaction resulted or will result in the formation of a registered holding company. No party alleges that federal regulation would be impaired by the proposed 2005 transaction. We further note that Puget will continue to be regulated in the same manner by the Washington Utilities and Transportation Commission. We find that federal or state regulation would not be impaired.

### **4. Applicants' Proposed Accounting Treatment**

13. Section 33.5, Proposed Accounting Entries, of the Commission's regulations requires that section 203 applicants present proposed accounting entries with sufficient detail showing the effect of the transaction. Applicants did not comply with the

requirement. Instead, they referenced certain journal entries that the Commission accepted for filing in Docket No. AC00-53-000 in connection with Puget's indirect purchase of the Facility in 1999.<sup>6</sup>

14. Although the jurisdictional facilities involved in the proposed 2005 transaction are the same as those conveyed in the 1999 transaction, the accounting accepted for filing in Docket No. AC00-53-000 is not a substitute for proper accounting for this intra-corporate transfer. While Applicants state that the Encogen subsidiaries will merge with Puget, Applicants do not provide the proposed accounting designed to account for the merger of the Encogen subsidiaries with the parent company.

15. As such, we will require Applicants to submit full particulars of their proposed accounting for the transaction within 30 days of the date of this order.

## **B. Conclusion**

16. Applicants did not obtain timely Commission authorization for the 1999 transaction in which Puget acquired Encogen. We note that section 203 of the FPA requires Commission approval of such a disposition before it is implemented. Implementing such a disposition without prior Commission approval is directly contrary to statutory requirements. We take non-compliance with section 203 requirements very seriously and expect public utilities to do the same. To remedy non-compliance, the Commission may, among other things, impose a term or condition on its approval of a disposition under section 203. In addition, a public utility that implements a disposition without the Commission's prior authorization faces the obvious risk that an affected party may seek to void that disposition in court. Further, while the Commission does not have civil penalty authority, we note that Applicants' failure to obtain prior Commission approval for the 1999 transaction is the type of violation for which the imposition of a penalty would be appropriate.

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<sup>6</sup> As noted above, Applicants did not file a section 203 application for the 1999 transaction in which Puget acquired Encogen. Consequently, Applicants did not provide a proposed accounting for the 1999 transaction.

The Commission orders:

(A) Applicants' proposed disposition of jurisdictional facilities in the 2005 transaction is hereby authorized, as discussed in the body of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) Applicants shall make any appropriate filings under section 205(a) of the FPA, as necessary, to implement the proposed 2005 transaction.

(F) Applicants shall submit full particulars of their proposed accounting and related details for the transaction required by section 33.5, Proposed Accounting Entries, of the Commission's regulations within 30 days of the date of this order.

(G) Applicants shall notify the Commission within 10 days of the date that the disposition of jurisdictional facilities has occurred.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.