

149 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kimberly J. Harris

Docket No. ID-7500-000

ORDER GRANTING CONDITIONAL AUTHORIZATION
TO HOLD INTERLOCKING POSITIONS

(Issued October 10, 2014)

1. On August 13, 2014, Kimberly J. Harris submitted an application, pursuant to section 305(b) of the Federal Power Act (FPA),¹ for authorization to hold the interlocking positions of Director of U.S. Bancorp (Bancorp) and President and Chief Executive Officer (CEO) of Puget Sound Energy, Inc. (Puget Sound). As discussed below, the Commission will grant Ms. Harris conditional authorization, effective from the date of this order.

I. Background

2. Puget Sound is a public utility for purposes of FPA section 305(b). A wholly-owned subsidiary of Puget Energy, Inc., Puget Sound's retail and wholesale utility businesses include the generation, purchase, transmission, distribution and sale of electric energy, plus the purchase, transportation, storage, distribution, and sale of natural gas. Ms. Harris states that she became President of Puget Sound in 2010 and CEO of Puget Sound in 2011.

3. Bancorp is a financial holding company and a bank holding company under the Bank Holding Company Act of 1956.² Bancorp provides a full range of financial services, including lending and depository services, cash management, capital markets, trust and investment management services, credit card services, merchant and ATM processing, mortgage banking, insurance, brokerage, and leasing.

¹ 16 U.S.C. § 825d(b) (2012).

² 12 U.S.C. § 1841, *et seq.* (2012).

4. According to Ms. Harris, she filed the instant application out of an abundance of caution because the interlocking positions that she seeks to hold, which are an interlock between a public utility and a holding company whose subsidiaries are authorized by law to underwrite or participate in the marketing of securities of a public utility, do not meet any of the four circumstances where Congress had limited Commission authority over interlocks between a public utility and a bank, trust company, banking association, or firm authorized by law to underwrite or participate in the marketing of securities of a public utility, for which Commission authorization is not required.³ Ms. Harris states that Bancorp is a financial holding company and bank holding company and that it does not itself participate in the underwriting of securities to any public utility, and thus, she states, she does not believe that she falls within any of the above-noted four circumstances. Ms. Harris explains that, in cases decided before Congress added these four circumstances to the FPA limiting Commission authority over interlocks between public utilities and firms authorized by law to underwrite or participate in the marketing of securities of a public utility, the Commission's policy was to impute the underwriting activity of a firm to its corporate parents and affiliates for purposes of asserting jurisdiction under section 305(b).⁴

5. Should Commission authorization be required, Ms. Harris asserts that the primary responsibility of the Board of Directors of Bancorp is to govern Bancorp's affairs for the benefit of its stockholders, and that the Board does not oversee the day-to-day affairs of Bancorp, its subsidiaries or its affiliates, including those entities authorized by law to underwrite securities of public utilities.

6. Ms. Harris notes that the Commission has permitted interlocking positions without condition when the applicant can be considered a corporate outsider, but has conditioned authorization on the firm refraining from underwriting or participating in the marketing of securities of the public utility when the applicant cannot be considered a corporate outsider. Ms. Harris asserts that such a condition is not necessary, but that she is not opposed to a condition that, in her role as Director of Bancorp, she "will not participate in any decisions regarding whether and under what terms a subsidiary or affiliate of [Bancorp] would underwrite an offering of securities, including any offering of [Puget Sound] securities."⁵

³ See *infra* P 11.

⁴ Application at 5 (citing *Salvatore H. Alfiero*, 84 FERC ¶ 62,278 (1998); *Norman Barker, Jr.*, 53 FERC ¶ 61,223, at 61,932 (1990)).

⁵ Application at 6.

II. Notice of Filing

7. Notice of Ms. Harris' filing was published in the *Federal Register*, 79 Fed. Reg. 49,302 (2014), with interventions and protests due on or before September 3, 2014. None was filed.

III. Discussion

8. Section 305(b) of the FPA prohibits persons from concurrently holding positions as officer or director of both a public utility and a bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of public utility securities, unless the Commission authorizes the interlock upon a finding that neither public nor private interests will be adversely affected.⁶

9. In *Hatch v. FERC*, the Court of Appeals for the District of Columbia Circuit addressed section 305(b) and stated:

It will suffice to note that during the passage of the Public Utility Holding Company Act in 1935, Congress exhibited a relentless interest in, bordering on an obsession with, the evils of concentration of economic power in the hands of a few individuals. It recognized that the conflicts of interest stemming from the presence of the same few persons on boards of companies with intersecting interests generated subtle and difficult-to-prove failures in the arm's length bargaining process. Its overriding concern with eliminating the source of "evils result[ing] from an absence of arm's length bargaining" was expressed in the preamble of the Act which Congress explicitly referenced for guidance in interpreting all other provisions of the Act. The legislative history makes clear too that Congress intended the Commission to have the broadest authority to achieve its objective of ameliorating the perceived evils of interlocking corporate relationships in the utilities field. . . . The Act is prophylactic in nature; it allows the Commission to prevent, not merely remedy, abuses due to conflicts of interest. Thus, the Commission need not approve all applications for interlocks simply on the assurance, even if that assurance is backed by favorable history, that no such abuses will occur.⁷

⁶ 16 U.S.C. § 825d(b)(1) (2012).

⁷ *Hatch v. FERC*, 654 F.2d 825, 831-32 (D.C. Cir. 1981) (footnotes omitted).

10. Furthermore, we have previously explained that, among the “evils to be eliminated by the enactment of section 305(b),” are:

(1) control over a large number and geographically widespread public utilities by a small group of individuals with perhaps a minimum of investment; (2) the evasion by means of common control of competition resulting in higher costs and poorer services to consumers; (3) the lack of arm’s-length dealings between public utilities and organizations furnishing financial services or electrical equipment; (4) the employment of dummy directors designated solely for the purpose of executing the order of those in control, and nominal directors who give little time and attention to the affairs of the companies; and (5) violations of laws, ethics, and good business practices by those holding such interlocking positions whereby such relationship is employed for their own benefit or profit, or for the benefit or profit of any other person or persons and to the detriment of the companies, their security holders or the public interest.⁸

11. As noted above, section 305(b) of the FPA was amended in 1999 to provide that no prior authorization is required for interlocking positions between a public utility and a bank, trust company, banking association, or firm authorized by law to underwrite or participate in the marketing of securities of a public utility if:

(1) the person seeking to hold the interlock does not participate in the public utility’s deliberations or decisions regarding the selection of a firm to underwrite or participate in the marketing of the public utility’s securities, if the person serves as an officer or director of the firm that is under consideration in the deliberation process; or

(2) the bank, trust company, banking association, or firm of which the person is an officer or director does not engage in the underwriting or marketing of securities of that public utility; or

(3) the public utility selects underwriters by competitive procedures; or

(4) the issuance of the public utility’s securities has been approved by all federal and state regulatory agencies having jurisdiction over the issuance.⁹

⁸ *James S. Pignatelli*, 111 FERC ¶ 61,496, at P 12 (2005) (quoting *John Edward Aldred*, 2 FPC 247, 261 (1940) (*Aldred*)); *Robert G. Schoenberger*, 110 FERC ¶ 61,197, at P 9 (2005) (quoting *Aldred*, 2 FPC at 261).

⁹ See 16 U.S.C. § 825d(b)(2)(B).

12. With respect to interlocking positions between a public utility and a bank, trust company, banking association, or firm authorized by law to underwrite or participate in the marketing of securities of a public utility, the Commission has attributed the underwriting activities of a firm to its corporate parent and to its affiliates for purposes of establishing section 305(b) jurisdiction.¹⁰ The Commission has stated a concern “about the more subtle ‘influences’ which members of coordinated corporate families may exert over one another...and the abuses which may result from the exercise of such influence.”¹¹

13. Though section 305(b) is prophylactic in nature and thus prohibits interlocks *ab initio*, Congress allowed the Commission latitude to authorize otherwise proscribed interlocks upon a showing that neither public nor private interests will be adversely affected. In this case, Ms. Harris represents that, as member of the Board of Bancorp, she does not oversee the day-to-day affairs of Bancorp, its subsidiaries or its affiliates, including those entities authorized by law to underwrite securities of public utilities, and thus, under Commission precedent, is considered an outside director of Bancorp.¹² However, in her role as President and CEO of Puget Sound, the Commission finds that Ms. Harris cannot be considered to be an outside director. Consequently, consistent with Commission precedent and section 305(b)(2)(B)(i) of the FPA, we shall condition authorization to hold the interlocking positions requested by Ms. Harris on the proviso that Ms. Harris does not participate in any deliberations or decisions of Puget Sound regarding the selection of a bank, trust company, banking association, or firm to underwrite or participate in the marketing of securities of Puget Sound, if Ms. Harris serves as an officer or director of Bancorp, and Bancorp or a subsidiary or affiliate of Bancorp is under consideration as an underwriter or marketer of securities to be issued by Puget Sound.¹³

¹⁰ *Frederick W. Mielke, Jr.*, 22 FERC ¶ 61,004, *reh’g denied*, 23 FERC ¶ 61,183, at 61,398, n.10 (1983); *see also Thomas Madison McDaniel, Jr.*, 24 FERC ¶ 61,026 (1983); *John H. Byrne*, 38 FERC ¶ 61,067 (1987) (*Byrne*). In *Byrne*, the Commission specifically overruled an earlier holding in *Donald B. Riefler*, 32 FERC ¶ 61,375, at 61,849 (1985), that “as a general rule, affiliates do not control their affiliated companies and subsidiaries do not control their parents.”

¹¹ *Byrne*, 38 FERC ¶ 61,067 at 61,184 (citing *William T. Coleman, Jr.*, 19 FERC ¶ 61,270 (1982); *Margery Somers Foster*, 19 FERC ¶ 61,146 (1982) (*Margery Foster*); *Aldred*, 2 FPC at 261).

¹² *See Norman Barker, Jr.*, 53 FERC ¶ 61,223 at 61,934.

¹³ *See James R. Lientz, Jr.*, 93 FERC ¶ 61,007 (2000); *accord* 16 U.S.C. § 825d(b)(2)(B)(i).

14. And, as she has represented she is willing to do,¹⁴ we similarly require that insofar as she is on the Board of Directors of the parent holding company, Bancorp, she will not participate in any decisions regarding whether and under what terms a subsidiary or affiliate of Bancorp would underwrite or market an offering of Puget Sound securities.

15. In light of the Commission's conditional authorization of Ms. Harris's application noted above, the Commission finds that the potential adverse effect on jurisdictional activities (i.e., underwriting or marketing of Puget Sound securities) has thus been mitigated.

16. We conclude that the holding of the positions identified, in these circumstances, will not adversely affect public or private interests and we will conditionally grant the authorization.¹⁵

The Commission orders:

(A) Ms. Harris' application for authorization to hold the interlocking positions of Director of Bancorp and President and CEO of Puget Sound, is hereby conditionally granted, effective from the date of this order.

(B) In accordance with section 45.5(b) of the Commission's regulations, 18 C.F.R. § 45.5(b) (2014), if there is any change in the positions Ms. Harris holds with the companies covered by this order, or any other material change occurs with regard to the representations made in her application, she is hereby directed to give notice to the Commission of such change within 30 days. Such a requirement does not replace the annual FERC Form No. 561 that is mandatory under section 305(c)(1) of the FPA, 16 U.S.C. § 825d(c)(1) (2012).

¹⁴ See Application at 6 (she states that she is not opposed to a condition that, in her role as Director of Bancorp, she "will not participate in any decisions regarding whether and under what terms a subsidiary or affiliate of [Bancorp] would underwrite an offering or securities, including any offering of [Puget Sound] securities").

¹⁵ We do not, however, intend to bar Ms. Harris from holding this interlock if Bancorp or its subsidiaries and affiliates simply buy or sell securities in the so-called secondary securities markets solely on behalf of investors who desire to buy or sell Puget Sound's securities or the securities of Puget Sound's subsidiaries and affiliates. See *Norman Barker, Jr.*, 53 FERC ¶ 61,223 at n.61; *Margery Foster*, 19 FERC ¶ 61,146 at n.10.

(C) The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by the continued holding of the interlocking positions authorized by this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.