

155 FERC ¶ 61,175
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Puget Sound Energy, Inc.

Docket No. EL10-71-002

ORDER DENYING CLARIFICATION AND REHEARING

(Issued May 19, 2016)

1. On November 2, 2015, the Commission issued an order¹ that granted, in part, and denied, in part, requests for clarification and denied a request for rehearing of the Commission's February 16, 2012 order in this proceeding.² In this order, we deny El Paso Electric Company's (El Paso) December 2, 2015 request for clarification or, in the alternative, rehearing of the Rehearing Order.

I. Background

2. On June 4, 2010, Puget Sound Energy, Inc. (Puget) filed a petition for declaratory order (Puget Petition) requesting that the Commission find that locational exchanges³ of

¹ *Puget Sound Energy, Inc.*, 153 FERC ¶ 61,131 (2015) (Rehearing Order).

² *Puget Sound Energy, Inc.*, 138 FERC ¶ 61,121 (2012) (February 2012 Order).

³ In the Puget Petition, Puget defined a locational exchange as follows:

a pair of simultaneously arranged wholesale power transactions between the same counterparties in which party A sells electricity to party B at one location, and party B sells the same volume of electricity to party A at a different location with the same delivery period, but not necessarily at the same price.

Puget Sound Energy, Inc., Petition for Declaratory Order and Request for Expedited Action, Docket No. EL10-71-000, at 1 (filed June 4, 2010).

electric power are permissible wholesale power transactions and not transmission transactions subject to an open access transmission tariff. In the February 2012 Order, the Commission denied, in part, and granted, in part, the Puget Petition, finding that, when a simultaneous exchange transaction⁴ involves the marketing function of a public utility transmission provider, the public utility must seek prior approval from the Commission if the transaction involves its affiliated transmission provider's system.⁵ The Commission, therefore, denied the Puget Petition, in part, with regard to simultaneous exchange transactions involving the marketing function of a public utility transmission provider and its affiliated transmission provider's system.

3. In addition, the Commission granted the Puget Petition, in part, with regard to all other simultaneous exchange transactions, which the Commission concluded would not require prior Commission approval beyond the necessary authorization under section 205 of the Federal Power Act⁶ for the sale for resale of electric energy.⁷ The Commission found that entities are permitted to engage in simultaneous exchanges without prior Commission approval, if such transactions do not include the marketing function of a

⁴ Although Puget sought guidance on what it referred to as "locational exchanges," the Commission stated that Puget's focus on transactions with the same delivery period may unduly restrict the category of transactions relevant to the analysis of issues raised in the Puget Petition. Accordingly, in the February 2012 Order, the Commission referred to "simultaneous exchanges" that involve overlapping delivery periods, and defined such transactions as follows:

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.

February 2012 Order, 138 FERC ¶ 61,121 at P 12.

⁵ *Id.* P 11. The Commission noted that "[i]nvolvement of the transmission provider's system means that one point of the simultaneous exchange is either within or on the border of the transmission provider's system." *Id.* P 11 n.22.

⁶ 16 U.S.C. § 824d (2012).

⁷ February 2012 Order, 138 FERC ¶ 61,121 at P 17.

transmission provider conducting simultaneous exchange transactions involving that transmission provider's system.⁸

4. On March 19, 2012, El Paso filed a request for clarification of the February 2012 Order, asking the following:

[w]hen the Commission states that “when the simultaneous exchange transaction . . . involves the *marketing function* of a public utility transmission provider” (emphasis added), is the Commission using the definition of “marketing function” set forth in the Standards of Conduct and codified at 18 C.F.R. § 358.3(c), such that bundled retail sales are excluded? In other words, if a public utility seeks to enter into a locational exchange for the purpose of making a bundled retail sale (and not for the purpose of engaging in “marketing functions” as defined in the Standards of Conduct), is prior Commission approval of the locational exchange necessary?^[9]

5. In the Rehearing Order, the Commission stated:

Furthermore, we grant El Paso's request for clarification as to whether the Commission uses the definition of “marketing function” set forth in the Standards of Conduct, 18 C.F.R. § 358.3(c) when it refers to “marketing function” within the definition of simultaneous exchange transaction. We note that the Commission recently stated that the “marketing function” term does refer to the definition in 18 C.F.R. § 358.3. Moreover, we grant El Paso's request for clarification that prior approval is necessary where a public utility seeks to enter into a locational exchange for the purpose of making bundled retail sales, and not for the purpose of engaging in marketing functions, where the transaction involves a marketing function affiliate and affiliated transmission provider's system.^[10]

⁸ *Id.*

⁹ El Paso March 19, 2012 Request for Clarification at 1-2 (emphasis by El Paso).

¹⁰ Rehearing Order, 153 FERC ¶ 61,131 at P 24 (citation omitted).

II. El Paso Request for Clarification or, in the Alternative, Rehearing

6. El Paso argues that the Commission erred in directing that prior Commission approval is necessary where a public utility enters into a locational exchange for the purpose of making bundled retail sales.¹¹ El Paso states that the directive is at odds with the grant of clarification in the Rehearing Order that the term, “marketing function” for purposes of the Commission’s locational exchange policy is the definition of “marketing function” found in the Standards of Conduct at 18 C.F.R. § 358.3. El Paso also contends that this directive is an unexplained change from the Commission’s prior orders in this proceeding.¹²

7. El Paso states that, with the first two sentences of paragraph 24 of the Rehearing Order, the logical result would be that prior approval would be unnecessary where a public utility seeks to enter into a locational exchange for the purpose of engaging in bundled retail sales, because section 358.3 specifically excludes bundled retail sales from the definition of marketing function.¹³ El Paso asserts that the Rehearing Order reads in reverse concluding that prior approval of a locational exchange is necessary when a public utility is engaging in bundled retail sales, which is a reversal of the Commission’s finding in the February 2012 Order.¹⁴

8. El Paso states that the Commission may have inadvertently transposed the contents of the third sentence in paragraph 24 of the Rehearing Order. El Paso states that, therefore, it requests further clarification and that the Commission issue an errata to the Rehearing Order to revise the last sentence of paragraph 24 to read as follows:

. . . that prior approval is necessary where a public utility seeks to enter into a locational exchange for the purpose of engaging in marketing functions (and not for the purpose of engaging in bundled retail sales), where the transaction involves a marketing function affiliate and affiliated transmission provider’s system.^[15]

9. In the alternative, El Paso seeks rehearing of the Rehearing Order on the grounds that the use of the Standards of Conduct definition of “marketing function” excludes

¹¹ El Paso December 2, 2015 Request for Clarification at 1.

¹² *Id.*

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *Id.* at 3-4.

bundled retail sales, and, therefore, that prior approval is unnecessary where a public utility seeks to enter into a locational exchange for the purpose of making bundled retail sales.¹⁶

III. Discussion

10. We deny El Paso's request for the Commission to clarify the Rehearing Order and issue an errata to the third sentence of paragraph 24. We also deny El Paso's alternative request for rehearing. However, to the extent that the Commission's interpretation of and ruling on El Paso's March 19, 2012 request for clarification was not sufficiently clear, or there is some misapprehension of the Commission's findings with regard to when prior Commission approval is required for simultaneous exchange transactions, we further explain our rulings below.

11. In the February 2012 Order, the Commission explained why a simultaneous exchange transaction involving the marketing function of a public utility transmission provider and its affiliated transmission provider's system requires prior approval from the Commission. The Commission expressed its concern that certain simultaneous exchanges may resemble transmission service because they involve a party placing power onto the power grid at one delivery point, and then, simultaneously receiving power at another delivery point, and, when such transactions involve the marketing function of a transmission provider, they may appear to enable the marketing function, in effect, to provide service on its transmission provider's system without the reservation of service on that system.¹⁷ The Commission stated that a transmission provider's marketing function has a unique relationship with the transmission provider that is governed by the Commission's Standards of Conduct, which prohibit marketing function employees from conducting transmission functions¹⁸ and prohibit many types of communication between the transmission function employees and marketing function employees.¹⁹ The Commission also explained that, within these types of transactions, the marketing function of a transmission provider could utilize the complexity of simultaneous exchanges in effect to perform transmission functions, thus, circumventing Commission open access regulations.²⁰ Therefore, we affirm that prior Commission approval is

¹⁶ *Id.* at 4.

¹⁷ February 2012 Order, 138 FERC ¶ 61,121 at P 13.

¹⁸ 18 C.F.R. § 358.5(b) (2015).

¹⁹ *Id.* See also 18 C.F.R. § 358.2(b) (2015).

²⁰ February 2012 Order, 138 FERC ¶ 61,121 at P 14.

necessary where a public utility seeks to enter into a simultaneous exchange transaction that involves the marketing function of a public utility transmission provider and the affiliated transmission provider's system.

12. We disagree with El Paso's assertion that the Commission's findings in the Rehearing Order means that prior Commission approval is not necessary where a public utility seeks to enter into a locational exchange for the purpose of making bundled retail sales. When the Commission noted that it had recently stated that "marketing function" does refer to the definition in 18 C.F.R. § 358.3,²¹ the Commission did not intend for its statement to be read as not requiring prior Commission approval in any instance where a public utility seeks to enter into a simultaneous exchange transaction that involves the marketing function affiliate of a public utility transmission provider and the affiliated transmission provider's system.²² To the extent that El Paso may have interpreted the Commission's reference to the definition of "marketing function" in 18 C.F.R. § 358.3 as excluding from the Commission's prior approval requirement a simultaneous exchange transaction entered into for the purpose of making bundled retail sales and that involves the marketing function of a public utility transmission provider and the affiliated transmission provider's system, we affirm that is not the case. Where a public utility seeks to enter into a simultaneous exchange transaction that involves the marketing function affiliate of a public utility transmission provider and the affiliated transmission provider's system, even if the purpose of that transaction is for bundled retail sales, we find that Commission prior approval is required due to the same concerns we identified in the Rehearing Order—that is, there is the potential that the affiliated entities may circumvent the Commission's open access regulations through these transactions. Accordingly, we deny rehearing.

The Commission orders:

(A) El Paso's request for clarification is hereby denied, as discussed in the body of this order.

²¹ Rehearing Order, 153 FERC ¶ 61,131 at P 24 (citing *Cheyenne Light, Fuel and Power Co.*, 143 FERC ¶ 61,113, at P 14 & n.8 (2013)).

²² In the Rehearing Order, the Commission cited to *Cheyenne Light, Fuel and Power Co.*, 143 FERC ¶ 61,113, where the Commission found that a proposed transaction was a simultaneous exchange transaction that required prior Commission authorization but, based on the specific information provided by the applicant utility, the proposed transaction did not raise the types of open access transmission service concerns that were described in the February 2012 Order.

(B) El Paso's alternative request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.