

FERC Clarifies Jurisdiction Over Demand Response

On January 19, 2010, the Federal Energy Regulatory Commission (FERC) issued an order clarifying its jurisdiction over demand response services under the Federal Power Act (FPA). In *EnergyConnect, Inc.*, 130 FERC ¶ 61,031 (2010), FERC explained that sales of pure demand response services (i.e., reduction in consumption of electricity) are not subject to FERC's jurisdiction and do not require the seller to have a tariff on file with FERC. In contrast, wholesale sales in which electric energy is injected into the grid require the seller to have a rate on file with FERC.

EnergyConnect, Inc. (EnergyConnect) filed with FERC an application for market-based rate authority. EnergyConnect provides demand response services in various organized markets. Its activities include the purchase of ancillary services from generation sources for eventual resale into wholesale electric markets.

In reviewing EnergyConnect's application, FERC acknowledged that prior orders had created ambiguity on whether a utility's purchase of demand reduction from its end-use customers should be treated as a sale of electricity by the customers to the utility. FERC determined that a reduction in the consumption of electricity by customers from their expected consumption is not a sale of electricity and, therefore, sales of pure demand response services do not require market-based rate authority or a FERC-approved tariff.

FERC, however, clarified that where wholesale sales include the injection of electricity into the grid—as in the case of sales of ancillary services from generation sources—the sales are FERC-jurisdictional and the seller must have a FERC-approved tariff before making such sale.

Finally, FERC noted that even providers of pure demand response remain subject to the rules of the organized markets in which they participate, and to the FPA provisions governing market manipulation, price transparency, and enforcement of violations.

As a result of this order, entities providing demand response and other services should review their current and anticipated business practices to ensure full compliance with the requirements of the FPA and the Commission's regulations.

FOR ADDITIONAL INFORMATION

Van Ness Feldman advises energy companies, including demand response providers, on regulatory and transactional matters before FERC. The firm regularly assists clients in obtaining market-based rate authorization and counsels clients on issues related to their participation in organized markets. For more information, please contact Jay Ryan, Andrew Art, Vincenzo Franco, or any member of the firm's Electricity practice at (202) 298-1800.

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