

INSIGHTS

FERC Revises Interlocking Directorate Reporting Requirements

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A February 21, 2019 Federal Energy Regulatory Commission (“FERC”) order updated certain FERC interlocking directorate requirements (“Order”).^[1] More detailed background information on FERC’s interlocking directorate requirements is provided below, but in short, these requirements apply to the officers and directors of public utilities subject to FERC’s jurisdiction (including many generation companies and power marketers) and may trigger FERC prior approvals, notice requirements, and/or annual reporting requirements. Compliance with these requirements are particularly sensitive because the obligation or duty to comply rests with the individual holding the interlock, not only with the companies involved. Thus, failure to comply could have consequences both for the individual and for the validity of decisions made by a company in which a non-complying person participated in the decision-making process.

The underlying statutory Federal Power Act (“FPA”) provisions, FPA Section 305(b) and Section 305(c), are detailed and do not provide FERC with much implementation flexibility in large part because FERC is not able to waive statutory requirements. Consistently, the Notice of Proposed Rulemaking resulting in the Order did not propose extensive changes. However, there are some helpful developments of which those responsible for interlock compliance should take note.

Among other things, FERC will now allow individuals to hold temporary interlocking positions for affiliated entities without making a FERC submittal under certain circumstances. Also, the regulations now reflect that in certain circumstances, FERC may consider late-filed notifications for affiliated interlocking directorate positions. The Order also clarified when FERC must be informed of changes in positions an individual holds in affiliated entities. The Order also made certain “clean-up” changes to the regulations to reflect the current law. Although those focusing in this area already understood that the relevant statutory provisions “overrode” the language in FERC’s regulations, it is nice to see the regulations updated. The new rules become effective May 3, 2019. Further highlights are below.

I. Background on Interlocking Directorate Requirements

Pursuant to Section 305(b) of the FPA and Part 45 of FERC's regulations, individuals seeking to serve in certain interlocking positions must receive prior authorization from FERC to serve as an officer or director of a public utility, including the following positions: (1) officer or director of more than one public utility; (2) officer or director of a public utility and of any bank, trust company, banking association or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility; and (3) officer or director of a public utility and

any company supplying electrical equipment to a public utility. 18 C.F.R. § 45.1(a)(1)-(3). Also, generally, an officer or director generally must notify the Commission after he or she no longer holds a given interlocking position. See 18 C.F.R. § 45.5(b). For many years, FERC's requirements for affiliated interlocks has been streamlined with individuals seeking to serve in certain other interlocking positions among affiliates required to file a report with FERC *before* assuming an interlocking position rather than applying for formal FERC authorization. 18 C.F.R. § 45.9.

Section 305(c) of the FPA, Part 46 of the FERC regulations, provides for an annual report, FERC Form 561, which must be filed with FERC to report interlocking positions. The annual report covers a wider range of interlocking positions than the prohibition under Section 305(b) described above. The reporting requirements apply to certain interlocks for which no prior FERC authorization is required.

II. Modifications to FERC Interlock Requirements

Consideration of Late-Filed Applications to Report Affiliate Positions

In the past, FERC indicated it would deny all late-filed applications or notices for authorization to hold interlocking positions. This included applications for interlocking positions with non-affiliates and notice regarding affiliated interlocking directorate positions. For example, FERC's "old" regulations regarding notice for affiliated interlocking directorate positions, 18 C.F.R. § 45.9, required applicants to include an affirmation that the applicant had not yet performed or assumed the duties or responsibilities of the position. These restrictions had the potential to create obstacles for companies who discovered that due to inadvertence, they had not complied with FERC requirements until after an individual was already an officer or director of affiliated public utilities. The only "solution" had been for a company to have an officer or director to step down from the interlocking position. This created difficulties for compliance personnel and lawyers.

Now, FERC will consider late-filed applications for interlocking positions on a "case-by-case" basis after concluding: "We do not think that it is in the public interest to deny otherwise-qualified applicants' late-filed applications and informational filings made under these regulations when the late filing is due solely to good faith errors and oversights, and the error or oversight is promptly identified and expeditiously rectified." Order at P 11.

Holding Temporary Positions Among Affiliates Without Filing Report

In some very narrow circumstances, FERC will now allow individuals to hold interlocking directorate positions among affiliated companies for up to 90 days without making an informational report with FERC first. "We note that this temporary appointment exemption would, in practice, apply only in a narrow set of circumstances – where a person *who has never held an interlock before* is temporarily appointed to a position at an affiliate company." Order at P 56. Thus, a person seeking to hold an interlocking position that would require an automatic authorization notice filing could be appointed to fill a vacant position temporarily, for 90 days or less, without FERC notice or annual reporting in FERC Form No. 561. FERC noted that the 90 days could not be extended. Order at P 57.

Clarifications Regarding Updates to Affiliate Interlock Informational Filings

FERC also modified its regulations to make clear that supplemental applications and notice of change do not need to be filed in the case of a person already authorized to hold affiliate interlocks (*i.e.*, an individual who had already filed a notice of affiliate interlock). A supplemental submittal need only be submitted to FERC when such an individual resigns from *all* previously held interlocking officer and director positions. Order at P 20. FERC noted that instead of being reported in a supplement, additional interlocks should be included in the annual Form No. 561, due to be filed by those holding certain interlocking directorate positions by April 30 of each year to provide information on interlocks held the prior calendar year.

FERC also made changes to clarify that once affiliated interlocking positions have been reported to FERC, the individual at issue may hold positions other than those initially reported without submitting a new notice to FERC. Order at P 21. So, if an individual no longer held the position that triggered the initial submittal but continued to hold other officer or director positions with affiliated companies that would separately trigger a notice filing to FERC, the updated information need only be included in the FERC Form No. 561. To the extent that a change filing is required, FERC's rule changes require that submittal to be made within 60 days of the "triggering event". Order at P 22.

III. Updates to Reflect Current Law

FERC also updated certain language in its regulations to conform to statutory changes. Significantly, FERC had applied its requirements consistent with the currently effective statutes so this is not a change from a practical standpoint but FERC used this rulemaking to update its regulations to reflect the current law. Specifically, FERC's interlocking directorate regulations have now been updated to reflect the Gramm-Leach-Bliley Financial Modernization Act of 1999 and the Public Utility Holding Company Act of 2005 ("PUHCA 2005").

The Gramm-Leach Bliley Financial Modernization Act of 1999 law amended Section 305(b) of the FPA to provide four exceptions to the FPA Section 305(b) requirement on prior approvals related to holding interlocks that involve a financial institution. Pub L. 106-103, 113 Stat. 1338 (codified in scattered sections of 12 and 15 U.S.C.). See *James R. Lientz, Jr.*, 93 FERC ¶ 61,007 (2000). PUHCA 2005 rendered many definitions in the FERC's interlocking directorate regulations obsolete. FERC updated its regulations to reflect these changes, including removing corresponding Section 46.2(b) from its regulations.

IV. FERC Decided Not to Adopt Certain Other Suggested Changes

FERC declined certain other rule change suggestions made by commenters. In general, it saw its interlock requirements as imposing only minimal burdens. For example, FERC decided not to create a blanket authorization for interlock holders at companies within holding company systems without captive customers. Among other things, FERC also declined to implement a new submission process or database.

V. Interlock Compliance

Companies' FERC compliance programs should include provisions to ensure compliance with FERC's interlocking directorate requirements. As indicated by the above, the requirements are detailed. Among other provisions, such a plan could include the following:

- Steps the company will take with respect to prospective officers and directors;
- A checklist of interlocking directorate considerations among affiliated entities (particularly important for companies with multiple generation company affiliates);
- Information the company will provide to its new officers and directors as to their obligations under sections 305(b) and 305(c);
- Questions the company will ask its directors and officers annually to determine what senior executive positions they hold outside of the company (in order to keep the information updated and to ensure compliance with both Sections 305(b) and (c));
- Procedures the company's FERC compliance officer will follow in connection with directors and officers with interlocks, and with the company's procurement department (regarding electrical equipment interlocks) and its finance department (regarding bank interlocks); and
- Procedures the company will follow to submit its 20 largest customers report to FERC on a timely basis each year.

Please let us know if you have any questions regarding FERC's interlocking directorate requirements generally or with your specific compliance issues on interlocks.

^[1] *Interlocking Officers and Directors; Requirements for Applicants and Holders*, 166 FERC ¶ 61,119 (2019).