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PRATT'S

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FERC Simplifies Director/Officer Requirements

*By Mark C. Williams, J. Daniel Skees, and Heather L. Feingold**

The authors of this article discuss a new Federal Energy Regulatory Commission rulemaking that will simplify requirements applicable to persons holding “interlocking” director and/or officer positions involving more than one public utility, or a public utility and an electric equipment supplier.

The Federal Energy Regulatory Commission (“FERC”) adopted a new rulemaking that will substantially simplify requirements applicable to persons holding “interlocking” director and/or officer positions involving more than one public utility, or a public utility and an electric equipment supplier.¹

BACKGROUND

Under the Federal Power Act (“FPA”), a person may not hold a director or officer position with one public utility and simultaneously hold another “interlocking” director or officer position with (1) any other public utility; or (2) certain suppliers of electrical equipment, without first receiving FERC authorization.² Pre-incumbency applications to FERC are required for interlocks, except in cases in which only certain positions with affiliated public utilities are held, and in those cases pre-appointment affidavit filings and disclosures must be publicly submitted to FERC as “informational reports.”³ In general, even affiliated utility appointments must also be annually reported to FERC; FERC’s interlock requirements include both initial application (or informational reports) and annual disclosure filings.⁴ If an incumbent position-holder is to be appointed to a new entity within a group of affiliated public utilities, then new affidavit filings and “informational reports” will typically be required.

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¹ Interlocking Officers and Directors; Requirements for Applicants and Holders, Order No. 856, Docket No. RM18-15-000, 166 FERC ¶ 61,119 (2019) (the “Interlock Rulemaking”).

² See *gen’ly*, 16 U.S.C. § 825d, 18 C.F.R. Parts 45, 46. Certain interlocking positions involving simultaneous public utility and financial institution are also subject to regulation, but in many cases no pre-appointment approvals are required. 16 U.S.C. § 825d(b).

³ 18 C.F.R. § 45.9.

⁴ See, Form 561, 18 C.F.R. §131.31.

FERC views violations of interlock regulations as violations of the FPA by the incumbent position-holders and potentially by the appointing public utilities as well,⁵ and treats even unintended interlock violations exceptionally seriously. For example, all late interlock applications were deemed to be denied and could trigger intricate position restructuring and/or reappointment requirements.⁶ A very large number of interlock filings are made with FERC every year; during calendar year 2018, for example, nearly 1,200 interlock applications and “informational reports” and amendments, and roughly the same number of Form 561 annual reports, were filed.⁷ Within a large holding company system that includes many generating companies, marketers, and/or franchised utilities, the complexity of interlock requirements can be daunting.

INTERLOCK RULEMAKING

The Interlock Rulemaking simplifies and reduces FERC requirements in several key respects:

- An interlock-holding incumbent who has already filed an “informational report” with FERC may add positions with previously unreported public utilities that are “affiliates” of the incumbent’s existing companies without having to file new or amended pre-appointment informational reports and affidavits. This dispenses with the prior requirements under which interlocking appointments with additional public utilities after the first filed interlocks with a holding company system or among affiliated public utilities could have led to ongoing amendments to informational reports and affidavits for additional appointments, even when those additional appointments were preauthorized by the Commission’s regulations. The Commission emphasized that this relaxed paperwork treatment only applies to appointments to public utility positions involving public utilities within a single holding company system or among affiliated public utilities. This change does not authorize the appointment of a public utility director or officer to positions with unaffiliated public utilities.⁸
- A person not already appointed to hold any interlocking position

⁵ Order Advising Public Utilities and Their Officers and Directors of Federal Power Act Section 305(B) Obligations, Docket No. PL04-10-000, 107 FERC ¶ 61, 290 (2004).

⁶ *See gen’lly, Commission Authorization to Hold Interlocking Positions*, Docket No. RM05-6, Order No. 664, 70 Fed. Reg. 55717 (September 23, 2005) FERC Stats. & Regs. ¶ 31,194; Order No. 664-A, Order Denying Rehearing And Stay, 114 FERC ¶61,142 (2006).

⁷ Based on results of search, February. 23, 2019, <https://elibrary.ferc.gov/idmws/search/fercadvsearch.asp>.

⁸ Interlock Rulemaking at Paras. 15, 17, 21, 50, and 56.

within a particular holding company system, or among already-affiliated public utilities, may be temporarily appointed to hold interlocking positions for up to 90 days, on an “acting” basis. The Commission cautioned that successive “acting” appointments would not be permitted.⁹

- Longstanding Commission policy treating all late-filed interlock applications as effectively being void will no longer be in force without exception. Instead, a late-filed interlock applicant may be permitted to explain and justify the circumstances. The Commission will expect any such late filings to demonstrate good faith and to report merely unintentional error.¹⁰
- The Commission clarified that a public utility that itself has no directors or officers need not be reported in an interlock holder’s informational report, annual Form 561 report, or other interlock-related filings (such as partnership or limited liability entities that do not have an officer slate and are member-managed). The Commission cautioned that a person who performs duties that are fundamentally similar to those of directors or officers might still be subject to interlock filings.¹¹
- The Commission also struck from its regulations a number of defined terms that did not match those set forth in the Federal Power Act and in other Commission regulations.¹²

The Interlock Rulemaking will take effect 60 days from the date of its publication in the *Federal Register*. The Interlock Rulemaking reminded interlock holders that their annual reports were due for submission by April 30.¹³

⁹ Interlock Rulemaking at Paras. 55–57.

¹⁰ Interlock Rulemaking at Para. 10.

¹¹ Interlock Rulemaking at Paras. 24–27.

¹² Interlock Rulemaking at Para. 33.

¹³ Interlock Rulemaking at Para. 50.