

168 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 45 and 46

[Docket No. RM18-15-001; Order No. 856-A]

Interlocking Officers and Directors; Requirements for Applicants and Holders

(Issued July 18, 2019)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Rehearing.

SUMMARY: In this order on rehearing, the Federal Energy Regulatory Commission grants in part and denies in part rehearing and clarification regarding certain revisions to its regulations related to interlocking officers and directors.

EFFECTIVE DATE: This rule will become effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Interlocking Officers and Directors;
Requirements for Applicants and Holders

Docket No. RM18-15-001

ORDER NO. 856-A

ORDER ON REHEARING

(Issued July 18, 2019)

I. Background

1. On February 21, 2019, the Commission issued Order No. 856.¹ Order No. 856 revised parts 45 and 46 of the Commission's regulations related to interlocking officers and directors to clarify and update the requirements for both applicants and holders. In particular, Order No. 856: (1) updated the Commission's regulations to reflect statutory changes to the circumstances in which an applicant who would otherwise require Commission authorization to hold an interlocking position need not do so; (2) revised the Commission's regulations and clarified the Commission's position on late-filed applications and informational reports; (3) revised the Commission's regulations and clarified that an interlock holder is not required to file a notice of change when merely

¹ *Interlocking Officers and Directors; Requirements for Applicants and Holders*, Order No. 856, 166 FERC ¶ 61,119 (2019).

changing positions within a holding company; (4) revised the Commission's regulations and stated that applicants do not need to list in their applications public utilities that do not have officers or directors; (5) revised the Commission's regulations with regard to public utilities owned by a natural person; (6) created an exemption from the filing requirements for interlocking positions of 90 days or less; and (7) removed § 46.2(b) of the Commission's regulations, which contained definitions and phrases now rendered obsolete.

2. On March 25, 2019, El Paso Electric Company (El Paso) filed a request for rehearing of Order No. 856, seeking clarification or rehearing of two revisions made by the final rule. We address these issues below.

II. Discussion

A. Sufficiency of Form No. 561 for Reporting Changes in Position

1. Final Rule

3. In Order No. 856, the Commission amended §§ 45.4 and 45.5 of the Commission's regulations to state that supplemental applications and notices of change need not be filed in the case of a person already authorized to hold interlocks identified in § 45.9(a) who may assume new or different positions that are still among those identified by § 45.9(a). The Commission stated that such changes in positions among related public

utilities are already reported in the annual Form No. 561s,² and separate filings under §§ 45.4 or 45.5 are unnecessary.

2. Request for Rehearing

4. El Paso seeks clarification that supplemental applications and notices of change need not be filed in the case of a person already authorized to hold interlocks with respect to all interlocks authorized under part 45 generally, and is not limited solely to interlocks identified in § 45.9. El Paso states that, when an officer or director holds a new or different interlocking position within any interlock authorized under Part 45, it is reported in Form No. 561. El Paso asserts that “the Commission’s rationale for its clarification in Order No. 856 that Form No. 561 reporting is sufficient, and that supplemental applications and changes in notice need not be filed if/when an officer or director assumes a new or different position within the same interlocking companies, applies equally to any interlock authorized under [p]art 45, and not merely to an interlock identified in [§] 45.9.”³

5. El Paso states that, in the alternative, it seeks rehearing of Order No. 856 and requests that the Commission grant equal treatment to all interlocks authorized under part 45, on the basis that it is sufficient for changes in position for all authorized

² 18 CFR 131.31 (Annual Report of Interlocking Positions). The Form No. 561 is an annual report of information detailing electric public utility officer and board of director positions that officers and directors held within and outside their affiliated public utility at any point during the preceding year.

³ El Paso Request for Rehearing at 4.

(continued ...)

interlocks to be reported annually in Form No. 561, without the need for the filing of a supplemental application under § 45.4 or a notice of change under § 45.5.⁴

3. Commission Determination

6. We deny El Paso's request for clarification or rehearing. The Commission's rationale for the change adopted in Order No. 856 that supplemental applications and notices of change need not be filed in the case of a person already authorized to hold interlocks identified in § 45.9(a) stated that "such changes in positions among *related public utilities* are already reported in the annual Form No. 561s, and separate filings under § 45.4 or § 45.5 are unnecessary."⁵ However, that rationale does not apply equally to "any interlock authorized under [p]art 45."⁶ The Commission has recognized a difference between holding interlocks among two or more commonly-owned or -controlled public utilities, and holding an interlock between, for example, a public utility and an electrical equipment supplier. Interlocks that fall under § 45.2 and are not between two or more commonly-owned or -controlled public utilities (and therefore are outside the scope of § 45.9(a)) are reviewed by the Commission so that the Commission can be sure that the "evils to be eliminated by the enactment of section 305(b)"⁷ are not

⁴ *Id.* (internal citations omitted).

⁵ Order No. 856, 166 FERC ¶ 61,119 at P 12 (emphasis added).

⁶ El Paso Request for Rehearing at 4.

⁷ *James S. Pignatelli*, 111 FERC ¶ 61,496, at P 12 (2005) (quoting *John Edward Aldred*, 2 FPC 247, 261 (1940)). The "evils to be eliminated by the enactment of section 305(b)," include: "[...] (3) the lack of arm's-length dealings between public utilities and (continued ...)

present. By contrast, for interlocks that fall under § 45.9(a)'s automatic authorization, the Commission has found that the evils to be eliminated by the enactment of Federal Power Act (FPA) section 305(b) are not present because the potential for abuse would be unlikely to result from such interlocks.⁸ Therefore, we will continue to require an officer or director who seeks a new or different interlocking position, or leaves a position, with entities covered by § 45.2 and not subject to the automatic authorization of § 45.9(a) to file supplemental applications and notices of change so that the Commission may review the new or different position to ensure that there continues to be no potential for abuse.

B. Past Grants of Authorization for Interlocks that No Longer Require Commission Authorization

1. Final Rule

7. In Order No. 856, the Commission explained that § 45.2 of the Commission's regulations describes the types of interlocking positions that require Commission authorization, including those between a public utility and entities authorized by law to

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." *Id.*; accord *Hatch v. FERC*, 654 F.2d 825, 831-32 (D.C. Cir. 1981).

⁸ See *Automatic Authorization for Holding Certain Positions that Require Commission Approval Under Section 305(b) of the Federal Power Act*, Order No. 446, 34 FERC 61,168 at 30,129-30,131 (1986).

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underwrite or participate in the marketing of public utility securities.⁹ However, in 1999, Congress amended FPA section 305(b)(2) to provide that an applicant for certain interlocking positions is no longer required to obtain Commission authorization to hold such positions.¹⁰ In Order No. 856, consistent with the revision of the underlying statute, the Commission revised § 45.2 of its regulations to add that an applicant for an interlocking position between 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”¹¹ does not need Commission authorization when certain circumstances are present; that is, when:

- (1) the person does not participate in any deliberations or decisions of the public utility regarding the selection of the bank, trust company, banking association, or firm to underwrite or participate in the marketing of securities of the public utility, if the person serves as an officer or director of a bank, trust company, banking association, or firm that is under consideration in the deliberation process;
- (2) the bank, trust company, banking association, or firm of which the person is an officer or director does not engage in the underwriting of, or participate in the

⁹ 18 CFR 45.2(b)(2).

¹⁰ *See* Pub. L. No. 106-102, sec. 737, 113 Stat. 1338, 1479 (1999) (known as the Gramm-Leach-Bliley Act).

¹¹ 18 CFR 45.2(b)(2).

marketing of, securities of the public utility of which the person holds the position of officer or director;

(3) the public utility for which he/she serves or proposes to serve as an officer or director selects underwriters by competitive procedures; or

(4) the issuance of securities of the public utility for which the person serves or proposes to serve as an officer or director has been approved by all Federal and State regulatory agencies having jurisdiction over the issuance.¹²

2. Request for Rehearing

8. El Paso states that a member of its board of directors sought and received Commission approval for an interlock that was subsequently removed from the Commission's FPA jurisdiction as a result of the Gramm-Leach-Bliley Act. El Paso states that "[t]he presence of this, and other, past grants of case-specific authorizations for interlocks no longer within the Commission's Federal Power Act jurisdiction creates the potential for confusion and uncertainty regarding whether those past applicants are expected to adhere to the requirements of [p]art 45 of the Commission's regulations governing Commission-approved interlocks." El Paso therefore seeks the Commission's grant of clarification in this regard, or, in the alternative, rehearing of Order No. 856.¹³

¹² Order No. 856, 166 FERC ¶ 61,119 at P 6; *see also* 16 U.S.C. 825d(b)(2).

¹³ El Paso Request for Rehearing at 4-5.

3. Commission Determination

9. We grant El Paso's request for clarification and clarify that if, as a result of the change in FPA section 305(b)(2) in 1999 and the corresponding changes to § 45.2 of the Commission's regulations made by Order No. 856, an individual no longer holds an interlock that requires Commission authorization, that individual no longer needs to adhere to the requirements of parts 45 and 46 of the Commission's regulations governing Commission approval of such interlocks. We direct those individuals holding interlocking positions that no longer require Commission authorization to make a notice of change filing under § 45.5 of the Commission's regulations, within 45 days of the effective date of this order, informing the Commission that they no longer hold such interlocks.

III. Document Availability

10. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington DC 20426.

11. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this

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By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.