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FERC Final Rule Narrows and Clarifies Filing Requirements for Applicants and Holders of Interlocking Positions

The Federal Energy Regulatory Commission (FERC or the Commission) final rule amending its regulations related to the FERC filing and notice requirements for officers and directors to hold interlocking positions (Order 856) has been published in the *Federal Register* and will become effective on May 3, 2019.

Order 856, which largely adopted the amendments and updates initially proposed in the Commission's July 19, 2018, Notice of Proposed Rulemaking (NOPR), makes the following changes to parts 45 and 46 of the Commission's regulations, as described further in this Alert:[1]

1. Updates the regulations to reflect statutory changes that narrow the circumstances under which a person must get advanced Commission authorization before holding an interlocking position;
2. Changes and explains the FERC's position on late-filed applications and informal reports;
3. Confirms that an approved interlock holder is not required to file a notice of change with the FERC when changing positions within the utility holding company system;
4. Removes any requirement that applicants list in their applications public utilities that do not have officers or directors;
5. Broadens the scope of automatic authorizations to include public utilities that are owned by natural persons;
6. Narrows the requirement for preauthorization to hold interlocking positions between a utility and a company supplying electrical equipment only when the supplier supplies electrical equipment to the utility involved; and
7. Approves the inclusion of a temporary appointment for 90 days or less without requiring advanced Commission approval or reporting.

Changes to Application Process

Authorization

Section 45.2 of the Commission regulations now reflects Section 305(b)(2) of the Federal Power Act, which limits when interlocking positions must first be authorized by the Commission.

An applicant for an interlocking position ***does not*** need to get Commission authorization when he or she is applying to be on the board of a public utility while also serving on the board or as an officer of 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 services, provided:

1. The individual 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 public utility services, if the individual 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 marketing of, securities of the public utility of which the individual holds the position;
3. The public utility for which the individual 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.

FERC Treatment of Late-Filed Applications

Order 856 revises Sections 45.3(a) and 45.9(b), which previously provided for the automatic rejection of applications and other informal filings that were submitted late to the FERC. Section 305 of the Federal Power Act requires that applications must be filed and granted before an applicant is authorized to hold any interlocking position. In Order 856, the Commission concludes that when the reasons for untimeliness are good faith errors and oversights, it does not serve the public interest to deny the applications of otherwise well-qualified applicants. Under the final rule, the Commission will consider late-filed applications for interlocking positions on a case-by-case basis.

Content of Applications

Recognizing the growing complexities of certain corporate entity structures and the possibility that a company may not have identified officers and directors, Order 856 revises Section 45.8(c)(1) of the Commission's regulations to provide that applications to hold interlocking positions under part 45 need not list those public utilities that do not have officers or directors.

Public Utility Ownership

The Commission regulations allow automatic authorization if an officer or director of a public utility holds an interlocking position of one or more other public utilities if the same holding company owns the requisite percentage of each utility's stock. Recognizing the increasing number of public utilities being owned by natural persons, the Commission revised Section 45.9(a)(1) to account for this circumstance.[2]

Changes to When Filings Are Required

No Supplemental Authorization Required for Changes Within a Public Utility Holding Company System

Once a director or officer has received authority to hold an interlocking position within a public utility holding company system, the Commission decided not to require supplemental applications and notices of change if that director or officer has a new position or positions within the same holding company system. Instead, the Commission expects that information to be included in annual Form No. 561, which would identify when an officer or director resigns from only one position out of several interlocking positions for which they received authorization, and when an officer or director has a new or different interlocking position within the same holding company system that was previously authorized under Section 45.9.

Authorization Required Only When Electrical Supply Company Supplies to Interlocking Utility

The Commission amended Section 45.1(a)(3) to make clear that authorization to hold interlocking positions between a utility and a company supplying electrical equipment is necessary only when the supplier supplies electrical equipment to the utility involved.

Exemption for Persons Holding a Temporary Interlocking Position

The Commission added a new subsection (c) to Section 45.1 as well as additional language to Section 45.9(b) that exempts a person holding a temporary interlocking position, for 90 days or less, from the requirement to submit an informational report.

Deadlines for Filings

Notice of changes to interlocking positions are required after those changes occur. Order 856 increases the time for filing such notices from 30 to 60 days in order to allow time for more accurate filings.

Conclusion

Officers and directors of public utilities need to pay close attention to whether the positions they hold (or intend to hold) require advanced FERC approval or notice filings. The new regulations announced in Order 856 narrow those circumstances where filings are required, potentially reduce the amount of information required to be included in the filings, and relax timing requirements. The new exemption to hold temporary interlocking positions is an important change reflecting current market activity and should give public utilities more flexibility in determining permanent staffing arrangements.

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[1] In addition to the seven issues described here, Order 856 removes from the regulations Section 46.2(b), which became obsolete in 2005 when Congress repealed the Public Utility Holding Company Act of 1935.

[2] The revised Section 45.9(a)(1) states, "Officer or director of one or more other public utilities if the same holding company ***or person*** owns, directly or indirectly, that percentage of each utility's stock (of whatever class or classes) which is required by each utility's by-laws to elect directors. ..."

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