UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Commission Information Collection Activities (FERC-520, FERC-561, FERC-566)	)))))	**Docket No. IC14-9-000**

COMMENTS OF THE NRG COMPANIES ON INTERLOCKING DIRECTORATE POSITIONS AND 20 LARGEST PURCHASER REPORTS

The NRG Companies respectfully submit the following comments to the Federal Energy Regulatory Commission ("FERC" or "Commission") in response to the request for comments on the currently approved information collections FERC-520 (Application for Authority to Hold Interlocking Directorate Positions), FERC-561 (Annual Report of Interlocking Positions), and FERC-566 (Annual Report of a Utility's 20 Largest Purchasers). These reporting practices are a relic of a different era, no longer serve a useful purpose and place an unnecessary burden on public utilities. The NRG Companies ask the Commission to eliminate the burdens placed on public utilities by these requirements consistent with the recommendations of the Electric Power Supply Association filed on this same date in this docket.

I. Introduction.

Generators are faced with a multitude of Commission reporting obligations and compliance requirements and NRG dutifully complies with all such requirements. However, it appears more and more that our time is spent fulfilling requirements that, frankly, may not serve much of a purpose and rather are a remnant of a different era or an interpretation of the Federal Power Act ("FPA") that could and should be revised. The three forms under consideration in this docket are particularly ripe for reform.

First, the Commission should review its approach to ensuring compliance with the Federal Power Act's interlocking directorate requirements, and in particular, FERC Form Nos. 520 and 561. As the Commission is aware, the interlock requirements arose out of the integrated utility days where FERC public utilities had captive customers that were made to bear increased costs where common officers and directors entered into "sweetheart deals" with non-affiliated companies, which were nevertheless under common control. The Commission's focus has rightfully shifted over the years. In an era of independent generation companies, the rationale behind the Commission's filing requirements requiring case-specific prior approval before one individual assumes multiple officer or director roles within the subsidiaries of a single parent company appears to have faded. Yet the Commission's regulations have not adapted with the changing times. And with over 800 legal entities and over 100 public utilities, NRG personnel spend a tremendous amount of time complying with the interlock rules – far more than the 15 minutes per respondent estimated by the Commission.[1] NRG strongly recommends that the Commission consider adopting a blanket authorization for an officer or director to hold multiple interlocking positions: (i) within a single holding company system and (ii) where that holding company system has no captive ratepayers. Additionally, NRG recommends that the Commission further reduce the paperwork burden by simplifying the annual reporting form.

Second, the obligation on exempt wholesale generators ("EWGs") to file a FERC Form 566 is an entirely "check the box" exercise. As the Commission is aware, EWGs are specifically prohibited from making retail sales. Yet to satisfy the FERC Form 566 requirement, each year each EWG dutifully states that it makes no retail sales, as it engages exclusively in sales of

[1] The Notice estimates 15 minutes for preparation of the FERC Form 561 and additional time for the initial applications. *See* Notice at 6-7.

electric energy for resale and did not have sales of electric energy to purchasers, other than those purchasing for resale, during the prior three years. It serves little purpose other than fulfilling a regulatory requirement to make such statements each year. Our recommendation is that the Commission allow EWG entities to make a standing representation that they make no retail sales, and that the EWG will affirmatively notify the Commission when, and if, that representation changes. This would eliminate the filing of several thousands of pieces of paper with the Commission on an annual basis – an outcome that everyone should favor.

II. Interlocking Directorate Requirements.

A. The Interlocking Directorate Requirements Arose Out of a Different Era.

The statutory provisions underlying the interlocking directorate requirements were established in the Public Utility Holdings Companies Act of 1935. Section 305(b) of the Federal Power Act ("FPA") prohibits individuals from concurrently holding positions as an officer or director of a public utility and of an entity authorized by law to underwrite or participate in the marketing of public utility securities; or to hold the positions of officer or director of a public utility and a company supplying electrical equipment to that particular public utility, unless the holding of such positions has been authorized by the Commission upon a showing that neither public nor private interests will be adversely affected thereby. In discussing the legislative history underlying the interlocking directorate statutory provisions, the Commission has recognized that "during the passage of the Public Utilities Holding Company Act in 1935, Congress exhibited a relentless interest in, bordering on an obsession with, the evils of concentration of economic power in the hands of a few individuals. It recognized that the conflicts of interest stemming from the presence of the same few persons on boards of

companies with intersecting interests generated subtle and difficult-to-prove failures in the arm's-length bargaining process."[2]

The 1935 Congress did not envision a time where independent power producers would own multiple public utilities and compete in the market. Some public utilities own single power plants and others are power marketers. These entities lack the captive customers which the 1935 Congress were trying to protect. The concerns of the 1935 Congress about the "evils of concentration of economic power in the hands of a few individuals" simply do not apply to the officers of affiliated public utilities. The Commission fully vets this "power" in Federal Power Act Section 203 applications for the transfer of jurisdictional facilities and through FPA Section 205 market-based rate proceedings. Once accepted, the entities have Commission approval to buy or sell a jurisdictional asset and to sell at market-based rates. Since the upstream holding company owns all of these entities and they are without captive customers, the concerns from 1935 are clearly attenuated – if they are present at all.

NRG is no way suggests that the Commission can or should ignore its statutory mandate. Until Congress speaks again, sections 305(b) and (c) of the FPA are as much part of the Commission's organic statutes as any other section. However, we do submit that the Commission can and should consider alternative means of compliance with the statute that better reflect the changing realities of today's energy markets.

B. Burden of the Current Interlocking Directorate Requirements

While the Notice of Information estimates the annual burden of completing applications for interlocking directorate positions and for fulfilling the annual filing requirement, the Notice

[2] *Hatch v. FERC*, 654 F.2d 825, 831 (D.C. Cir. 1981) (citing e.g., 79 Cong. Rec. 10379 (1935) (remarks of Representative Lea), 79 Cong. Rec. 8524 (1935) (remarks of Sen. Norris)).

provides no estimate of the time it takes to ensure entities are not running afoul of the Commission's interlock rules. With over 100 public utilities and close to 850 legal entities, NRG spends a considerable amount of time ensuring that its employees are holding positions consistent with the Commission's rules. Each time the officer slate of an entity changes, the regulatory team must review the proposed change to determine whether the entity is a public utility and if the proposed officer has interlock authority or if the entity is another potential interlock entity, such as an equipment supply company. When new entities are formed, the same review must be undertaken. It also takes a considerable amount of time when NRG acquires a number of public utilities at once to ensure that all of the proposed officer slates are checked against the interlock status of both NRG employees and employees of the newly acquired company. The regulatory team has a system in place to be informed of all NRG departures so we can timely terminate any interlocks. While any one of these activities may not take a good amount of time, the sheer quantity adds up. It is not just the time of the regulatory team that is spent on complying with interlock rules, but the requirements impact multiple employees throughout the company: the subsidiary management team must wait for approval and employees within the company making changes to officer slates must work with regulatory to develop an approved slate. NRG recognizes that these are good problems to have – and are the sign of a successful, growing company. However, as one of the larger owners of generation in the country, our size also gives us a growing appreciation for the inefficiencies in the Commission's current requirements.

Furthermore, NRG spends time maintaining interlock and equipment supply officer lists and preparing informational reports, the annual reports for close to 40 employees – with some of them reporting officer positions for over 50 public utilities – and termination filings. This time

does not even factor in the time spent working with our Joint Venture partners to ensure the officers of our JVs meet the interlock requirements where the officer slate process does not go through the NRG subsidiary management process. In addition to all of the steps not accounted for in the Notice's time estimates, the Commission underestimates the amount of time spent on the FERC Form 561 filings. Rather than the 15 minutes estimated by the Notice,[3] we spend, on average, at least double that time for the annual filings. All in all, NRG spends a considerable amount of time on fulfilling the Commission's interlocking directorate requirements.

C. The Commission Should Act to Minimize the Interlocking Directorate Burden.

1. Form 520

NRG suggests that the Commission can take several steps that would help minimize the burden associated with Forms 520 and 561. As just one example of potential reforms, the Commission should issue blanket authorization for individuals holding officer positions in affiliated entities – whether public utilities, equipment supply companies or fuel supply companies – to hold positions in such entities without prior-notice filing requirements. In fact, the Commission could completely eliminate the paperwork burden by pre-authorizing individuals to hold interlocking positions in affiliated companies without captive ratepayers. Such approach would be consistent with directives in the Government Paperwork Elimination Act to reduce the information collection burden.[4] The Commission has already issued a highly successful blanket authorization in the context of section 203 filings, where a number of acquisitions that are consistent with the public interest to proceed without prior Commission

[3] Notice at 7.

[4] 44 U.S.C. 3504(a)(1).

authorization.[5] To the extent any officer seeks to hold a position in a non-affiliated entity, such position should require interlock authorization just as it does today.

Such a regime would allow the Commission to rigorously police for the conduct that concerned Congress in 1935 (that companies under common control were entering into above-market contracts and passing through those costs to retail customers), meet the plain language requirements of the statute, *and* reduce the paperwork burden on regulated entities.

2. Form 561

Additionally, the Commission should re-think the annual filing requirement for officers and directors receiving blanket authorization to hold positions in affiliated entities. Specifically, the Commission should consider an annual report where covered individuals are permitted to check a box indicating that they are the officer of affiliated entities – whether they be public utilities, equipment supply, fuel supply or none of the aforementioned categories. Such practice would considerably diminish the burden imposed on public utilities today.

D. The Commission Can Continue to Meet its Statutory Mandate While Also Reducing Burden.

These requirements – granting pre-authorization to individuals seeking to hold interlocking positions in public utilities within a single holding company system and then simplifying the annual submission – meet the statutory requirement. Section 305(c)(1) of the FPA states that an individual holding an interlocking directorate file on or before April 30 of each year, a "written statement concerning such positions held by such person" on an annual basis, but such statement need only be "***in such form and manner as the Commission shall by***

[5] *Blanket Authorization Under FPA Section 203*, Order No. 708, 122 FERC ¶ 61,156 (2008).

rule prescribe . . . ."[6] This proceeding provides a timely and much needed avenue to diminish the burden interlock requirements impose on affiliated public utilities and such action is well within the Commission's statutory authority.

III. 20 Largest Purchaser Report.

The 20 Largest Purchaser Report – FERC Form 566 – is another requirement that arose out of a different era. Section 305(c) of the FPA requirements states that each year each public utility file a list of "the 20 purchasers which purchased (for purposes other than for resale) one of the largest amounts of electric energy sold by such public utility" during the prior three calendar years.[7] The Commission has interpreted this statute to require all public utilities, including EWGs, to file a Form 566 each year listing their 20 largest retail customers. By definition, EWG's do not have retail customers. As a result, the Commission should eliminate the requirement for EWGs to file Form 566s by exempting them from the filing requirement. Such action is consistent with the Commission's statutory requirement under which the Commission has the discretion to make such change and the change would still meet the intent of the 1935 Congress. As the Commission recognized, the legislative intent behind the 20 Largest Purchaser Report was to eliminate any potential conflicts of interest.[8] As noted above, since EWGs are not permitted to have retail customers there is no conflict of interest and in exempting EWGs from the filing requirement, the Commission is acting consistent with the legislative intent underlying the statutory provision.

---

[6] 16 U.S.C. § 825d.

[7] 16 U.S.C. § 825d(c)(D) (2013).

[8] 111 FERC ¶ 61,278 (2005).

NRG recommends that the Commission allow EWGs to make a standing representation that they make no retail sales, and thus have no retail customers. Such a form would be deemed by the Commission as a standing representation by the public utility, which would allow it to continue meeting its statutory mandate in a manner that results in a minimal burden on the regulated industry.

Additionally, NRG also recommends that the Commission amend the requirements of Form 566 to avoid requiring public utilities that do make retail sales from having to report the names and addresses of small retail customers. Over the past few years, NRG has experienced several cases where new public utilities have been required to report the names and addresses of small residential customers on Form 566. In such cases, the "largest" twenty customers can be very small indeed. NRG simply recommends that for residential accounts, the Commission amend its rules to allow public utilities to identify individual customers as "Generic Residential Customer" and provide a zip code in lieu of an address. This is a common-sense reform that will reasonably protect individuals' privacy and avoid the uncomfortable situation where an electricity provider is required to contact individual retail customers and tell them that their names and addresses are being submitted to a government entity with which they are likely unfamiliar.

IV. Conclusion.

Wherefore, the NRG Companies respectfully request that the Commission (i) eliminate the FERC-520 filing requirement for officers holding positions in affiliated entities, (ii) revise the FERC-561 annual reporting requirement to allow officers of affiliated entities to check a box on an annual form stating such without listing the entities and (iii) exempt EWGs from the FERC-566 reporting requirement.

Respectfully submitted,

/s/
Cortney Madea
Senior Counsel – Regulatory
NRG Energy, Inc.
211 Carnegie Center
Princeton, NJ 08540
Telephone: (609) 524-5422
cortney.madea@nrgenergy.com

/s/
Abraham H. Silverman
Assistant General Counsel – Regulatory
NRG Energy, Inc.
211 Carnegie Center
Princeton, NJ 08540
Telephone: (609) 524-4696
abe.silverman@nrgenergy.com

Attorneys for the NRG Companies

Dated May 5, 2014

Certificate Of Service

I hereby certify that I have served a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Princeton, New Jersey this 5th day of May 2014.

/s/ *Kathryn Wig*
Kathryn Wig