

**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 WHITE & CASE LLP

Pursuant to the Notice of Information Collection and Request for Comments issued by the Commission in this proceeding on February 26, 2014 (the Notice), the undersigned attorneys of White & Case LLP offer the following comments with respect to FERC-520, FERC-561, and FERC-566 (collectively, the Interlock Filings), based in their own independent knowledge and views.

The Commission issued the Notice in compliance with the Paperwork Reduction Act of 1995 (PRA)¹ and invited comments on four aspects of the Interlock Filings, as required by the PRA. As discussed herein, several opportunities exist to streamline the requirements related to the Interlock Filings in order to reduce the compliance burden and augment the Interlock Filings' practical utility within the parameters of section 305 of the Federal Power Act. The proposed revisions to the Interlock Filings requirements comport with the requirements of the PRA that the Commission "reduce information collection burdens on the public" and enhance the "efficiency and effectiveness" of the information collected via the Interlock Filings.² Therefore, the undersigned urge the Commission to adopt the changes discussed below, or at a minimum issue a

¹ 44 U.S.C. §§ 3501-3521 (2010).

² *See also* Executive Order No. 13610 (EO 13610) (issued to all agency heads in 2012, to "conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances."); Executive Order No. 13563 (requiring agencies to routinely review regulatory obligations to "make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.").

notice of proposed rulemaking to seek further industry input regarding the proposed changes to the Interlock Filing requirements.

I. Communications

All communications regarding this submission should be made to:

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II. Background

The Interlock Filings are required pursuant to the Commission's authority under FPA §§ 305(b) and (c). FPA § 305(b) prohibits the officer or director of a public utility from contemporaneously holding the position of officer or director of (1) another public utility, (2) a "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" (with significant exceptions enacted in 1999)³ or (3) "any company supplying electrical equipment to such public utility" absent authorization "by order of the Commission."⁴ Commission approval to hold these positions is contingent upon a successful showing "in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected."⁵ FERC-520 is the vehicle adopted to implement this provision.

³ Gramm-Leach-Bliley Act, Pub.L. 106-102, 113 Stat. 1338 (1999), also known as the Financial Services Modernization Act.

⁴ 16 U.S.C. § 825d(b) (2006).

⁵ *Id.*

FERC-561 is rooted in FPA § 305(c), which requires a person who was an officer or director of one or more public utilities or a public utility and certain other covered entities to file a report on or before April 30 of each year “in such form and manner as the Commission shall by rule prescribe... concerning such positions.”⁶ FERC-566 is similarly based in FPA § 305(c) and requires each public utility to publish on or before January 31 of each year a list of its purchasers “which during any one of the 3 calendar years immediately preceding the filing date was one of the 20 purchasers of electric energy which purchased (for purposes other than for resale) one of the 20 largest annual amounts of electric energy sold by such public utility (or by any public utility which is part of the same holding company system).”⁷

In the Notice, the Commission requested comments on, among other things, “whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility,” “ways to enhance the quality, utility and clarity of the information collection” and “ways to minimize the burden of the collection of information on those who are to respond.”⁸

III. Comments

Below are several specific recommendations for improving the “practical utility”⁹ of the Interlock Filings and reducing the regulatory burden of compliance on respondents. The

⁶ 16 U.S.C. § 825d(c)(2)(D).

⁷ 16 U.S.C. § 825d(c)(2).

⁸ Notice at 7.

⁹ “Practical utility” as used herein has the meaning set forth in OMB regulations, specifically “the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects (or a person's ability to receive and process that which is disclosed, in the case of a third-party or public disclosure) in a useful and timely fashion. In determining whether information will have ‘practical utility,’ OMB will take into account whether the agency demonstrates actual timely use for the information either to carry out its functions or make it available to third-parties or the public, either directly or by means of a third-party or public posting, notification, labeling, or similar disclosure requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction. In the case of recordkeeping requirements or

undersigned request that the Commission implement the proposed improvements or, at a minimum, issue a notice of proposed rulemaking to elicit further industry comment. The Commission must operate in accordance with its legislative mandates, which includes implementing FPA §§ 305(b) and (c). In crafting FPA §§ 305(b) and (c), however, Congress granted the Commission significant discretion to formulate the rules, form and manner of compliance. As explained herein, several aspects of the Interlock Filings extend beyond the demands of FPA § 305 and are not “necessary for the proper performance” of the Commission’s functions. Moreover, the information currently required with respect to certain of the Interlock Filings lacks any practical utility as required by the PRA. Implementing the recommendations below will reduce these unnecessary burdens on respondents while continuing to provide the Commission with information of practical utility, thus complying with the federal requirement that agencies seek to “[e]liminat[e] unjustified regulatory requirements, including unjustified reporting and paperwork burdens.”¹⁰

a) An updated FERC-561 should only be required after a year in which the respondent changed reportable positions.

The Commission should revise its regulations to only require the re-filing of an updated FERC-561 after a year in which the individual changed reportable positions from those previously reported in a prior FERC-561. Part 46 of the Commission’s regulations currently requires covered individuals to list all reportable positions held in the prior year. Individuals must file FERC-561 every year regardless of whether there have been any changes in their previously-reported positions. There is no practical utility to a series of identical annual filings

general purpose statistics, ‘practical utility’ means that actual uses can be demonstrated.” 5 C.F.R. 1320.3(l) (2014) (internal citations omitted).

¹⁰ Cass Sunstein, Administrator, OIRA, *Memorandum for the Heads of Executive Departments and Agencies*, (June 22, 2012) <http://www.whitehouse.gov/sites/default/files/omb/inforeg/memos/reducing-reporting-and-paperwork-burdens.pdf> (OMB Memorandum).

reflecting no new or different information; in fact, annual submissions of FERC-561 reduce practical utility because it is extremely difficult to monitor when a change in reportable positions occurs for a particular individual. FPA § 305(c) requires that on or before April 30 of each year, covered individuals “file with the Commission, *in such form and manner as the Commission shall by rule prescribe*, a written statement”¹¹ concerning the covered positions held in the prior year; the statute does not require covered individuals to re-file FERC-561, unchanged, year after year. In light of the substantial discretion granted the Commission in the “form and manner” by which to require individuals to meet the statutory requirement, the Commission should revise its regulations to require the filing of FERC-561 only after a year in which the individual changed positions from those reported in the most recent prior FERC-561. FERC-561 can be amended to state that the individual certifies the FERC-561 to be true and correct until such time as a revised FERC-561 is subsequently filed. In this way, the initial FERC-561 filed after the first year a reportable interlock is held would constitute the “written statement” filed “before April 30 of each year” that follows, until a change to the reportable positions occurs. Adopting this revision to the Interlock Filing requirements would significantly reduce the annual burden on limited corporate resources that is currently caused by filing FERC-561 on behalf of all the covered individuals in a corporate family. In addition, this change would improve the practical utility of FERC-561 because it would be immediately clear, from the fact that a FERC-561 was filed in a particular year, when an individual has changed reportable positions.

b) The Commission should eliminate the requirement to file Notices of Changes.

Another revision that would reduce the burden of the Interlock Filings without interfering with the Commission’s obligations under FPA § 305(b) is to eliminate the requirement in section 45.5 of the Commission’s regulations to file “Notices of Changes” when an officer or director

¹¹ 16 USC § 825d(c)(1) (2010) (emphasis added).

ceases to hold “any of the positions for which authorization has been granted,” or in the event of other substantial or material changes to such positions. The language in FPA § 305(b) is limited to the authorization of covered positions; it does not require notice of changes in such positions. If the recommendation in Section III(a) above is adopted, FERC-561 will serve as the vehicle for FERC to monitor changes in an individual’s reportable positions over time, including where the individual ceases to hold a position altogether. Moreover, if an individual “ceases to hold a position theretofore authorized” by the Commission, then such authorization automatically terminates pursuant to Section 45.6 of the Commission’s regulations. There is little practical utility for the Commission to collect notices of an individual’s departure from a position that the Commission has already found does not “adversely affect” any “public nor private interests.”¹² Therefore, the Commission should eliminate the requirement to file Notices of Changes in Section 45.5 of the Commission’s regulations.¹³

c) The Commission should require public utilities to file the FERC-566 only when there are reportable sales.

The Commission should eliminate the FERC-566 “nothing to report” filing that the Commission demands from public utilities that do not make any reportable sales under FERC-566. The Notice justifies the FERC-566 first by citing to the relevant provision of the FPA, and then by stating that “[t]he public disclosure of this information provides officers and directors with the information necessary to determine whether any of the entities with whom they are related are any of the largest 20 purchasers of the public utility with which they are affiliated.”¹⁴ However, FPA § 305(c) only requires public utilities to publish a list of purchasers; it does not

¹² 16 U.S.C. § 825d(b).

¹³ If the Commission does not eliminate this requirement all together, it should eliminate the requirement that the filing be signed by the applicant since, as discussed below in Section III(e), it is often a corporation that prepares and makes the requisite submissions on the individual’s behalf. Moreover, the circumstances leading to the need to make a filing are often unforeseen, and former employees may be unreachable or uncooperative.

¹⁴ Notice at 5.

require a report of the absence of purchasers. Consequently, the “nothing to report” FERC-566 report imposes an unjustified burden on public utilities with no practical utility and should be eliminated.

- d) The Commission should adopt a blanket authorization, without an informational report, for individuals to hold officer/director positions with public utilities within the same corporate family where there are no franchised public utilities with captive customers.**

The Commission should not require an informational report under Part 45 of the Commission’s regulations for an automatic authorization to hold officer and/or director positions with more than one public utility in a corporate family where the corporate family does not include any franchised public utility with captive customers. FPA § 305(b) simply states that the holding of interlocking positions governed by that section “shall have been authorized by the Commission, upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby.” Consistent with this law, the Commission has already established “automatic authorization” of interlocking positions in a public utility and “one or more other public utilities” if “the same holding company 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.”¹⁵ In doing so, the Commission concluded that “a review of the applications processed over the years reveals that the abuses that section 305(b) was intended to preclude are never alleged to result from the holding of interlocking positions within holding company systems as they are now constituted.”¹⁶ However, the Commission continues to require the submission of an informational report pursuant to Section 45.9 of the regulations before the automatic authorization can take effect.

¹⁵ 18 C.F.R. 45.9(a)(1).

¹⁶ Order No. 446, at 30,130.

The informational report is an “unjustified reporting and paperwork burden”¹⁷ for holding company systems that do not include a franchised public utility with captive customers, and should be “eliminat[ed]”¹⁸ in compliance with the OMB Memorandum. Contrary to the Commission’s assumptions in the Notice,¹⁹ preparation of these informational filings consume considerable resources. It is not the individual officers or directors but the holding companies of the public utilities with which they are involved that in most cases prepare the informational reports. In large holding company systems, this collective burden to monitor, plan for and prepare informational filings is significant and wholly unjustified for interlocking positions that the Commission has already concluded do not result in the abuses that section 305(b) was intended to preclude. Since adoption of the automatic authorization noted above, FERC has crystalized its definition of “captive customers” and has found in other contexts that public utilities, other than franchised public utilities with captive customers, do not give rise to the types of abuse that are of concern under FPA § 205.²⁰ The Congressional concerns underlying FPA § 305(b) likewise do not arise absent involvement of a franchised public utility with captive customers. In the interest of complying with the Administration’s direction to eliminate “unjustified reporting and paperwork burden,” the Commission should eliminate the need to file an informational report for the automatic authorization in Section 45.9 of its regulations where the corporate family does not include any franchised public utility with captive customers.

¹⁷ OMB Memorandum.

¹⁸ *Id.*

¹⁹ Notice at 6.

²⁰ *Cross-Subsidization Restrictions on Affiliate Trans.*, Order No. 707 at PP 42-43, 73 Fed. Reg. 11,013 (Feb. 29, 2008), FERC Stats. & Regs. ¶31,264 (2008), *order on reh'g*, Order No. 707-A, 73 Fed. Reg. 43,072 (July 24, 2008), FERC Stats. & Regs. ¶ 31,272 (2008) (codified at 18 C.F.R. Part 35).

- e) **The estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used, are inaccurate.**

The burden and cost required to prepare the Interlock Filings is much greater than assumed in the Notice. For example, the quarter hour allocated to FERC-561 is substantially understated. The across-the-board underestimation may be attributable to the incorrect assumption that the filings are being prepared by individuals, not corporate organizations. It is often the case that a corporation prepares and makes the requisite submissions on the individual's behalf. Thus, the time required to train relevant corporate personnel, implement and maintain tracking mechanisms, develop compliance procedures, and explain the filings to the responsible individuals who must verify their accuracy takes significantly longer than the estimates in the Notice, especially the quarter of an hour allocated to the FERC-561.

IV. Conclusion

Per the requirements of the PRA and associated Administrative directives, and for the reasons discussed herein, the undersigned ask that the Commission revise the Interlock Filings requirements consistent with the proposals above or, at a minimum, issue a notice of proposed rulemaking to solicit further industry comment on the proposed revisions herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated at Washington, DC this 5th day of May, 2014.

/s/ Corey Neal

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