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 ELECTRIC POWER SUPPLY ASSOCIATION

The Electric Power Supply Association ("EPSA")[1] hereby submits comments in response to the February 26, 2014 request for comments[2] of the Federal Energy Regulatory Commission ("FERC" or "Commission") on the collection of information in three forms:

1. FERC Form No. 561, Annual Report of Interlocking Positions ("Form 561");
2. FERC Form No. 520, Application for Authority to Hold Interlocking Directorate Positions ("Form 520"); and
3. FERC Form No. 566, Annual Report of a Utility's 20 Largest Purchasers ("Form 566").

As discussed below, EPSA respectfully requests that the Commission examine the paperwork burden associated with each of these forms and determine whether

[1] EPSA is the national trade association representing leading competitive power suppliers, including generators and marketers. These suppliers, who account for nearly 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

[2] Commission Information Collection, Activities (FERC – 520, FERC-561, FERC-566); Comment Request; Extension, Docket No, IC14-9-000, February 26, 2014 ("Request for Comments").

appropriate modifications to the Commission's regulations could be undertaken that would reduce the paperwork burden on certain public utilities, while still meeting the statutory standards set forth in the Federal Power Act ("FPA").

I. BACKGROUND

In the Request for Comments, the Commission seeks industry input on: (1) 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; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

The three forms that are the subject of this proceeding are particularly ripe for Commission review:

a. Form 520 is the form of application used by any individual seeking to hold "Interlocking Directorate" positions as an officer or director of more than one unaffiliated public utility, a public utility and a bank or financial institution that underwrites or markets public utility securities, or a public utility and an electrical equipment supplier to that public utility.[3] Individuals with interlocking positions solely as a result of affiliated public utilities may be eligible for

[3] 18 C.F.R. § 45.7-8 (2013).

"automatic authorization" subject to a prior-notice requirement.[4] Otherwise, individuals holding interlocking positions are required to submit an extensive application form prior to their assuming their interlocking position.

b. Form 561 is an annual report that provides a summary of an individual's interlocking directorate positions.[5] Thus, Form 561 is a follow-on to Form 520 and requires individuals to include information that was not included in the Form 520. Form 561 is required to be filed annually on or before April 30.

c. Form 566 is an annual report in which each public utility lists its twenty largest purchasers of electric energy at retail. This form can include the home addresses of individual consumers of electricity, and to date, the Commission has declined to allow the filing of these forms confidentially or on a redacted basis.

II. COMMENTS

The three forms on which the Commission requests comments in this proceeding are excellent candidates for reform. Sections 305(b) and 305(c) of the FPA were put into place as part of the original Federal Power Act of 1935.[6] While the language of the statute has remained relatively static for nearly 80 years, the electric industry has evolved significantly.

In particular, many public utilities today do not have captive ratepayers, and in many cases, are not affiliated with an entity that has captive ratepayers. Instead, many

[4] 18 C.F.R. § 45.9 (2013).

[5] 18 C.F.R. Part 46 (2013).

[6] 16 U.S.C. § 825d(b)-(c) (2006).

public utilities today have market-based rate authority. An entity with market-based rate authority has demonstrated that it does not pose a threat of harm as a result of affiliate abuse concerns and, as such does not pose a threat to pass on rate increases driven by affiliate contracts or contracts between independent companies with a common set of officers or directors. As a result, the concerns that prompted Congress to adopt stringent requirements governing common sets of officers and directors are less present today.

EPSA does not make this point to suggest that the Commission should ignore the Congressional mandate embodied by sections 305(b) and (c). However, there are a number of very reasonable steps that the Commission could take to amend its regulations that would allow it to fulfill its statutory mandates, while also minimizing the burden on regulated entities.

A. Form 561

EPSA and its member companies are concerned that the usefulness of the information collected on Form 561 is extremely limited. Indeed, in a public utility holding company system with no captive ratepayers, the interlocking directorate reporting regime appears to serve little purpose. Unlike when the requirements were first adopted, today, there is no danger that the costs of above-market contracts between affiliated corporations with common officers or directors can be passed through to ratepayers. Indeed, in 1986, the Commission recognized that the interlocking directorate requirements are unnecessary for individuals who serve on the board of two or more affiliated public utilities, or a public utility's affiliated producer or supplier of electrical equipment or coal, natural gas, oil, nuclear fuel, or other fuel stating:

> It is not important whether [a] holding company controls its public utilities by assigning the same individuals to similar positions within each utility in its system, or by assigning different individuals to each public utility. In either case, the holding company exercises effective control over the public utilities within its system … and the abuses resulting from minority shareholder control no longer occur.[7]

As such, EPSA questions whether the Informational Filings required under Part 46 of its regulations continue to serve the public interest.

Additionally, as indicated above, Section 45.9 of the Commission's regulations was promulgated in recognition of the fact that interlocks of this sort "present no potential threat to public or private interests within the meaning of the FPA"[8] and that the then-existing requirements were "unnecessary and burdensome."[9] As adopted in 1986, Section 45.9 contained no prior filing requirement and instead allowed for the filing of informational reports within 30 days of assuming pre-authorized interlocking positions.[10] It was only 20 years later that the Commission re-interpreted the statutory language regarding "*prior* authorization" as requiring that informational reports be filed before assuming interlocking positions with affiliated public utilities.[11] EPSA respectfully submits that the Commission had it right the first time and that the 2006 rule incorrectly conflated prior authorization with prior filing.

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[7] Electric Utilities; Automated Authorization for Holding Certain Positions That Require Commission Approval Under Section 305(B) of the Federal Power Act, Order No. 446, FERC Stats. And Regs. ¶30,686 at 30,129 (1986).

[8] *See Electric Utils.; Automated Authorization for Holding Certain Positions That Require Commission Approval Under Section 305(b) of the Federal Power Act*, Order No. 446, FERC Stats. & Regs. ¶ 30,686 at 30,128 (1986) ("Order No. 446").

[9] *Id.* at 30,130.

[10] *Id.* at 30,133.

[11] *Commission Authorization to Hold Interlocking Positions*, Order No. 664, FERC Stats. & Regs. ¶ 31,194 at P 18, on reh'g, Order No. 664-A, 114 FERC ¶ 61,142 (2006).

What Section 305(b) requires is that no individual shall hold certain interlocking positions "unless the holding of such positions 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."[12] There is nothing in Section 305(d) that requires the Commission to authorize the holding of such positions "upon application" or that otherwise makes an individual's ability to hold such position contingent upon any prior filing.

To be sure, Section 305(c)(1) of the FPA contemplates that an individual holding an interlocking directorate will file on or before April 30 of each year, a "written statement concerning such positions held by such person" on an annual basis.[13] But Section 305(c)(1) makes clear that such statement need only be "in such form and manner as the Commission shall by rule prescribe . . . ."[14] The statute thus gives the Commission broad discretion to determine how much detail must be provided and to ease the administrative burden associated with filing and reviewing these statements where they do not appreciably aid the Commission in its oversight.

1. Proposed Modifications to Form 561.

The collection of information from Form 561 is often redundant for filers and unnecessary for the proper performance of the functions of the Commission. In order to alleviate the reporting burden on public utilities and their officials, and ensure the utility of information filed with the Commission, EPSA suggests that Form 561 be modified to

[12] 16 U.S.C. § 825d(b)(1) (2006).

[13] 16 U.S.C. § 825d(c)(1) (2006).

[14] 16 U.S.C. § 825d (2006).

allow individuals only holding interlocking positions pursuant to the automatic authorization under § 45.9 of the Commission's regulations to "check a box" indicating that they hold interlocking positions solely with affiliated entities.

B. Form 520

In addition, EPSA recommends that the Commission eliminate the obligation for individuals who intend to hold interlocking positions within a single holding company system with no captive customers, to provide prior notice to the Commission before the individual assumes his or her interlocking directorate responsibilities. The statutory requirements will still be met by way of Form 561. Through that annual filing, individuals holding interlocking positions within a single holding company that has no captive customers will continue to provide notice of their interlocking positions.

Importantly, the statute's commandment that "prior authorization" is required before an individual may assume an interlocking position does not in any way prohibit the Commission from authorizing such positions on a generic basis. For example, in the case of section 203 of the FPA, the Commission found that where the FPA explicitly requires that public utilities "secure[] an order of the Commission authorizing" certain transactions,"[15] it was within its mandate to "grant the blanket authorizations and not impose any type of filing requirement with respect to [a certain class of] transactions."[16] The Commission made its finding that those blanket authorizations were in the public interest because, as is true in the instant scenario, the identified categories do not raise concerns about competition or protection of customers, and there would be no benefit to

[15] 16 U.S.C. § 824b(a) (2006).

[16] *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 57 (2005) ("*Order No. 669*").

case-by-case evaluation of certain circumstances.[17] Today, because of the blanket authorizations set forth in Section 33.1(c) of the Commission's regulations,[18] many acquisitions do not require any filing, much less a prior filing, with the Commission. Certainly, the holding of interlocking positions – particularly within holding company systems with no captive customers – can be treated with at least as much flexibility as mergers and acquisitions.

C. Proposed Modification to Section 46.3 Relating to Form 566

Form 566 is another information collection burden that can and should be reformed. Section 305(c) provides that by January 31 of each year, "each public utility shall publish a list, pursuant to rules prescribed by the Commission, of the purchases to which subparagraph (D) applies,"[19] *i.e.*, 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.[20]

EPSA points out three problems with the Commission's current regulations governing Form 566. *First*, the Commission currently requires that all public utilities, including Exempt Wholesale Generators ("EWGs"), file Form 566, a list of its 20 largest ***retail*** customers during the three preceding calendar years, by January 31 of each year.[21] This requirement, however, makes little sense in the case of public utilities that are EWGs, because, by definition, such public utilities have no retail customers.

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[17] *Order No. 669* at PP 55-57.

[18] 18 C.F.R. § 33.1(c) (2013).

[19] 16 U.S.C. § 825d(c) (2006).

[20] 16 U.S.C. § 825d(c)(D) (2006).

[21] *See* 18 C.F.R. § 46.3 (2013).

Specifically, in order to be an EWG, an entity must be "***exclusively in the business*** of owning or operating, or both owning and operating, all or part of one or more eligible facilities ***and selling electric energy at wholesale***."[22] The filing of Form 566 by entities that, by definition, cannot have any retail sales is not an effective use of time and resources for the Commission as well as for those required to file the form.

In order to eliminate this unnecessary requirement, EPSA proposes that the Commission modify Section 46.3 of its regulations to provide that any public utility that was an EWG during the three prior calendar years or since it became a public utility shall be deemed by January 31 of a given year to have published a list indicating that it had no retail customers during the three preceding calendar years and need not file Form 566. As with other aspects of Section 305, the Commission possesses sufficient discretion to prescribe such a rule in order to end the requirement for EWGs to file annual reports to inform the Commission (and their directors and officers) that they did not make retail sales.

Second, EPSA member companies are concerned that entities making retail sales can be put in the position of being required to provide personally identifiable information about individual residential accounts. This happens when a public utility making retail sales sells predominantly in the mass-market residential space, or is a small company just starting out. In such cases, the "largest" twenty customers can be very small indeed.

EPSA simply recommends that for residential accounts, the Commission amend its rules to allow public utilities to identify individual customers as "Generic Residential

[22] 18 C.F.R. § 366.1 (2013) (emphasis added).

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.

Finally, EPSA requests that the Commission eliminate the requirement for public utilities submitting Form 566 to notify certain purchasers. Although not required in Section 305(c), Section 46.3(d) of the Commission's regulations requires "each public utility shall notify by January 31 of each year each purchaser which has been identified on the list of largest purchasers under paragraph (b) of this section."[23] EPSA members report that this notification is one of the most burdensome aspects of complying with Section 46.3. As a practical matter, the notification provides little or no benefit to the customers and, in fact, sometimes results in customer confusion.

Many states allow competition between retail energy providers and some retail power customers in competitive markets are served by public utilities (including traditional integrated utilities as well as power marketers who have both wholesale and retail operations), while other customers are served by competitors that operate solely at the retail level, and hence, are not public utilities and have no Form 566 reporting requirement. Customers in retail-choice states frequently change between retail providers. When a customer switches from one to another, even if both providers are public utilities, the customer may be among the largest 20 purchasers of one of the providers, but not the other. The inconsistency is compounded when a single purchaser

[23] 18 C.F.R. § 46.3 (d) (2013).

has multiple locations, that can be (and often are) served by different retail providers. In these situations, some, none, or all of a purchaser's load may be reflected in Form 566 submissions. In short, the inclusion of a retail customer in the Form 566 submitted by one or more public utilities can result in a customer's consumption being entirely or partially included in multiple Form 566 submissions or none at all each year. The confusion of retail power customers receiving notifications of submittal of Form 566 data is avoidable. Therefore, EPSA requests that the Commission eliminate the notification requirement currently found in Section 46.3(d) of the Commission's regulations.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA respectfully requests that the Commission determine that individuals who hold interlocking directorates solely within a single holding company may file an annual written statement certifying this fact rather than file Form 561. Further, EPSA requests that the Commission grant blanket authorization to individuals intending to hold public utility interlocks within a single holding company under Section 45.9 of the Commission's regulations. Lastly, EPSA requests that the Commission find EWGs are not required to file Form 566 reporting their largest retail purchasers, allow filing entities to submit generalized information on residential accounts on the Form 566, and eliminate the notification requirement under Section 46.3(d) of the Commission's regulations.

Respectfully submitted,

/s/ Nancy Bagot

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CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., May 5, 2014.

/s/ Nancy Bagot

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Nancy Bagot, VP of Regulatory Affairs