



MARCH 2019 • NO. 4

FERC Revises Interlocking Officer and Director Regulations

Order No. 856 eases somewhat the requirements for when an individual must file an application for public utility-bank interlocks, or report a notice of change for certain pre-authorized positions. However, holders of such positions may remain subject to the FERC Form No. 561 annual filing requirements. Additionally, while FERC will no longer automatically deny late-filed applications, applicants are reminded to be attentive to their obligation to file applications on a timely basis and to make every effort to ensure compliance with FPA section 305(b).

Section 305 of the Federal Power Act (“FPA”)¹ generally requires prior approval from the Federal Energy Regulatory Commission (“FERC” or “the Commission”) before an individual may serve as an officer or director of: (1) more than one public utility; (2) a public utility and certain entities authorized by law to underwrite or participate in the marketing of public utility securities; or (3) a public utility and a company that supplies electrical equipment to that public utility.

Parts 45 and 46 of the Commission’s regulations implement the provisions of Section 305.² On February 21, 2019, the Commission announced revisions to those regulations,³ which largely track those outlined in the Notice of Proposed Rulemaking (“NOPR”) issued last July.⁴ The revisions are outlined below:

- **Section 45.2**⁵ was amended to conform with changes made by Congress to FPA § 305(b)(2) in 1999. Those changes eliminated the need for FERC approval for interlocking positions between a public utility and a bank, trust company, banking association, or firm (collectively “firm”) authorized by law to underwrite or participate in the marketing of public utility securities if: (1) the individual does not participate in deliberations or decisions regarding the selection of the firm to underwrite or participate in the marketing of the public utility’s securities; (2) the firm does not engage in underwriting or participate in the marketing of securities of that public utility; (3) the public utility uses competitive procedures for selecting underwriters; or (4) the public utility’s issuance

of securities has been approved by all appropriate federal and state regulators.⁶ This revision does not affect the need for individuals to continue to report the interlocking positions in the annual Form No. 561.

- **Sections 45.3(a) and 45.9(b)**⁷ were amended to eliminate language that previously resulted in automatic denial of late-filed applications or for failure to timely file the required informational report. The Commission concluded that applications should not be denied when the late filing is solely the result of a good faith error and oversight, which is “promptly identified and expeditiously rectified.”⁸ Under the revised regulations, FERC will consider late-filed applications and untimely information reports “on a case-by-case basis.” However, the Commission cautioned that it would look unfavorably on applications “where an applicant has not been properly attentive to his/her obligation to file for the required authorization.”⁹ The Commission further cautioned that public utilities “should make every effort to ensure that their officers and directors . . . act in accordance with the statutory directives in FPA section 305(b).”¹⁰
- **Sections 45.4(c) and 45.5(b)**¹¹ were amended so that an individual in an automatically authorized interlock¹² need no longer file a notice of change when assuming a new or different position within the same companies or upon resigning or withdrawing from fewer than all interlocks held between related companies.¹³ In the event of resignation, withdrawal, or failure to be reelected or appointed for interlocks previously approved by the Commission (*i.e.*, not automatically authorized), the individual must continue to file a notice of change.¹⁴ However, the time for filing such a notice has been extended from 30 to 60 days.¹⁵ The Commission also adopted certain language requirements to more clearly express the revisions.¹⁶

The Commission also ruled on several issues not addressed in the NOPR, but which were raised by commenters.

- With respect to interlocks between a public utility and a company selling electrical equipment, Section 45.1(a)(3)¹⁷ was amended to make clear that approval is required only for an interlock between a public utility and a company supplying electrical equipment to **that** public utility and not simply to other utilities. This amendment brings the regulation in line with the statutory language.¹⁸ The Commission also declined to eliminate the reference to the Uniform System of Accounts in Section 46.2(f)’s definition of what constitutes “electrical equipment” under Section 45.1(a)(3).¹⁹
- The revised regulations also eliminate the need for prior approval or the filing of an informational report (in the case of an automatically authorized interlock) for temporary appointments not exceeding 90 days if the person has not held an interlock before.²⁰
- The Commission declined to adopt a blanket authorization for interlocks between affiliated companies that do not have captive customers.²¹
- Two commenters had requested that FERC create an online submission process or database for interlock filings. Although the Commission stated that it may consider doing so in the future, it will not do so at this time.²²
- Finally, the Commission disagreed with one commenter that it has underestimated the costs of informational filings and notices of change.²³

The revised regulations become effective on May 3, 2019.

For more information, please contact:

Mark R. Haskell
202.420.2654 | mhaskell@blankrome.com

George D. Billinson
202.420.2658 | gbillinson@blankrome.com

Lamiya Rahman
202.420.2662 | Irahman@blankrome.com

1. 16 U.S.C. § 825d(b) (2012).
2. 18 C.F.R. Parts 45, 46 (2018).
3. *Interlocking Officers and Directors; Requirements for Applicants and Holders*, Order No. 856, 166 FERC ¶ 61,119 (2019) (“Order No. 856”).
4. *Revisions to Parts 45 and 46 of the Commission’s Regulations*, Notice of Proposed Rulemaking, 164 FERC ¶ 61,032 (2018).
5. 18 C.F.R. § 45.2.
6. Order No. 856 at PP 3, 6.
7. 18 C.F.R. at §§ 45.3(a) and 45.9(b).
8. Order No. 856 at P 10.
9. *Id.* at P 11.
10. *Id.* at P 10, n.11.
11. *Id.* at §§ 45.4 and 45.5.
12. Section 45.9 provides for automatic authorization for certain interlocks in affiliated companies (although the individual must submit an informational report before assuming the interlocking position). See 18 C.F.R. § 45.9.
13. Order No. 856 at PP 19-21.
14. *Id.*
15. *Id.* at 22.
16. *Id.* at 23. The Commission also amended Sections 45.8(c)(1) to no longer require applicants to list public utilities that do not have officers or directors and 45.9 to add the word “person” in the definition of corporate relationships that are automatically authorized). The Commission deleted Section 46.2(b) because the definitions had been rendered obsolete. *Id.* at PP 26, 30, 33.
17. 18 C.F.R. § 45.1(a)(3).
18. Order No. 856 at P 35.
19. *Id.* at PP 37-38.
20. *Id.* at PP 55-57.
21. *Id.* at P 49.
22. *Id.* at P 53.
23. *Id.* at P 59.