UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Revisions to Parts 45 and 46 of the Commission's Regulations	)	Docket No. RM18-15-000

COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION

The Electric Power Supply Association ("EPSA")[1] hereby submits these comments in response to the Commission's July 19, 2018 Notice of Proposed Rulemaking ("NOPR") which proposes to revise parts 45 and 46 of its regulations related to interlocking officers and directors to clarify and update the requirements for both applicants and holders. EPSA is supportive of these changes. Further, however, EPSA believes that the Commission should consider granting public utility holding companies with no captive customers[2] blanket authorization to hold interlocking positions under these regulations on an intra-holding company basis.

I. STATEMENT OF INTEREST

EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and

[1] Launched over 20 years ago, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. Power supplied on a competitive basis collectively accounts for 40 percent of the U.S. installed generating capacity. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

[2] Captive customers are wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation. 18 C.F.R. § 35.36(a)(6) (2015)

technologies, including owning, operating and developing major assets across all ISO/RTO regions. As independent power suppliers, EPSA members supply power to wholesale competitive markets on a merchant sales basis, relying on market forces to recover their costs to operate their resources. These companies do not rely on traditional cost-based rate regimes, or include public utility franchises that have captive customers. Therefore, transactions and business arrangements that occur within members' holding companies neither harm nor benefit any group of captive ratepayers.

II. OVERVIEW AND SUMMARY

On July 19, 2018, the Commission issued a Notice of Proposed Rulemaking proposing to revise parts 45 and 46 of its regulations related to interlocking officers and directors to clarify and update the requirements for both applicants and holders. EPSA believes that these proposed changes will result in a more efficient, transparent, and useful regulatory program, and applauds the Commission's review of regulations in order to increase efficiency and efficacy for companies and the Commission. Additionally, for the reasons outlined below, in furtherance of these goals EPSA respectfully requests that the Commission consider granting blanket authorizations to public utility companies without any captive customers to allow individuals to concurrently hold positions as an officer or director of more than one public utility within its corporate holding company, and to allow individuals to concurrently hold the positions of officer or director of a public utility and a company supplying electrical equipment to a public utility within its corporate holding company. The holding of such positions is routinely authorized by the Commission based on a showing that neither

public nor private interests will be adversely affected and it presents none of the concerns outlined by Congress in Federal Power Act ("FPA") Section 305(b).[3] This is true for all interlocking positions within a holding company that has no captive customers, rendering the application or informational filing requirement for Commission authorization for each change or additional interlocking position unnecessary and overly burdensome for such companies and for the Commission.

This category of public utility, which includes independent power producers that are structured as merchant sellers of power only, is incapable of and therefore does not pose a danger of imposing excessive charges or allocating unreasonable costs to customers, flouting state regulation in any way, or harming customers through a general lack of economy of management, operation, inefficiency, or inadequacy of services. As entirely independent entities, any mismanagement or uneconomic transactions are not passed on to customers, but are born exclusively by shareholders. Thus, the concerns addressed by the interlocking filing requirements of FPA Section 305(b) are not present for these companies.

In order to ensure that only interlocking positions within companies that do not pose concerns as to impact on captive customers are eligible for the requested blanket authorization, EPSA proposes that such authorizations be granted solely to those utilities on an intra-holding company basis. Any interlocks initiated with entities outside of that independent utility company structure would not fall within the scope of the

[3] Title I, Sec. 1, of the Public Utility Act of 1935 (49 Stat. 803, 15 U.S.C. 79a). Title I was the Public Utility Holding Company Act of 1935. Title II became Parts II and III of the Federal Power Act, which include section 305(b).

contemplated blanket authorization and would be held to the requirements and obligations as outlined in the NOPR in this proceeding.

To provide oversight of those companies eligible for the proposed blanket authorization, an entity with market-based rate authority and previously granted a blanket authorization for interlocking positions within its holding company could declare in its triennial Market-Based Rate Authorization filings that its holding company structure remains fully independent, and therefore that entity continues to pose no threat of harm to captive customers 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.

III. COMMENTS

A. The Issuance of Blanket Authorizations Is Appropriate For Public Utilities With No Captive Customers

Issuance of blanket authorizations under the FPA is a tool that has been used by the Commission to efficiently apply its regulations in furtherance of ensuring just and reasonable, non-discriminatory wholesale rates. Most germane to the instant proposal is reliance on blanket authorizations under section FPA Section 203, which deals with mergers and acquisitions. In the case of section 203, the Commission found that where the FPA explicitly requires that public utilities "secure[] an order of the Commission authorizing certain transactions,"[4] 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."[5] The Commission made its finding that those blanket

[4] 16 U.S.C. § 824b(a) (2006).

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

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 case-by-case evaluation of certain circumstances.[6] Today, because of the blanket authorizations set forth in Section 33.1(c) of the Commission's regulations,[7] many transactions 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 blanket authorizations for certain merger and acquisition transactions.

In the instant matter, granting a blanket authorization for the holding of concurrent interlocking officer and director positions for individuals within public utility holding companies that do not have captive customers is equally appropriate, as there is no potential for undue associated company benefit or affiliate dealing that would harm captive customers in any manner. By granting blanket authorizations to those entities that clearly and by definition do not adversely affect either public or private interests as a result of any interlocking arrangements, the Commission can meet its statutory mandate for authorization embodied in FPA Sections 305(b) and (c) while minimizing the regulatory burden on regulated entities. Unlike when interlocking directorate approval and filing requirements were first adopted, when most holding company structures did implicate captive customers, today's independent power producer holding

6 *Order No. 669* at PP 55-57.

7 18 C.F.R. § 33.1(c) (2013).

companies exhibit no danger that the costs of above-market contracts between affiliated corporations with common officers or directors can be passed through to ratepayers.

Additionally, utilization of blanket authorizations will assist in eliminating inadvertent violations or good faith errors of the Section 305 requirements from this category of public utilities. As the NOPR explains, handling such inadvertent errors causes unnecessary inefficiencies and burdens for companies and for the Commission.[8] This is a practical concern as there are independent merchant holding companies that have complex corporate structures that may include dozens of entities with officer or director positions that may trigger Sections 45 and 46 of the Commission's rules. Even with the most diligent compliance program in place for all issues related to the holding of office or director positions, inadvertent errors can occur. In fact, the administration of these applications and reports is extensive, time consuming and overly burdensome – particularly where, as here, these companies pose none of the statutory concerns underpinning those regulations. Therefore, granting blanket authorizations for the holding of interlocking positions solely with affiliated entities within a holding company that does not have any captive customers is reasonable and will greatly ease the administrative burden associated with these applications where they do not appreciably aid the Commission in its oversight or mission to ensure just and reasonable rates.

B. Implementation of Blanket Authorizations Furthers The Goals of the Instant NOPR

Revisions to Parts 45 and 46 promulgated in the instant NOPR represent FERC's continuing efforts to identify regulations that warrant repeal or modification, or

[8] NOPR, P 8.

strengthening, complementing, or modernizing where necessary or appropriate.[9] The Commission has rightly recognized that the regulations that would be revised by the NOPR are clearly ripe for modernization and modification. The proposed revisions will effectuate the improvements intended,[10] and EPSA supports the NOPR in full. EPSA believes that this review and streamlining effort is furthered by an additional change to address the circumstances of independent power producers and marketers that have no captive customers connected to any entity within the utility's holding company structure. In those cases, provision of a blanket authorization for interlocking positions within the company is a logical and reasonable extension of the Commission's ongoing efforts to modernize and modify its regulations.

Under the Administrative Procedure Act ("APA"),[11] a final rule must be a "logical outgrowth" of the proposed rule, meaning that "affected parties [c]ould have anticipated that the relevant modification was possible." In the matter at hand, EPSA's request is very clearly a logical outgrowth of the NOPR.[12] The primary aim of this NOPR is to clarify, streamline and reduce regulatory burdens on both FERC staff and the companies[13] to which these regulations apply. Granting a blanket authorization as discussed herein furthers this goal and accomplishes these objectives while ensuring

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9 See generally, 2016 Biennial Staff Memo Concerning Retrospective Analysis of Existing Rules, Docket AD12-6-002 (Oct. 27, 2016). See also, Edison Electric Institute Comments, Docket AD12-6-002 (Nov. 28, 2016).

10 NOPR, P 5.

11 5 U.S.C. §§ 500, *et seq.* (2012).

12 *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014) ("*Allina Health*") (quoting *CSX Transp., Inc. v. Surface Transp. Bd.,* 584 F.3d 1076, 1080 (D.C. Cir. 2009)).

13 As noted in fn 25 of the NOPR, Commission staff believes that the average respondent for this collection is similarly situated to the Commission, in terms of salary plus benefits. Based upon FERC's 2018 annual average (for salary plus benefits) of $164,820, the average hourly cost is $79/hour.

that that Commission continues to meet the Congressional mandate set out in FPA Section 305(b).

While independent power supply company structures are certainly complex, they look quite different from the corporate structures in place when Part III of the Federal Power Act (including Section 305) was enacted in 1935. At that time, the Commission began regulating interlocking directorates to prevent abusive affiliate transactions which harmed a public utilities' consumers through cross-subsidization, cost shifting, or other means of passing on excessive costs to customers. Certainly, these concerns remain for those companies who have captive customers. For example, an interlock between a traditional public utility with captive customers and an entity that supplies electrical equipment to that public utility can pose a concern as the utility might pay inflated prices for electrical equipment from suppliers because of the influence of the interlocked person and pass these excessive "self-generated" costs onto captive customers. Importantly, when the FPA was enacted, every public utility was vertically-integrated. In this landscape, it was wholly appropriate for the Commission to broadly apply this regulation in order to protect the public interest.

Today, large swaths of the megawatts generated for the bulk power grid are generated by independent power producers who have no captive customers. If we apply the example outlined above to an independent power producer and an interlocked electric supply company owned within its holding company, any inflated price paid to the electric supply company would only serve to hinder the competitive position of the independent power producer by inflating its costs to generate. Accordingly, granting blanket authorization on an intra-holding company basis to independent power

producers and marketers without captive customers is a logical outgrowth of the NOPR and is a foreseeable change that is consistent with the NOPR's intent. Such an authorization would serve to reduce regulatory burdens and modernize these regulations to better reflect the modern state of the electricity generation and sales landscape.

Additional evidence of the Commission's authority to grant a blanket authorization can be found within the FPA itself. 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.[14] But Section 305(c)(1) makes clear that such a statement need only be "in such form and manner as the Commission shall by rule prescribe . . . ."[15] 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.

While the evidence outlined above clearly demonstrates that the Commission is able to direct these changes in the instant proceeding, if necessary, the Commission could in an abundance of caution issue a Supplemental Notice on the provision of blanket authorizations in the circumstances described herein in order to broaden the scope of the NOPR to expressly include the modifications proposed by EPSA in its final rule.

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14 16 U.S.C. § 825d(c)(1) (2006).

15 16 U.S.C. § 825d (2006).

IV. CONCLUSION

For the reasons outlined above, EPSA supports the revisions proposed in the instant NOPR. Additionally, EPSA respectfully requests that FERC grant blanket authorization for the holding of interlocking directorate by individuals in public utilities without any captive customers on an intra-holding company basis. Such action is a logical outgrowth of the NOPR and is in keeping with its intent while maintaining the Commission's mandate embodied in Sections 45 and 46. This request represents a reasonable step that the Commission could take to amend its regulations in order to minimize the burden on its own resources and the entities it regulates.

Respectfully submitted,

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