
**ON THE EVE OF THE FEDERAL POWER ACT
INTERLOCKING DIRECTORATE REGULATIONS’
DIAMOND JUBILEE, ARE WE LEFT WITH CHERRIES
OR THE PITS?**

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Synopsis: The Federal Power Act’s prohibition on certain interlocking directorates involving public utilities was a result of the concerns and fears of the era in which it was created. Over the last seventy plus years, the Federal Power Commission and its successor the Federal Energy Regulatory Commission have kept pace with the evolving economy and corporate organizations by transforming the Federal Power Act section 305 from simply a ban to a relatively accommodating information gathering tool.

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I. INTRODUCTION

[I]f federal agencies are going to use power to prevent free speech on the part of those with whom they come in contact, then, it seems only a short step to the point where that same agency can say to me as a writer, “Don’t you criticize us; we will throw you in jail if you do.” I call attention to this general situation because, as I said at the beginning, I think it is a dangerous trend in government. I think it is time for [C]ongress to awaken and use some caution in the powers it delegates to executive agencies.¹

1. William Bruckart, *National Topics Interpreted*, WASHINGTON DIGEST, Aug. 4, 1938, available at <http://www.newspaperarchive.com/LandingPage.aspx?type=glpnews&search=%22william%20bruckart%22%20aug&img=\\na0038\6773636\30824154.html>.

The above is from a nationally syndicated column critiquing the Federal Power Commission's (FPC) regulation of interlocking directorates, less than a few years after it became law with overwhelming support. Now, on the eve of the Federal Power Act (FPA) section 305's diamond jubilee, this article intends to provide both an exhaustive retrospective, and a forecast of changes to come.

Section two of this article will explain the environment which formed FPA section 305 – the restriction on interlocking directorates between public utilities and certain other entities (interlocks). Section three will examine the evolution of FPA section 305's application and summarize the significant changes to FPA section 305, including the creation of the annual filing requirement, the automatic approval of interlocks between affiliated utilities, and the Public Utility Regulatory Policies Act (PURPA) and Gramm-Leach-Bliley Act's (GLB Act) inclusion and exclusion of companies within the law's purview. Section three will also compare FPA section 305 to the interlock prohibitions found in section eight of the Clayton Act, and the now-repealed Public Utility Holding Company Act of 1935 (PUCHA 1935). Section four will explain the Federal Energy Regulatory Commission's (Commission) relatively new emphasis on enforcement of FPA section 305, and the new 2005 rules in light of the repeal of PUHCA 1935. Section five will provide practical advice when applying for the Commission's approval of an interlocking position. Section six will be forward-looking, examining where the Commission's application of the interlocking rules may lead.

II. FPA SECTION 305 BACKGROUND

A. *Environment That Bore Utility Interlock Regulation*

The federal government's concern about the economic power wielded by large corporations predates the New Deal's regulatory initiatives,² but President Franklin D. Roosevelt is rightly credited with the restrictions on certain public utility interlocking directorates.³

A perfect storm of public utility bad actors,⁴ and the belief that only the federal government could regulate big businesses, like public utilities,⁵ allowed President Roosevelt to deliver on his campaign promises with the FPA of

2. *Edwin I. Hatch*, 2 F.E.R.C. ¶ 63,023, at p. 65,125-26 (1978); *Charles T. Fisher*, 7 F.E.R.C. ¶ 61,290 (1979); Victor H. Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 YALE L.J. 1266 (1950) (citing S. REP. NO. 63-698 (1914)).

3. Franklin D. Roosevelt, President of the United States, Message to Congress Recommending Regulation of Public Utility Holding Companies (March 12, 1935) (<http://www.presidency.ucsb.edu/ws/index.php?pid=15019>).

4. Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L.J. 35 (2005). See also *In re Portland Elec. Power Co.*, 97 F.Supp. 857, 857-58 (D. Or. 1951) ("The history of this company [which sought voluntary reorganization] has been marked by stock manipulation, bond and note issues, holding companies and operations carried out by interlocking directorates . . . so characteristic of the period."); *In re Louisville Hydro-Elec. Co.*, 1 F.P.C. 130 (1933).

5. *Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

1935—sweeping legislation that regulated national electrical power.⁶ The FPA's legislative history shows that Congress had particular concern about the concentration of wealth and potential for conflicts of interest systemic to interlocking directorates.⁷ Nebraska Senator George William Norris' 1935 Senate floor speech is an example:

I have on my desk here the names of a great many other persons, and there are a great many that I do not have; but I will say that this is the universal rule, running all through these corporations, from one end of the United States to the other. They are interlocked, intermingled, intertwined, interwoven, mixed up, scrambled, and all put together so that they are practically like one man, bleeding those at the bottom, taking their toll from those who toil and sweat, levying upon everybody who uses electric light or electric power in this country, putting the cost of their murderous operations into everything we eat, drink, and wear. Everything that is produced by electric power has contributed to it. Every common little home must make its contribution, and every big factory with a million dollars capital must make its contribution. In the end, it all comes out of the consumers, the common people of the United States; and still we hesitate to put forth the strong arm of the law and say, "You shall not proceed further with these murdering operations, with this dishonorable business of controlling a necessity of life."⁸

As a result, FPA section 305 requires individuals to receive the Commission's⁹ approval before concurrently serving as officers or directors of public utilities, or public utilities and firms that underwrite or participate in the marketing of securities of any public utility, or public utilities and companies supplying electrical equipment to such public utilities ("interlocks").¹⁰

The FPA and the interlocking directorate restrictions on public utilities found in section 305 were actually the second of President Franklin Roosevelt's legislative initiatives to police public utilities. The first was the "PUHCA 1935" which, in addition to regulating public utility holding companies' interlocking directorates, restricted public utility companies from implementing complex corporate and capital structures, having more than a single integrated electric or gas utility within the holding company, borrowing or using the public utility for indemnification, or providing goods or services to the utility subsidiaries.¹¹

6. Richard M. Merriman & J. Richard Tiano, *Interlocking Director Positions: An Area of Concern for Electric Utilities*, 1 ENERGY L.J. 55, 55-56 n.2 (1980) (citing *In re John Edward Aldred*, 2 F.P.C. 247, 260-61 (1940)).

7. *Hatch v. FERC*, 654 F.2d 825, 831 (D.C. Cir. 1981).

8. *Hatch*, 2 F.E.R.C. ¶ 63,023, at p. 65,127 (quoting Cong. Rec. 8,694 (1935) citing CONGRESS NUMBER CONG. REC. 8694 (1935)).

9. The "Commission" in the original Federal Power Act referred to the FPC. The FERC was created on October 1, 1977 as the FPC's successor. Richard M. Merriman & J. Richard Tiano, *Interlocking Director Positions: An Area of Concern for Electric Utilities*, 1 ENERGY L.J. 55, 56 n.3 (1980) (citing 42 U.S.C. § 7107 (1977) and Exec. Order No. 12,009). To avoid confusion for the reader, the term "Commission" will be used in the article for both the FPC and FERC.

10. 16 U.S.C. § 825d (1934 & Supp. V).

11. 15 U.S.C. § 79 (2005); Markian M.W. Melnyk & William S. Lamb, *PUHCA's Gone: What Is Next for Holding Companies?*, 27 ENERGY L.J. 1 (2006).

B. Commission Authority and Interpretation of FPA Section 305

FPA section 305 empowered the Commission to prescribe the “form and manner” for applying the regulation.¹² While court decisions and congressional action have altered FPA section 305 over its seventy-plus life, the Commission has always had the last word in determining how and whether the regulated interlocking directorate rule should be applied.

1. Burden on the Applicant

The Commission places the burden on the applicant to show that neither public nor private interests would be adversely affected by the interlock. The Commission’s denial of John Edward Aldred’s application is an early example of the applicant’s burden, just the type of “clown car” of corporate inside dealing and conflicts of interest that FPA section 305 was created to eliminate, involving nearly two dozen interlocking directorates between public utilities and investment banks.¹³

The Commission may also revoke an approved interlock after giving due notice and an opportunity for hearing, and at such review, the burden remains with the applicant to show that neither public nor private interests will be adversely affected by the holding of the positions.¹⁴

2. Authority to Change the Standard

The Commission has the authority to change the applicant’s burden of proof, as shown in the *Edwin I. Hatch* series of cases. *Hatch*¹⁵ applied to hold the positions of Chairman and CEO of public utility Georgia Power Company (Georgia Power), and director of an entity with a second-generation subsidiary that purchased Georgia Power securities. Usually, the Commission required the applicant to show that neither public nor private interests would be adversely affected by the interlock. But, this time the Commission required *Hatch* to affirmatively show “clear, overriding benefit” of the interlock.¹⁶ On appeal, the D.C. Circuit wrote that the Commission was free to alter its then forty years of past practices and rulings to apply the new stricter standard so long as it “provide[d] a reasoned explanation for any failure to adhere to its own precedents” at a rehearing for *Hatch*.¹⁷ On rehearing, the Commission reverted back to its earlier test, and authorized *Hatch*’s interlock because he was able to show that neither public nor private interests would be affected by the interlock.¹⁸ The record does not explain why the Commission originally applied greater scrutiny to *Hatch*’s interlock application, but a reason could have been

12. 16 U.S.C. § 825d (1934 & Supp. V).

13. *In re Aldred*, 2 F.P.C. 247, (Sept. 27, 1940).

14. Application for Authority Under the Federal Power Act, Termination of Authorization, 18 C.F.R. § 45.6 (2005).

15. *Edwin I. Hatch*, 57 F.P.C. 1100, (Feb. 17, 1977).

16. *Hatch*, *supra* note 2, at 65,125.

17. *Hatch v. FERC*, *supra* note 7, at 834.

18. *Edwin I. Hatch*, 18 F.E.R.C. ¶ 61,141 (1982).

that Hatch was involved in double interlocks, and was a director of a vast array of entities outside of the purview of FPA section 305.¹⁹

3. Federal Court Deference to the Commission's Application of FPA 305

The Federal Courts deference to the Commission's interpretation of FPA section 305 extends further than just allowing the Commission to change the threshold test. In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*²⁰, two utilities entered into "a number of intercompany contracts establishing rates and charges,"²¹ while under the same ownership.²² After the two utilities separated, Montana-Dakota Utilities alleged, in part, that its interlocking directors with Northwestern Public Service Co. were used to fraudulently and unlawfully deprive it of reasonable rates and charges. The U.S. Supreme Court denied the FPA section 305 claim because the Commission's earlier approval of the interlock removed any presumption of fraud.²³

It would be a strange contradiction between judicial and administrative policies if a relationship which the Commission has declared will not adversely affect public or private interests were regarded by courts as enough to create a presumption of fraud. Perhaps, in the absence of the Commission's approval, such relationship would be sufficient to raise the presumption under state law, but it cannot do so where the federal supervising authority has expressly approved the arrangement.²⁴

Conversely, the Commission has shown deference to the federal bankruptcy courts in applying FPA section 305. In two approved FPA section 305 applications, over sixty years apart, the Commission deferred to the federal bankruptcy courts and allowed court-appointed individuals to serve in interlocks between FPA section 305 regulated entities during the bankruptcy proceedings that the Commission may otherwise have denied or approved with conditions.²⁵

III. COMMISSION TREATMENT OF EACH FPA SECTION 305 INTERLOCK TYPE

The Commission reviews each proposed interlock on its own merit, but its tolerance for the intimacy of each particular type of FPA section 305 regulated interlock varies. Generally, the Commission is less concerned with public

19. Hatch and other individuals were double interlocked between Bank of Atlanta and Georgia Power. Hatch also served as director of the First National Bank of Atlanta, which at the time was trustee for 748,811 shares (12.26 million dollars) in Southern Company, and provided a twenty million dollar line of credit to Georgia Power. *Hatch*, *supra* note 2 at 65,122.

20. 341 U.S. 246 (1951).

21. *Id.* at 247-248.

22. *Montana-Dakota Util. Co. v. North-Western Pub. Serv. Co.*, 341 U.S. 246, 247-248 (1951).

23. *Id.* at 252. The Court allowed the state fraud claim to stand. *Id.* at 252-253. *See also S. Ca. Edison Co.*, 49 F.E.R.C. ¶ 61,001 at p. 61,353-61,360 (1989) (The Commission determined that interlocking directorates docket appropriate forum to investigate interlocking directorate violations, not the application for the proposed merger between Southern California Edison Company and San Diego Gas and Electric Company).

24. *Montana-Dakota Util. Co.*, 341 U.S. at 253.

25. David S. Soliday, 2 F.P.C. 743 (1940) (application to serve as director of Mountain States Power Company and partner of Hopper, Soliday & Company approved because he was appointed public utility director in bankruptcy proceedings.) Teresa Conway, 115 F.E.R.C. ¶ 62,073 (2006) (serve as officer of Powerex Corp (public utility) and Director of California Power Exchange Corporation (public utility) as a result of the latter's bankruptcy reorganization).

utility-electrical equipment supply company interlocks and will usually allow a business relationship between the two entities to continue while the interlock exists. The Commission is more concerned with public utility - public utility securities firm interlocks and will oftentimes condition the authorization upon a restriction of the two entities' business relationships or dealings.²⁶ The Commission is most concerned with interlocks between two unaffiliated public utilities, and as a result seldom authorizes their interlock under any condition.²⁷

A. Interlocking Directorates Between Public Utility and Electrical Equipment Supplier

FPA section 305 regulates interlocks between public utilities and entities that manufacture, deal, or supply electrical equipment pursuant to a construction, service, agency, or other contract to that particular public utility.²⁸ The Commission imputes the sales from a subsidiary to the parent company.²⁹ As a result, an individual needs the Commission's approval before being interlocked between a public utility and a parent of an electrical equipment supplier to the public utility, regardless of the parent's relationship with the public utility.

Generally, the Commission "has been reluctant to sanction interlocking directorates between public utilities and [potentially] large suppliers of electrical equipment."³⁰ Accordingly, "[t]here have been only a very few applications filed to hold positions between public utilities and supply companies, the majority of which have either been withdrawn or denied."³¹ However, the Commission will approve interlocks when the electrical equipment supplier sells a de minimis amount to the public utility.³² The decision has usually turned on the definition of de minimis.³³

In at least one case, the alleged violation of FPA section 305 was used to deny a portion of a utility's application for a rate increase.³⁴ In the late 1970's, public utility Minnesota Power & Light (MP&L) applied for an 11.5 percent rate increase of approximately 2.45 million dollars.³⁵ The Commission excluded over \$300,000 requested for extraordinary property loss because it arose from abandonment of defective wet scrubbers procured from an electrical equipment

26. *Robert G. Schoenberger*, 61 F.E.R.C. ¶ 61,197 at p. 61,723 (2005).

27. *Id.*

28. 18 C.F.R. § 45.2 (2008).

29. *Walter M. Vannoy*, 60 F.E.R.C. ¶ 62,114, at p. 63,316 (1992).

30. *Robert H. Engels*, 55 F.P.C. 628, 629 (1976).

31. *Lelan F. Sillin, Jr.*, 33 F.P.C. 1006, 1007 (1965). *See also Edward O. Boshell*, 35 F.P.C. 189 (1966). (dismissing Order to Show Cause because candidate did not seek re-election to electric equipment company board).

32. *Dr. Gloria M. Shatto*, 34 F.E.R.C. ¶ 61,303 at p. 61,558-59 (1986); *Walter B. Gerken*, 56 F.E.R.C. ¶ 61,026 at p. 61,100 (1991).

33. William J. Harmon, *FERC Interlocking Director Rules-A Guide to Compliance*, JONES DAY, http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=3570.

34. *Minnesota Power & Light Co.*, 7 F.E.R.C. ¶ 63,033 (1979) *rev'd in part* 11 F.E.R.C. ¶ 61,313 (1980).

35. *Id.* at p. 61,656.

supply company whose principal shareholder also served on the MP&L.³⁶ The Commission found “no evidence in the record that MP&L had obtained a performance warranty with respect to operation of the equipment,”³⁷ which it determined was “imprudent” and may have contravened FPA section 305.³⁸

1. Definition of Electrical Equipment

Up until 1980, the definition of electrical equipment was “ambiguous, at best.”³⁹ In 1957, the Commission originally denied Leroy S. Stephen’s application to serve as president and director of Stephens-Adams Manufacturing Company and director of public utility Commonwealth Edison.⁴⁰ On rehearing, the Commission dismissed the application, thereby allowing the interlock, because it determined that the conveying machinery, coal-handling equipment and industrial ball-bearing units supplied by Stephens-Adams to Commonwealth Edison, was not electrical equipment within the meaning of FPA section 305.⁴¹

In 1980, the Commission defined electrical equipment as “any apparatus, device, integral component, or integral part used in an activity which is electrically, electronically, mechanically, or by legal prescription necessary to the process of generation, transmission, or distribution of electric energy,”⁴² and directed applicants to the Uniform System of Accounts Prescribed for Public Utilities and Licensees for additional guidance.⁴³ In practice, the Commission has broadly defined electrical equipment to include computers, calculators, and sprinklers.⁴⁴

2. Definition of De Minimis

The Commission has generally used two definitions of de minimis when reviewing the amount of electrical equipment sold to the public utility by the electrical equipment supplier: dollar amount of the sale, and the percentage of the electrical equipment supplier’s total sales compared to the percentage of sales made to the public utility.⁴⁵

The Commission’s denial of Harold S. Falk’s interlock application in 1947 to serve as director of electrical equipment supplier Allis-Chalmers Manufacturing and director of public utility Wisconsin Electric Power Company is an example of the dollar amount standard.⁴⁶ Allis-Chalmers had recently sold to Wisconsin Electric an 80,000 kilowatt generating unit for 4.3 million dollars,⁴⁷

36. *Id.* at p. 65,188 n.8.

37. *Id.* at p. 65,195.

38. *Id.*

39. *Charles T. Fisher, III*, 7 F.E.R.C. ¶ 61,290 at p. 61,624 dissent n.2 (1979).

40. *Leroy S. Stephens*, 17 F.P.C. 480 (1957).

41. *Id.* The concurring opinion did not see a difference between this equipment and electrical equipment. *Id.*

42. 18 C.F.R. § 46.2 (2007).

43. 18 C.F.R. Pt. 101 (2007).

44. *William S. Lee*, 50 F.E.R.C. ¶ 62,138 at p. 63,137 (1990); *Walter M. Vannoy*, 60 F.E.R.C. ¶ 62,114 (1992).

45. *Charles T. Fisher, III*, 9 F.E.R.C. ¶ 61,096 at p. 61,195 (1979).

46. *Harold S. Falk*, 6 F.P.C. 1110 (1947).

47. *Id.*

and annually sold Wisconsin Electric \$410,000 worth of electrical equipment,⁴⁸ “precisely the inside dealing [FPA section 305] was trying to prevent.”⁴⁹

Possibly as a reflection of the changes in corporate structures from stand-alone entities into large conglomerates, the Commission’s determination of de minimis has evolved from the dollar amount to the percentage of an electrical equipment supplier’s sales to that public utility compared to their total sales.⁵⁰ While no magic number exists, a 2007 Commission order authorizing John L. Skolds’ interlock seems to indicate that even if the total dollar amount is in the millions, the Commission will approve the interlock if the electrical equipment supplier’s annual sales to the public utility are ten percent or less of its total annual sales.⁵¹

3. Subsequent Reporting Requirement

The approval of electrical equipment supply-public utility interlocks are conditioned on an annual report signed and verified under oath by the interlocked individual, due on or before April thirtieth, that sets forth the purchases from the electrical equipment supplier to the public utility within the previous calendar year.⁵² The annual report is required even if the public utility did not make any purchase from the electrical equipment supplier.⁵³

B. Interlocking Directorates between Public Utility and Public Utility Securities Firm

Of the three types of interlocks regulated by FPA section 305, the Commission’s analysis of public utility and public utility securities firm interlocks have evolved the most over the last seventy-plus years. While

48. *Id.*

49. *Id.* See also *Alfred M. Shook, III*, 14 F.P.C. 525 (1955) (application to serve as Director of Alabama Power Company and Secretary-Treasurer of Shook & Fletcher Supply Company. Interlock denied because hundreds of thousands of dollars worth of sales from the electrical supply company, for which applicant was secretary-treasurer, and various subsidiary utilities in Southern Company family, including Alabama Power, for which he was director); *But see also Charles T. Fisher, III*, 7 F.E.R.C. ¶ 61,290 (1979) (denied interlock between General Motors and Detroit Edison because 27,000 dollars worth of sales simply occurred, regardless of dollar amount).

50. *General H. Norman Schwarzkopf*, 73 F.E.R.C. ¶ 62,017 at p. 64,020 (1995) (The Commission authorized Schwarzkopf’s application to serve as Director of both public utility Washington Water Power Company (WW) and Kuhlman Corporation. Kuhlman supplied \$180,567 of electrical equipment to WW, less than 1.6 percent of WW’s total expenditures for 1994 and .15 percent of Kuhlman’s total sales in 1994); *James D. Cunningham*, 17 F.P.C. 382 (1957) (The Commission denied application for Cunningham to serve as director of Commonwealth Edison Company public utility and director of Allis-Chalmers Manufacturing Company electric supply company, and President and Director of Republic Flow Meters Company, an electric supply company. Republic Flow’s sales to Edison from 1954–1956 averaged twenty-eight percent of Republic flow’s total sales. During same time, Allis-Chalmers annually averaged 8.9 million dollars in sales to Edison).

51. *John L. Skolds*, 119 F.E.R.C. ¶ 62,263 (2007) (Skolds was President of Exelon generation company and director of Zolo technologies. At the time, Zolo did not supply electrical equipment to Exelon; however, Exelon was investigating whether to purchase four million dollars in electrical equipment from Zolo. The Commission found that even if Exelon were to purchase the electrical equipment from Zolo, it would constitute only .4 percent of Zolo’s relevant sales).

52. *Phillip R. Lockner, Jr.*, 122 F.E.R.C. ¶ 62,009 (2008); *Skolds*, 119 F.E.R.C. ¶ 62,263 (2007); *Roger Agnelli*, 109 F.E.R.C. ¶ 62,109 (2004).

53.*Id.*

“marketing” has been consistently defined as requiring a public offering,⁵⁴ the definition of what qualifies as a public utility securities firm has been changed by both congressional actions and the Commission’s interpretation and modification of the interlock regulations. Even so, one thing has remained consistent: the Commission is more likely to deny, or place a condition on an interlocking directorate between a public utility and a public utility security firm, than it is to deny or condition a public utility-electrical equipment supplier interlock.⁵⁵

1. 1935: Original Definition of Public Utility Securities Firm

When FPA section 305 first became law in 1935, a public utility securities firm was defined as “any 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.”⁵⁶ Under this definition, and the fact that most financial institutions were local concerns that were not part of larger financial conglomerates, many financial institutions did not fall under FPA section 305’s jurisdiction.⁵⁷

2. 1978: PURPA Expands Definition of Public Utility Securities Firm

The Public Utility Regulatory Policies Act of 1978 (PURPA) was the first significant change to FPA section 305,⁵⁸ and expanded the type of entities that were considered public utility securities firms to include

“any investment bank, bank holding company, foreign bank or subsidiary thereof doing business in the United States, insurance company, or any other organization primarily engaged in the business of providing financial services or credit, a mutual savings bank, or a savings and loan association”... “any company, firm, or organization which is authorized by law to underwrite or participate in the marketing of securities of a public utility.”⁵⁹

PURPA also created an annual reporting requirement for all approved FPA section 305 interlocks.⁶⁰

3. Late 1980’s: FPA Section 305 Attributed to Affiliates and Subsidiaries

As a response to being presented with “increasingly complex corporate scenarios,”⁶¹ the Commission made an abrupt turn from decades of precedent

54. *Donald B. Riefler*, 32 F.E.R.C. ¶ 61,375, 61,484 (1985) *overruled* on other grounds.

55. *Edward O. Boshell*, 14 F.P.C. 1003 (1955) (denied interlock between security firm and public utility even though security firm stated that it would not underwrite or participate in the marketing of securities of the public utility); *Harold Palmer Woodcock*, 16 P.U.R. 3d 371 (1956); *George Fabian Brewer*, 15 F.E.R.C. ¶ 61,020 (1981).

56. 16 U.S.C. § 825d (b) (1934 & Supp. V).

57. *Arthur F. Davey*, 2 F.P.C. 534 (1939); *Walter J. Allen*, 6 F.P.C. 651 (1947).

58. In 1962, the Commission amended the information required to be submitted in support of the application by deleting the submission of information already on file or readily available to the Commission. 27 F.P.C. 1008 (1962), Order No. 246. In 1967, the Freedom of Information Act was implemented by Commission Order to interlocking directorate filings. 38 F.P.C. 1 (1967), Order No. 351.

59. Public Utility Regulatory Policies Act, 16 U.S.C. § 825(d) (1999).

60. *Id.*

and began attributing any public utilities securities firm within a “large, complex, and closely coordinated corporate family,”⁶² to the entity being interlocked with a public utility. William T. Coleman, Jr.’s application was one of the first to be analyzed under the new interpretation.⁶³ Coleman applied to serve in several interlocks between public utility Philadelphia Electric Company and CIGNA Corporation. CIGNA was not authorized to underwrite or participate in the marketing of public utility securities, but through a series of wholly-owned subsidiaries, CIGNA was a twenty-four percent owner of an underwriter and marketer of public utility securities.⁶⁴ The Commission attributed the subsidiary’s actions to CIGNA, writing that it did not want FPA section 305 to be circumvented “through the fiction of separate corporate entities.”⁶⁵

Under this new criterion, the Commission also routinely conditioned the authorization of an interlock between a public utility and the parent, or affiliate on a public utilities securities firm of the subsidiary, or affiliate not underwriting or marketing the interlocked public utilities’ securities,⁶⁶ including one instance involving an Independent System Operator (ISO).⁶⁷ On occasion, the Commission did approve interlocks without this condition.⁶⁸

4. 1990’s: FPA Section 305 Jurisdiction is Narrowed

A Commission Order and a new federal law decreased the number of companies considered public utilities security firms under the purview of FPA section 305.⁶⁹ In 1992, the Edison Electric Institute received a Commission Order holding that although commercial paper is a security for purposes of FPA section 305, the placement of third-party public utility commercial paper would not constitute underwriting or marketing of public utility securities.⁷⁰ As a result, an individual could serve as an officer or director of both a public utility

61. *John J. Byrne*, 38 F.E.R.C. ¶ 61,067 at p. 61,184 (1987).

62. *Id.* (“To the extent that *Riefler* is inconsistent with [applying affiliate or subsidiary securities firms actions to affiliate or parent], we overrule *Riefler*. . . .”); *Donald Riefler*, 32 F.E.R.C. ¶ 61,375 at p. 61,375 (1985).

63. *William T. Coleman, Jr.*, 19 F.E.R.C. ¶ 61,270 at p. 61,524 (1982).

64. *Id.*

65. *Id.*

66. *Robert F. Gilkeson*, 22 F.E.R.C. ¶ 61,226 (1983); *Frederick W. Mielke, Jr.*, 22 F.E.R.C. ¶ 61,004 (1983); *Edwin I. Hatch*, 18 F.E.R.C. ¶ 61,141 (1982); *Norman Barker Jr.*, 53 F.E.R.C. ¶ 61,223 (1990); *see also William S. Lee*, 30 F.E.R.C. ¶ 61,079 (1985) (interlocked financial institution engaged in underwriting and marketing); *Kenneth J. Douglas*, 40 F.E.R.C. ¶ 62,174 (1987) (application approved even though subsidiary of financial institution had underwritten and participated in the marketing of public utility securities in the Eurobond market).

67. *Alger B. Chapman*, 84 F.E.R.C. ¶ 62,129 (1998).

68. *See generally William T. Coleman, Jr.*, 21 F.E.R.C. ¶ 61,242 (1982); *Margery Somers Foster*, 19 F.E.R.C. ¶ 61,146 (1982) (interlocks approved without restriction that subsidiary not underwrite or market interlocked public utilities’ securities); *John J. Byrne*, F.E.R.C. ¶ 62,020 (1988) (approval conditioned upon interlocked individual refraining from participating in any decisions regarding the financing of the public utility or its subsidiaries or affiliates).

69. *Edison Electric Institute*, 60 F.E.R.C. ¶ 61,294 (1992).

70. *Id.*

and an entity that places third-party public utility commercial paper without requiring the Commission's approval.⁷¹

In November 1999, the "GLB Act" removed interlocks from FPA section 305's regulation if it met any one of these four conditions:

1. The officer or director of the public utility does not participate in any deliberations or decisions of the public utility regarding the selection of a bank, trust company, banking association, or firm to underwrite or participate in the marketing of securities of the public utility, if the person serves as an officer or director of a bank, trust company, banking association, or firm that is under consideration in the deliberation process;
2. The bank, trust company, banking association, or firm of which the person is an officer or director does not engage in the underwriting of, or participate in the marketing of, securities of the public utility of which the person holds the position of officer or director;
3. The public utility for which the person serves or proposes to serve as an officer or director selects underwriters by competitive procedures; or
4. The issuance of securities of the public utility for which the person serves or proposes to serve as an officer or director has been approved⁷² by all Federal and State regulatory agencies having jurisdiction over the issuance.

The GLB Act had a noticeable effect on FPA section 305 applications. Applications for interlocks involving public utility securities firms have become virtually nonexistent.⁷³ Also, the Commission acknowledged that it did not have jurisdiction over individuals whose interlock met at least one of the law's conditions, and as a result, conditions on previously authorized interlocks no longer applied.⁷⁴

C. *Interlock of Two Utilities*

Public utilities are defined as any "person who owns or operates facilities for the transmission of electric energy in interstate commerce, or any person who owns or operates facilities for the sale at wholesale of electric energy in interstate commerce."⁷⁵ Of the three types of interlocks regulated by FPA section 305, the Commission reviews interlocking directorates between two unaffiliated public utilities⁷⁶ with the strictest scrutiny.⁷⁷

71. *Id.* at p. 62,049.

72. Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999); see generally *David M. Carlisle*, 88 F.E.R.C. ¶ 62,137 at p. 64,267 (1999) (referencing F.P.A. Section 305(b)(2), stating, "the Commission has attributed the activities of a firm to its corporate parent and to its affiliates for purposes of establishing Section 305(b) jurisdiction").

73. A search of Westlaw on June 2, 2008 revealed no subsequent interlock applications involving public utility security firms.

74. *James R. Lientz, Jr.*, 93 F.E.R.C. ¶ 61,007 at p. 61,015-61,016 (2000)

The Commission also take[s] this opportunity to state that if there are other individuals who have been granted authorization to hold interlocking directorates, but believe that they now do not need such Commission authorization because of Section 305(b)(2)(B), they should notify the Commission of this within 30 days of the date of publication in the *Federal Register*, pursuant to Section 45.5(b) of the Commission's regulations.

75. 18 C.F.R. § 45.2 (2008).

76. 18 C.F.R. § 45.1(a)(1) (2008).

77. *Paul H. Henson*, 51 F.E.R.C. ¶ 61,104 at p. 61,232 (1990).

1. Non-Affiliated Utilities

The Commission seldom, if ever, authorizes interlocking directorates between non-affiliated public utilities.⁷⁸ Specifically verboten were interlocks between unaffiliated public utilities that did not operate in adjoining territories, were not under common ownership, and were not operated as a single integrated system, even if an interlock already existed for years without incident.⁷⁹ On the occasions that the Commission approved the interlock between traditional unaffiliated utilities,⁸⁰ the result was oftentimes just the type of conflict of interest FPA section 305 was created to prevent.⁸¹

2. Affiliated Utilities

Throughout most of the Commission's application of FPA section 305, it authorized interlocks between operating affiliates of holding companies or jointly-owned public utilities.⁸² In 1986, under the theory that it eliminated an unnecessary filing burden that "present[ed] no potential threat to public or private interests within the meaning of the Federal Power Act,"⁸³ the Commission formalized the approval of this type of interlock by creating an automatic authorization. The automatic approval was allowed if it involved any of the following: 1. Officer or director of 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 directors⁸⁴; 2. Officer or director of two public utilities, if one utility is owned, wholly or in part, by the other and, as its primary business,

78. Merriman & Tiano, *supra* note 6, at 56-57 (An example of the exception situation where the Commission authorized an interlocking directorate between unaffiliated utilities Stone & Webster Service Corporation and Sierra Pacific Power Company. In approving the interlock, the Commission wrote that it believed Rempe's "long experience with the utility industry can be of value to these relatively small, unaffiliated systems located in different parts of the country." (citing Peter J. Rempe, Docket No. ID-1562 (September 18, 1968)).

79. *Willis C. Fitkin*, 7 F.E.R.C. ¶ 61,291 at p. 61,626 (1979) (Fitkin and MacInnes had served on the Boards of two vertically-integrated utilities, Tampa Electric Company and Green Mountain Power Corporation, but applied for commission approval only after it was determined that Tampa Electric was a public utility. The assertion by the applicants that their long-standing interlock had not adversely affected public or private interest "would be of little consequence to the Commission's decision" because the Commission's application of 305(b) is not to "act with hindsight, it must deal with potentialities." While not provided as a rationale for the decision, the Commission may have been swayed by the fact that Fitkin was also president and director of Wiramal Corporation, which owned 56,900 shares of common stock of Green Mountain Power and 3,000 shares of common stock of Tampa Electric, and MacInnes was also director for over a dozen additional companies, including a gas distribution company, commercial bank, real estate investment trust, coal transfer and storage company, and building materials company).

80. As opposed to ISOs, RTOs, and power marketers.

81. *Shurly R. Irish*, 2 F.P.C. 656 (1939) (accounting methods "wholly inadequate," "irregular and improper and not in conformity with" the Commission prescribed uniform system of accounts); *George A. Carlson*, 54 F.P.C. 1211, 1213-1214 (1975) (President's pay was twice as much as the median salary for a similarly situated officer in a utility with similar revenues).

82. Merriman & Tiano, *supra* note 6, at 56-57.

83. 51 Fed. Reg. 4,900-4,9001 (1986) (to be codified at 18 C.F.R. pt. 45).

84. Order No. 446, *Electric Utilities; Automated Authorization for Holding Certain Positions That Require Commission Approval Under Section 305(B) of the Federal Power Act*, [Regs. Preambles 1986-1990] F.E.R.C. STATS. & REGS. ¶ 30,686 (1986), 51 Fed. Reg. 4,900 (1986) (to be codified at 18 C.F.R. pt. 45).

owns or operates transmission or generating facilities to provide transmission service or electric power for sale to its owners⁸⁵; and 3. Officer or director of more than one public utility, if such officer or director is already authorized under FPA section 305 to hold different positions as officer or director of those utilities where the interlock involves affiliated public utilities.⁸⁶

To take advantage of this automatic authorization, an informational report must be filed listing all the public utilities the individual seeks to hold positions with, a brief description of the positions, and the corporate relationship between the public utilities.⁸⁷ After the first interlock within the same corporate family is reported, the individual does not need to report any additional interlocks between the affected public utilities.⁸⁸

Until the new 2005 interlock rules,⁸⁹ the Commission included essentially an automatic authorization and a waiver of the full interlocking directorate rules in orders granting market-based rates to public utilities.⁹⁰

3. Unintended Consequence

As a result of several decisions, the Commission has established a principal that public utility holding companies are not public utilities because they do not own or operate facilities subject to Commission jurisdiction, and therefore their interlocks may not be regulated by FPA section 305.⁹¹ For example, Herbert H. Tate, Jr. applied to interlock between a public utility and an unaffiliated public utility holding company of a wholesale power generator, but none of the subsidiary public utilities.⁹² The Commission determined that the holding company was not in and of itself a public utility, so therefore the interlocking directorate did not fall within the purview of FPA section 305.⁹³ This, in spite of the fact that the public utilities were unaffiliated and located in different parts of the country - two constantly repeated concerns of the Commission in its usual application of FPA section 305.⁹⁴ This interpretation also runs contrary to the Commission's past practice of applying the actions of electric equipment suppliers or public utility security firms to their affiliates, subsidiaries, and parent companies.⁹⁵ Taking this to a logical, albeit extreme, step an individual could apparently serve in interlocking positions between two large holding companies, for example, Progress Energy in the mid-Atlantic region and PG&E

85. *Id.*

86. *Id.*

87. 18 C.F.R. § 45.9(b) (2005).

88. *Id.*

89. *Infra*, Section IV., B. The 2005 FPA Section 305 Rules.

90. *E.g.*, *Ontario Energy Trading Int'l Corp.*, 99 F.E.R.C. ¶ 61,039, at p. 61,145 (2002); *Allegheny Energy Supply Co., LLC et al* 101 F.E.R.C. ¶ 61,278 at p. 62,116 (2002).

91. *Norman Barker, Jr.*, 53 F.E.R.C. ¶ 61,223 at p. 61,932 n. 48 (1990) (citing 16 U.S.C. § 824(e)); *Charles W. Wells*, 71 F.E.R.C. ¶ 62,192 at 64,327 n. 2 (1995).

92. *Herbert H. Tate, Jr.*, 106 F.E.R.C. ¶ 62,156 (2004).

93. *Id.*

94. *Id.*

95. *Id.*

on the west coast, without Commission approval in accordance with FPA section 305.⁹⁶

D. Compare and Contrast: FPA Section 305 with Other Interlocking Directorate Restrictions.

The federal government's concern over the potential for abuses caused by interlocking directorates extends beyond the utility industry.⁹⁷ The now-repealed PUHCA 1935 and section eight of the Clayton Act are two that serve as good comparisons to FPA section 305.

1. PUHCA 1935

Like FPA section 305, PUHCA 1935, addressed the concentration of control of public utilities, in part, by regulating certain interlocking directorates with financial institutions. Under PUHCA 1935, administrated by the Securities and Exchanges Commission (SEC), officers and directors of registered public utility holding companies, or their subsidiaries, were prohibited from serving as officers or directors of certain types of banks, trust companies, banking associations, and banking firms.⁹⁸ The PUHCA 1935 interlock regulation affected holding companies that have either gas or electric utilities within the corporate family, while FPA section 305 does not regulate gas utility interlocks. However, PUHCA 1935 did not address interlocks between a public utility holding company and an electric equipment supplier, which FPA section 305 does.⁹⁹

Another difference between these two interlock prohibitions, which helped contribute to PUHCA 1935's eventual demise, was the tendency of corporations to inadvertently stumble into the PUHCA 1935 regulation. FPA section 305 clearly regulates the interlocks of an owner or operator of an interstate electric energy corporation.¹⁰⁰ PUHCA 1935 regulated entities that either operate or own ten percent or more of a gas or electric utility. So, even though the holding company did not "sell a single watt or electricity of cubic foot of gas"¹⁰¹ it would be regulated under PUHCA 1935.

2. Section Eight of the Clayton Act

Section eight of the Clayton Act prohibits an individual from concurrently serving as an officer or director for any two corporations of a certain size that are

96. *Id.*

97. *Charles T. Fisher, III*, 7 F.E.R.C. ¶ 61,290 at p. 61,623 n. 8 (1979); *Hatch, supra* note 2 at n. 16, & p. 61,127 (a non-exhaustive list includes; horizontal and vertical interlocks between companies in the liquor industry (27 U.S.C. 208(a)), horizontal and vertical interlocks between investment companies and investment advisors banks and securities underwriters (15 U.S.C. 80(a)(10)), horizontal interlocks between Common Carriers (47 U.S.C. § 212)).

98. 15 U.S.C. § 79(q)(c) (1935), repealed by Pub.L. 109-58, Title XII, § 1263, Aug. 8, 2005, 119 Stat. 974.

99. *Id.*; 18 C.F.R. § 45.2.

100. 18 C.F.R. § 45.2.

101. Barry P. Barbash, Dir., Remarks from speech given at the Tenth Annual Utility M&A Symposium at the Plaza Hotel, New York, New York: Whither PUHCA? (February 4, 1997) (<http://www.sec.gov/news/speech/speecharchive/1997/spch147.txt>).

engaged in whole or in part in commerce, and “by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.”¹⁰² However, FPA section 305 applies only to public utilities, while section eight of the Clayton Act can apply to any type of business. FPA section 305 applies to all public utilities regardless of size, while section eight of the Clayton Act only applies to corporations that have capital, surplus, and undivided profits aggregating more than 25 million dollars and annual sales of 2.53 million dollars as of January 29, 2008.¹⁰³ The Clayton Act is enforced by two governmental entities - the Federal Trade Commission and the United States Department of Justice - and can also be used as a private action in civil court. FPA section 305 is just enforced by the Commission, and the federal courts have in the past not allowed it as a private cause of action.¹⁰⁴

IV. COMMISSION GETS TOUGH

A chorus had built for over two decades, including from the SEC itself, that PUHCA 1935 had not only outlived its usefulness, but had prevented necessary utility infrastructure investment while failing to prevent some of the abuses it was created to foil, for example, Enron.¹⁰⁵ As a result, PUHCA 1935 was repealed effective February 8, 2006 by the Energy Policy Act of 2005 (“EPAct 2005”).¹⁰⁶

EPAct 2005 also transferred from the SEC to the Commission the regulatory responsibility over public utility holding companies, which resulted in the Commission administered Public Utility Holding Company Act 2005 (“PUHCA 2005”).¹⁰⁷ In contrast to the expansive regulatory nature of PUHCA 1935, PUHCA 2005’s scope is limited - it allows the Commission to access public utility holding companies’ books and records and approve certain mergers and transactions of public utilities and holding companies, and allows for waiver or exemption from the regulations.¹⁰⁸

The PUHCA 2005’s replacement of PUHCA 1935 transferred more regulatory authority of utilities from the SEC to the Commission, and with it added responsibility. FPA section 305’s parallel provisions in PUCHA 1935 no longer existed.¹⁰⁹ As a result, the Commission’s enforcement of FPA section 305 is the sole mechanism for safeguarding public and private interests against the hazards associated with utility interlocking directorates. With this in mind, it should come as no surprise that in 2004 and 2005, after decades of tolerating lax

102. 15 U.S.C. § 19(a)(1) (1993); *White v. Central Vermont Pub. Serv. Corp.*, 958 F. Supp. 174, 177 (D. Vt. 1996).

103. Notice, *Revised Jurisdictional Thresholds for Section 8 of the Clayton Act*, 73 Fed. Reg. 5,192-5,201 (2008); 15 U.S.C. § 19(a)(5) (provides an annual adjustment of the threshold amount).

104. *Supra* Section II., B., 3. Federal Court Deference to the FERC’s Application of FPA 305.

105. Cudahy, *supra* note 4; Melnyk & Lamb, *supra* note 11, at 56, 57 (citations omitted).

106. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

107. Public Utility Holding Company Act of 2005, 18 C.F.R. pt. 366 (2005).

108. *Id.*; *see also* Melnyk & Lamb, *supra* note 11, at 16-22.

109. *Hatch v. FERC*, *supra* note 7, at 828, n.5.

adherence to FPA section 305,¹¹⁰ the Commission recommitted itself to enforcing the interlocking directorate rules first, by strictly applying the letter of the interlocking directorate law, and second, by amending the rules to create greater compliance via greater penalties.¹¹¹

A. *Enforcing the Rules Already on the Books*

The Commission reaffirmed the importance of FPA section 305 requirements by making examples of three applicants, and issuing a “reminder” Order.¹¹²

1. Michael J. Chesser

Chesser served in interlocks between public utility Kansas City Power & Light (“KCP&L”) and electrical equipment supplier Itron for over two months before seeking Commission approval.¹¹³ Itron had sold relatively small amounts of equipment and services to KCP&L, but was competitively bidding for 2.6 million dollars of KCP&L work.¹¹⁴ Chesser was not seeking re-election to the KCP&L Board, and his term would have ended a couple of months after the Order was issued. The Commission noted that it typically granted applications between public utilities and electrical equipment suppliers that engaged in de minimis amounts of business, but denied Chesser’s application because of the mere possibility that KCP&L may award the million dollar competitively bid contract to Itron.¹¹⁵

2. Commission Order Reminding Public Utilities of FPA Section 305 Obligations

The Commission issued an order emphasizing the importance it placed on compliance with FPA section 305, writing that it would “not look favorably on untimely applications to hold interlocking positions,”¹¹⁶ and it “will exercise remedial authority, as appropriate, to persons that fail to obtain the prior approval.”¹¹⁷ The Commission also encouraged applicants to promptly seek clarification if applicants were confused about FPA section 305 obligations, and urged public utilities to exercise due diligence to ensure that officers or directors are in compliance with the requirements.¹¹⁸

110. *E.g. Thomas Madison McDaniel, Jr.*, 24 F.E.R.C. ¶ 61,026 at p. 61,106 (1983); *Walter F. Torrance, Jr.*, 29 F.E.R.C. ¶ 61,288 at p. 61,588 (1984).

111. 18 C.F.R. pt. 366 (2005).

112. *Michael J. Chesser*, 107 F.E.R.C. ¶ 61,021 (2004); *Douglas R. Oberhelman*, 109 F.E.R.C. ¶ 61,332 (2004); *Robert G. Schoenberger*, 110 F.E.R.C. ¶ 61,197 (2005); 107 F.E.R.C. ¶ 61,290 (2004).

113. 107 F.E.R.C. ¶ 61,021, at p 11.

114. *Id.* at P 10-11. 175,000 dollars in 2002, which was 0.6 percent of KCP&L’s non-fuel materials and supplies purchased during 2002, and 355,000 dollars from January through September 2003, which was 1.6 percent of KCP&L’s non-fuel materials and supplies during that nine-month time period. In addition, Itron was providing 30,000 dollars worth of consulting services and a 221,000 dollar software licensing agreement to KCP&L. *Id.*

115. *Id.* at P 8.

116. 107 F.E.R.C. ¶ 61,290, at p. 62,372.

117. 107 F.E.R.C. ¶ 61,290, at p. 62,372 (2004).

118. *Id.* at P 2.

3. Douglas R. Oberhelman

Oberhelman served in several interlocks between public utilities in the Ameran family and electrical equipment supplier, Caterpillar, for over a year before filing for Commission approval.¹¹⁹ The Commission denied the application because Oberhelman failed to provide enough information regarding the Ameren-Caterpillar business relationship.¹²⁰ In a concurring opinion, Commissioner Joseph T. Kelliher wrote that Oberhelman's application should have been denied simply because he served in the interlocks for over one year before applying for Commission approval.¹²¹ To add emphasis that times have changed, Kelliher continued, "[i]t does not matter that the Commission may have, on occasion, been inconsistent in its application of [FPA section 305] to late filers, or that the Commission's own regulations contain contrary language to the statute, because the plain language of the statute governs"¹²² that late filings are a violation.

4. Robert G. Schoenberger

Schoenberger served in interlocked positions between public utility and regional transmission organization, Southwest Power Pool, and public utility holding company, Unitil Corporation, for nearly two years before filing for the Commission's approval.¹²³ The Commission denied the application, and Commissioner Kelliher again explained his view that non-compliance with FPA section 305 was a "very serious matter,"¹²⁴ and noted that Schoenberger has also never sought permission to serve interlocking positions between the public utilities in the Unitil family.¹²⁵ Kelliher added that "while the Commission does not have civil penalty authority... Schoenberger's failure to obtain prior Commission approval for concurrently holding interlocking directorate positions is the type of violation for which the imposition of a penalty would be appropriate."¹²⁶

B. The 2005 FPA Section 305 Rules

Now that the Commission had everyone's attention, it issued Order Number 664.¹²⁷ In a press release accompanying the Order, Chairman Kelliher was quoted as saying, "[f]or some, meeting the Federal Power Act's provisions addressing interlocking corporate directorates has been a casual afterthought. With today's final rule, there should be no question that the Commission takes

119. *Douglas R. Oberhelman*, 109 F.E.R.C. ¶ 61,332 at P 3 (2004).

120. *Id.* at 62,585.

121. *Id.*

122. *Id.* at 62,586.

123. 110 F.E.R.C. ¶ 61,197.

124. *Id.* at 61,724.

125. *Robert G. Schoenberger*, 110 F.E.R.C. ¶ 61,197, at p. 61,724 (2005).

126. *Id.*

127. Order No. 664, *Commission Authorization to Hold Interlocking Positions*, F.E.R.C. STATS. & REGS. ¶ 31,194, 70 Fed. Reg. 55,717 (2005) (codified at 18 C.F.R. pt. 45); 112 F.E.R.C. ¶ 61,298 at P 2 (2005) (rehearing denied 114 F.E.R.C. ¶ 61,142 at P 1 (2006)).

compliance with section 305 of the Federal Power Act seriously.”¹²⁸ To no one’s surprise, the new rules emphasized the importance of receiving Commission approval before serving in the interlocks, and also eliminated waivers and required informational reports.¹²⁹

1. All Late-Filed Applications Will Be Denied - Period

Applications must be filed, and authorization granted, before a person may hold the interlocks, including interlocks between affiliated utilities.¹³⁰ Previous rules allowing applications to be filed thirty days after the individual began serving in the interlock were eliminated.¹³¹

2. Oath Obligation

Individuals serving in interlocks between affiliated public utilities would still receive automatic Commission authorization upon the filing of a report, but they first must “state or affirm” that they did not assume the duties of the interlocked positions until after filing the report. However, this would remain a one-time filing requirement so long as the individual held interlocking positions of the same type.¹³²

3. Defined Holding

“Holding” was clarified to mean, “acting as, serving as, voting as, or otherwise performing or assuming the duties and responsibilities of [the interlocking positions requiring Commission authorization].”¹³³

4. Eliminated Future Market Based Rate Waivers

Waiver of the full requirements of the interlocking directorate rules would no longer be provided in the Commission orders granting market based rate authority, under the argument that since power marketers are public utilities, it is not justified to treat them any differently than traditional public utilities.¹³⁴ Public utilities that already received a waiver from the full FPA section 305 requirements in its market based rate authority would not need to come into full compliance.¹³⁵

5. Temporary Safe Harbor Sixty Days After Filing Application

The Commission has sixty days to take action on a completed application, or it is deemed granted, but the Commission reserved the right to revoke the

128. F.E.R.C. News Release, Commission Finalizes Interlocking Directorate Rules, Emphasizes That Prior Authorization is Required, Docket No. RM05-6-000 (September 15, 2005) (<http://www.ferc.gov/news/news-releases/2005/2005-3/09-15-05-E-2.pdf>).

129. *Id.*

130. 18 C.F.R. § 45.3.

131. *Id.*

132. 18 C.F.R. § 45.9(c)(5).

133. Order No. 664, *supra* note 128.

134. *Commission Authorization to Hold Interlocking Positions*, 114 F.E.R.C. ¶ 61,142, at p. 61,479 (2006).

135. Order No. 664, *supra* note 128.

authorization or require proof that the interlock will not adversely affect public or private interests.¹³⁶

6. Grandfathering of Existing Interlocking Directorates

The new requirements would not apply to any individual who was already authorized to hold interlocking positions.¹³⁷

V. COMPLIANCE WITH NEW RULES & NEW COMMISSION FOCUS

The EAct 2005's 1 million dollar per day civil penalties do not apply to section 305 violations.¹³⁸ However, a due diligent review of both potential and current directors and officers is required to avoid embarrassment, resignations, and possible Commission sanctions. It is important to determine if a candidate will require Commission approval and receive the authorization so a board of directors is not prevented from making decisions due to vacant positions. A proper vetting will also provide cold comfort that some very qualified director candidates simply will not receive Commission approval because of their relationships or potential relationships.

A. General Advice

1. Determine Type of Business Employing the Candidate

As set forth in Section III of this article, the Commission treats the different types of interlocks differently. Regardless, FPA section 305 applies to most business organizations, including "corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing."¹³⁹ The Commission has not expressed heightened concern or applied additional scrutiny to interlocks involving foreign electrical equipment supply companies or securities firms.¹⁴⁰ Excluded from FPA section 305 jurisdiction are government instrumentalities like municipal utilities, rural electrical cooperatives, and "facilities used for the generation of electric energy... in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."¹⁴¹

136. 18 C.F.R. § 45.3.

137. Order No. 664, *supra* note 128.

138. 16 U.S.C. § 825(o-1) (2006). EAct 2005 civil penalties apply to violations of subchapter II. Interlocking directorate rules are in subchapter III. *Id.*

139. 18 C.F.R. § 45.2.

140. *Roger Agnelli*, 109 F.E.R.C. ¶ 62,060, at p. 64,207 (2004) (director of public utility Duke Energy and Switzerland based electric supply company ABB, Ltd.); *David Bing*, 84 F.E.R.C. ¶ 62,114, at p. 64,183 (1998) (director of public utility Detroit Edison and Standard Federal Bank which is indirectly, wholly-owned by Netherlands bank holding company).

141. 16 U.S.C. § 824(b)(1) (2006).

2. Title Not Determinative of FPA Section 305 Authority

The Commission has “observed that a senior executive or corporate officer has the ability to substantially influence company policies in such a manner as to jeopardize the best interests of the utility, its investors, and the consuming public.”¹⁴² FPA section 305’s accompanying regulations set forth a broad swath of regulatory titles: “any person elected or appointed to perform the duties or functions ordinarily performed by a president, vice president, secretary, treasurer, general manager, comptroller, chief purchasing agent, director or partner, or to perform any other similar executive duties or functions.”¹⁴³ The Commission has interpreted the list broad enough to encompass “variations in executive nomenclature used by different affected companies”¹⁴⁴ including “assistant secretary,” “second vice president,” “honorary director,” or “past chairman” so long as the position has the opportunity to significantly influence corporate decisions.¹⁴⁵

The Commission is generally more concerned about interlocked public utility officers than interlocked public utility directors because of the belief that officers have a greater potential to substantially influence public utility policy to the detriment of public and private interests.¹⁴⁶ As a result, the Commission is more likely to approve interlocked public utility directors with fewer conditions or restrictions, than applications involving public utility officers.¹⁴⁷ The Commission’s concern increases with the number of interlocks between two companies.¹⁴⁸

3. Plan Ahead

The Commission has up to sixty days to review a completed application. While a completed application is deemed approved if the Commission does not issue a decision within sixty days, the Commission can revoke that assumption with a subsequent denial. Therefore, it is important to allocate the proper time to vet the candidate and receive Commission approval before the individual begins to exercise their fiduciary duties as an officer or director. While not a recommended course of action, it should be noted that the Commission has recently, on occasion, approved interlocks of individuals who were elected to the

142. *Andrew Payne*, 85 F.E.R.C. ¶ 62,066, at p. 64,209-64,210 (1998); *Alger B. Chapman*, 84 F.E.R.C. ¶ 62,129, at p. 64,203 (1998).

143. 18 C.F.R. § 45.2(a).

144. *Walter F. Torrance, Jr.*, 29 F.E.R.C. ¶ 61,288, at p. 61,589 (1984).

145. *Id. Margaret M. Stapleton*, 27 F.E.R.C. ¶ 61,286, at p. 61,531 (1984); *Hatch*, *supra* note 2, at 61,291.

146. *Benjamin F. Montoya*, 75 F.E.R.C. ¶ 62,078, at p. 64,128 (1996).

147. *Kenneth J. Douglas*, 40 F.E.R.C. ¶ 62,174, at p. 63,282 (1987); *Margery Somers Foster*, 19 F.E.R.C. ¶ 61,146, at p. 61,261 (1982); *William T. Coleman, Jr.*, 21 F.E.R.C. ¶ 61,242, at p. 61,534 (1982).

148. *Id.*; 19 F.E.R.C. ¶ 61,146, at p. 61,261; *but see A. Thomas Young*, 80 F.E.R.C. ¶ 62,102, at p. 64,168 (1997); *Charles W. Mueller*, 79 F.E.R.C. ¶ 62,166, at p. 64,387 (1997) (Commission approved three interlocks between companies).

positions before applying for Commission approval.¹⁴⁹ The applicants' saving grace was that they had not assumed the duties of the interlock position.

B. Going Forward: Post-Approval Obligations and Rules

Important reporting obligations exist for individuals whose interlocks receive the Commission's approval.

1. Form 561

On or before April thirtieth of each year, the individual serving in the authorized interlock must file the Annual Report of Interlocking Positions ("Form 561"), which allows the Commission to monitor relationships not within the purview of its authority. The individual must report whether during the previous calendar year they served as a director, officer, partner, appointee, or representative of:

- Any bank, including investment bank, bank holding company, foreign bank or subsidiary, financial services or credit provider, mutual savings bank, or saving and loan association.¹⁵⁰
- Any insurance company.¹⁵¹
- Any fuel supplier, defined as any entity that produces or supplies coal, natural gas, oil, nuclear fuel, or any other fuel used by any public utility.¹⁵²
- Any electrical equipment supplier, even if it does not supply the interlocked public utility.¹⁵³
- Any company which during the previous three calendar years was one of the twenty largest purchasers of electric energy sold by the public utility.¹⁵⁴
- Any entity controlled by any of the above.¹⁵⁵

2. Reporting Obligations Related to Changes in Position

Re-election to an already authorized interlocking position does not require a re-filing, but the individual is responsible for reporting changes in position within thirty days, including new positions within the same public utility holding company structure.¹⁵⁶ When an individual no longer holds one of the authorized interlock positions, the authorization will automatically terminate without

149. *Fong Wan*, 112 F.E.R.C. ¶ 62,071, at p. 64,168 (2005); *Herbert H. Tate, Jr.*, 106 F.E.R.C. ¶ 62,156, at p. 64,260 (2004).

150. 18 CFR § 46 (1980).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. 18 C.F.R. § 45.5 (b).

Commission action.¹⁵⁷ If the individual does not continue to hold at least one interlock (two positions), all Commission authorizations will be terminated.¹⁵⁸

VI. FUTURE OF FPA SECTION 305

If recent practice is any indication of future performance, it appears that the Commission considers the seventy-five years young FPA section 305 still useful in regulating the vibrant and developing utility industry and capable of fulfilling the responsibilities previously in PUHCA 1935's interlocking directorate regulations. While every case has its own unique facts, the Commission has applied FPA section 305 in a way that can safeguard the public and private interest while encouraging an efficient and coordinated transmission system, acknowledging the realities systemic in multinational corporate conglomerates, and requiring registration from new players like public utility security firms as power marketers without prohibiting their participation.

A. Public Utility – Public Utility Interlocks

Throughout most of the Commission's application of FPA section 305, it has rarely allowed unaffiliated public utilities to interlock. Recently, as the Commission has promoted the benefits of ISOs and Regional Transmission Organizations (RTOs), which are considered public utilities,¹⁵⁹ the Commission has relaxed its general opposition, and began to allow interlocks between regional entities and other public utilities.

The Commission approved William L. Cyr's application¹⁶⁰ to serve as a director of Northern Maine Independent System Administrator, Inc. ("NMISA") and an officer of Maine Public Service Company ("MPSC") which is located within NMISA because NMISA is electrically isolated, not directly connected to any United States electric system, and has a stakeholder board. The Commission also approved Tim D. Brown's application¹⁶¹ to serve as a director of NMISA, executive director of MPSC, and director of transmission provider Maine Electric Power Company (located within NMISA) because it determined that the interlock would not adversely affect public or private interest.¹⁶²

However, the Commission will still deny public utility - ISO/RTO interlocks, as it did with James S. Pignatelli's application to serve as director of

157. *Id.*

158. *Id.*

159. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery Stranded Costs by Public Utilities and Transmitting Utilities*, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 31,036 (1996), 61 Fed. Reg. 21,540 (1996) (to be codified at C.F.R. pts. 35 and 385); Order No. 889, *Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct*, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 31,035 (1996), 61 Fed. Reg. 21,737 (1996) (to be codified at 18 C.F.R. pt. 37); Order No. 2000, *Regional Transmission Organizations*, [Regs. Preambles] F.E.R.C. STATS. & REGS. ¶ 31,089 (1999), 65 Fed. Reg. 809 (2000) (to be codified at 18 C.F.R. pt. 35); Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, [Regs. Preambles] F.E.R.C. STATS. & REGS. ¶ 31,241 (2007), 72 Fed. Reg. 12,266 (2007) (to be codified at 18 C.F.R. pts. 35, 37).

160. *William L. Cyr*, 106 F.E.R.C. ¶ 62,012 (2004).

161. *Tim D. Brown*, 121 F.E.R.C. ¶ 62,131 (2007).

162. *Id.*

ISO-New England (“ISO-NE”) while serving as Chairman, President and Chief Executive Officer of Tucson Electric Power Company.¹⁶³ The fact that a representative of the New England Conference of Public Utilities Commissioners served on the nominating committee that selected Pignatelli, ISO-NE customers endorsed Pignatelli, and Pignatelli had electric utility industry operating and management experience did not sway the Commission.¹⁶⁴ The Commission ruled that Pignatelli’s proposed interlock between two utilities thousands of miles apart with minimal investment was “just such relationships which [FPA section 305 sought] to curb,”¹⁶⁵ because he “would be “performing duties for potentially competing systems”¹⁶⁶ to the detriment of the public utilities and private interests.¹⁶⁷ In then Chairman Pat Wood’s dissent, he argued that since the electric utility business had changed since FPA section 305 became law, the Commission should have adopted a more flexible approach then relying on previous decisions and seventy year old legislative history.

While the Commission seems to be establishing its approval between ISO/RTOs and other public utilities on the same justification it used in authorizing affiliated public utilities, the subsidiary is already controlled by the parent, interlocks could enable the operation of the system more efficiently and economically, and the abuses that FPA section 305 was intended to preclude had never been alleged to result from the holding of these interlocks.¹⁶⁸ The Commission will not allow an ISO/RTO - public utility interlock if the entities are a great distance apart and are not affiliated.

B. Financial Institution – Public Utility Interlocks

1. Public Utility Securities Firms

Since the passage of the GLB Act, the number of applications involving public utilities and public utility securities firms has become virtually non-existent.¹⁶⁹ It is likely that the GLB Act exclusions allow individuals that would previously have needed to seek Commission approval to serve without applying, while individuals that would still need to receive Commission approval have decided that their employer could not abide the typical restrictions of an approved interlock, *e.g.*, not participate in the marketing or underwriting of the securities of the interlocked public utility.

163. *James S. Pignatelli*, 111 F.E.R.C. ¶ 61,496 (2005). Although not relevant to the discussion, the applicant was also director and president of holding company operating Tucson Electric’s assets. *Id.*

164. *Id.* at 63,109-110.

165. *Id.* at p. 63,111 (quoting *Willis C. Fitkin*, 7 F.E.R.C. ¶ 61,291, at p. 61,296 (1979)).

166. *Id.* (citing Order No. 446, *Automated Authorization for Holding Certain Positions That Require Commission Approval Under Section 305(b) of the Federal Power Act*, F.E.R.C. STATS. & REGS. ¶ 30,686, 51 Fed. Reg. 4900 (1986), 18 C.F.R. pt. 45).

167. *Id.* at 63,111.

168. 111 F.E.R.C. ¶ 61,496 (citing Order No. 446 *supra* note 85).

169. Carlisle, *supra* note 73.

2. Power Marketers

Power marketers, entities authorized to buy and re-sell electricity at market-based rates, are classified as public utilities.¹⁷⁰ However, several prominent financial institutions, including Bank of America,¹⁷¹ Credit Suisse,¹⁷² UBS,¹⁷³ and JP Morgan¹⁷⁴ received Commission authorization to be power marketers. Before the new FPA section 305 rules became effective in 2005,¹⁷⁵ power marketers regularly were waived from strict adherence to FPA section 305 requirements.¹⁷⁶ Financial institutions unsuccessfully, but vigorously, fought the waiver elimination in the 2005 rules.¹⁷⁷ Now, power marketers have to seek the Commission's approval for FPA section 305 regulated interlocks.¹⁷⁸

C. Electrical Equipment Supplier - Public Utility Interlocks

Electrical equipment supplier–public utility interlocks typically were less of a Commission concern than the two other types of interlocks, and two recent approvals indicate the continuance of this trend.

In 2007, the Commission approved Charles Laskey's application to serve in interlocking directorates between public utility, FirstEnergy Corporation, and electrical equipment supplier, Powerspan Corporation, even though FirstEnergy's parent purchased seventy-one percent of Powerspan's 2006 revenues (2.6 million dollars, although only .008 percent of FirstEnergy's parent's purchases) and owned 36.5 percent of Powerspan.¹⁷⁹ The Commission reasoned that since both are wholly, or partly, owned by the same holding company, the proposed interlock would not adversely affect public or private interest.¹⁸⁰ The Commission's logic is consistent, in that this partly-owned electrical equipment company is treated like a power marketer or public utility–public utility interlock. However, while the total risk to FirstEnergy ratepayers is minute, and FirstEnergy correctly filed for Commission approval, it could be argued that this lack of arm's length transactions was of the type that FPA section 305 was established to prevent.

In 2008, the Commission approved James J. Mulva's application to serve as president and CEO of public utility ConocoPhillips and director of electrical equipment supplier General Electric because of the de minimus business transactions between the entities.¹⁸¹ In a supplemental order, the Commission

170. COMMITTEE ON ELECTRIC UTILITY REGULATION, *Report of the Committee on Electric Utility Regulation*, 16 ENERGY L.J. 529 (1995).

171. *Bank of America*, 101 F.E.R.C. ¶ 61,098 (2002).

172. *Credit Suisse First Boston Energy, LCC*, 110 F.E.R.C. ¶ 61,055 (2005).

173. *ExxonMobil Chemical Co.*, 98 F.E.R.C. ¶ 61,225 (2002).

174. *Pacific Gas & Electric Co.*, 112 F.E.R.C. ¶ 61,332 (2005).

175. Order No. 664, *supra* note 128.

176. *Pignatelli*, *supra* note 164.

177. *Commission Authorizing to Hold Interlocking Positions*, 114 F.E.R.C. ¶ 61,142 (2006).

178. *John C. Lee Jr.*, 122 F.E.R.C. ¶ 62,190 (2008); *Jeffrey S. Edwards*, 120 F.E.R.C. ¶ 62,026 (2007). Both involved interlock between TEC Trading (owned and controlled by Old Dominion Electric Cooperative).

179. *Charles D. Laskey*, 119 F.E.R.C. ¶ 62,154 (2007).

180. *Id.* at p. 64,402.

181. *James J. Mulva*, 122 F.E.R.C. ¶ 62,012 (2008) (between .1 and .2 percent from 2005 – 2007 of ConocoPhillips' total purchases and .01 percent of General Electric's total revenues during the time period).

granted Mulva's request to waive ConocoPhillips' obligation to report indirect purchases so long as they remain de minimis.¹⁸² Again, the Commission provided valid logic for the decision; numerous suppliers sell electrical equipment manufactured by General Electric, ConocoPhillips does not sell power at cost-based rates, and ConocoPhillips' purchases of electrical equipment are unrelated to power marketing activities.¹⁸³ However, the rationale begs the question, if the information is difficult to gather, and does not need to be gathered, how will anyone determine that it is de minimis?

D. Commission Enforcement Policy

On November 16, 2007, the Commission held a conference on enforcement, focusing on its expanded jurisdiction and increased maximum civil penalties via EAct 2005. The conference also provided insight into the Commission's overall enforcement policy prospective, including FPA section 305 compliance.¹⁸⁴ In connection with the conference, the Commission staff issued a report of investigations, self-reports, settlements, and orders to show cause since EAct 2005's effective date - October 2005.¹⁸⁵ Of relevance to this article:

- The Commission received seventy-four self reports. Thirty-seven were closed without a monetary fine, five of which involved failure to file interlocking position/form 561.¹⁸⁶
- Enforcement staff closed or completed action on sixty-four investigations. Forty-seven were closed without sanction, including seven regarding interlocking directorates.¹⁸⁷
- The Commission completed 151 audits, twenty of which dealt with interlocking directorates.¹⁸⁸

In response to requests at the conference for future Commission guidance on enforcement that provides "a fuller picture as to how [the Commission's] investigative process works,"¹⁸⁹ the Commission issued a Revised Policy Statement on Enforcement ("Statement") on May 15, 2008¹⁹⁰ that superseded its 2005 Statement. According to Commission Chair Kelliher, the Statement shows the Commission's "dedication to strengthening the ability of those regulated entities to comply with [the Commission's] rules."¹⁹¹ The Statement included the Commission's considerations when pursuing an investigation and "sets forth

182. *James J. Mulva*, 122 F.E.R.C. ¶ 62,021 (2008).

183. *Id.*

184. F.E.R.C. OFFICE OF ENFORCEMENT, REPORT ON ENFORCEMENT DOCKET NO. AD01-13-000, 3 (2007) <http://www.ferc.gov/EventCalendar/Files/20071114084824-Staff-report-11-14-07%20.pdf>.

185. *Id.*

186. *Id.* at 14-15.

187. *Id.* at 21, 24.

188. *Id.* at 29-30.

189. *Revised Policy Statement on Enforcement*, 123 F.E.R.C. ¶ 61,156 (2008).

190. *Id.*

191. Press Release, F.E.R.C., F.E.R.C. Acts to Strengthen Enforcement Program (May 15, 2008) (<http://www.ferc.gov/news/news-releases/2008/2008-2/05-15-08-M-1.asp>).

in detail the factors [it] consider[s] in determining whether, and how much of, a penalty is appropriate.”¹⁹² In the Statement, the Commission commits to issuing a statistical report summarizing enforcement activities by September of each year, and reemphasized its commitment to prosecutorial discretion and mitigating penalties when faced with good-faith first time self reports and cooperation with the investigation.¹⁹³

VII. CONCLUSION

The changes that have occurred in the electric utility industry since the FPA became law in 1935 could hardly be predicted. Electric utilities have evolved from Edison and Insull’s isolated basement powerhouses, to vertically integrated utilities, to participants in the competitive market. Corporations have grown as well from local concerns into international conglomerates. FPA section 305 has evolved along with the industry it was created to safeguard. Sometimes as a result of Commission action, sometimes as a result of Congressional encouragement, FPA section 305 has become less of a prohibition, and more of an information gathering and compliance tool. Now, with the repeal of PUHCA 1935, the Commission is now chief federal regulator of the utility industry. FPA section 305, unlike PUHCA 1935, is still a viable part of the regulatory safety net to protect public and private interests from the potential of harm that can be caused by certain utility interlocks.

In honor of the 2008 Olympics being held in China, it is apropos to use the Chinese proverb and curse “may you live in interesting times” to describe the current state of the utility industry. For example, some utilities are accumulating nuclear power plants throughout the United States.¹⁹⁴ Stand alone transmission companies are becoming more prevalent.¹⁹⁵ Joint ventures are being formed to build an interstate transmission superhighway.¹⁹⁶ The Commission has shown support of open access to transmission, utility ownership of non-utility businesses, and investment outside of home service area. It remains to be seen whether the Commission’s application of FPA section 305 will encourage utilities to take advantage of economic opportunities in the evolving environment, and if the result will be overall lower costs, or increase in consumer choice for green power. While the Commission’s recommitted to FPA section 305 enforcement should cause caution when individuals wish to serve in certain interlocking directorates, it is comforting that the Commission is focused on information gathering and compliance, not on punishment.

192. *Id.*

193. *Id.*

194. From 1999 –2007, Entergy has purchased 5 nuclear power plants, FPL has purchased 3, and Dominion has purchased 2. NUCLEAR ENERGY INSTITUTE, U.S. NUCLEAR PLANT SALES (2007), nei.org/filefolder/US_Nuclear_Plant_Sales_1.xls; ENERGY INFORMATION ADMINISTRATION, STATUS OF POTENTIAL NEW COM. NUCLEAR REACTORS IN THE UNITED STATES (2008), eia.doe.gov/cneaf/nuclear/page/nuc_reactors/reactorcom.html#table1ref.

195. American Transmission Company, <http://www.atllc.com> (last visited Aug. 26, 2008); National Grid, <http://nationalgridus.com> (last visited Aug. 26, 2008); ITCTransmission, <http://www.itctransco.com> (last visited Aug. 26, 2008).

196. AEP AND ALLEGHENY ENERGY, INC. AEP INTERSTATE PROJECT (I-765) (2007), <http://www.aep.com/about/i765project/default.aspx>.