FERC Proposes to Tighten its Interlocking Directorates Regulations

On March 25, 2005, the Federal Energy Regulatory Commission (“FERC”) issued a Notice of Proposed Rulemaking proposing to amend its regulations regarding Interlocking Directorates, i.e. the ability of a person to be an officer or director of a public utility and an officer or director of certain other entities. If adopted, this will impact utility executives, as well as executives of, among others, financial institutions and securities firms serving or desiring to serve as officers or directors of a public utility.

Section 305 of the Federal Power Act (“FPA”) states that it is unlawful for any person to hold the following positions:

1. Officer or director of more than one public utility;
2. Officer or director of a public utility and of 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; or
3. Officer or director of a public utility and of any company supplying electrical equipment to a public utility.

To the extent a person intends to hold or is appointed to interlocking positions as identified in the FPA, Part 45 of FERC’s regulations require such person to file an application with FERC requesting authorization to hold the interlocking positions.

The FERC’s NOPR proposes to amend Part 45 of its regulations to:

- Require individuals to file applications for authorizations to hold interlocking positions, and to obtain approval from FERC, before an individual may hold an otherwise prohibited interlocking position.

- Implement a policy that late-filed applications for authorization will be denied.
  - The current regulation requires individuals to file an application for approval within 30 days of election or appointment to a qualifying position, and disfavors late applications.

- Clarify its regulations regarding automatic authorization under 18 CFR Part 45.9.
  - The current regulation provides that, in certain circumstances where an officer or director is already authorized to hold different positions where the interlock involves affiliated public utilities, the officer or director may apply for “automatic authorization.” Such authorization requires only an informational report containing the name, business address of the individual seeking authorization, the names of any other entities that the individual serves as an officer or director of and a brief description of the positions held, and an explanation of the corporate relationship between or among the involved public utilities.
  - FERC proposes to amend its regulation to require the party seeking authorization to state the date upon which they assumed the positions for which they seek automatic authorization.
  - Untimely requests for automatic authorization will not be granted.
• Clarify its regulations regarding abbreviated filings pursuant to Commission orders granting market-based rates for certain public utilities.

• Current FERC practice is to “lessen” the filing requirement in orders granting market-based rate authorization, by permitting an “abbreviated filing,” which consists of the applicant’s full name, business address, and all jurisdictional interlocks, identifying the affected companies and positions held by that person.

• FERC proposes to amend its regulations to delete the abbreviated filing option in orders granting market-based rate authorization. Accordingly, FERC proposes to require any officer or director of a public utility with authority to charge market-based rates to comply with the full requirements of Part 45 and timely file any application for FERC authorization to hold interlocking positions.

FERC’s proposed amendments to Part 45 of its regulations did not come without warning. In June 2004, FERC reiterated the obligations of persons serving in interlocking positions, and stated that it would take remedial action with regard to violations of Section 305 of the FPA. In December 2004, FERC denied the belated application of an individual that had been concurrently serving on the boards of directors of unaffiliated public utilities. Similarly, in February 2005, FERC took exception to the belated application of an electrical equipment executive serving on the boards of several public utility companies. In both Oberhelman and Schoenberger, the individuals had been serving in the interlocking positions for more than a year before submission of their applications under Part 45 of FERC’s regulations.

Nevertheless, the proposed amendments to Part 45 will most likely be met with opposition from the electric industry, where many companies form numerous LLCs, each with their own officers and directors, for the sole purpose of holding specific generating facilities. In a company with many generating assets, it is common that the officers and directors of each of the different LLCs are the same. FERC’s proposal to require that the authorization to hold interlocking positions be obtained prior to assumption of the interlocking positions will not be popular, as many director and officer positions are not determined until after closing. In addition, many power marketers take advantage of the abbreviated filing requirements for their officers and directors who hold interlocking positions, and this option is proposed to be eliminated.

For more information about the issues raised in this alert, please contact one of the lawyers listed below. For more information on Venable’s Energy Group go to: http://www.venable.com/practice.cfm?practice_id=536

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3 Robert G. Schoenberger, 110 FERC ¶ 61,197 (2005). In a concurring statement, Commissioner Joseph T. Kelliher stated that, while FERC does not have civil penalty authority, Schoenberger’s failure to obtain prior FERC approval for concurrently holding interlocking directorate positions is the type of violation for which the imposition of a civil penalty might be appropriate.