

110 FERC ¶ 61,197
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Robert G. Schoenberger

Docket No. ID-4154-001

ORDER DENYING AUTHORIZATION TO HOLD INTERLOCKING POSITIONS

(Issued February 28, 2005)

1. On December 13, 2004, Robert G. Schoenberger filed an application pursuant to section 305(b) of the Federal Power Act (FPA)¹ for Commission authorization to hold the interlocking positions of Director of Southwest Power Pool (SPP) and President, Chairman of the Board, and Chief Executive Officer of Unitil Corporation (Unitil), Fitchburg Gas and Electric Light Company (FG&E) and Unitil Energy Systems, Inc. (UES). As discussed below, the Commission will deny the application. Doing so in this instance will promote the underlying purpose of section 305(b) by responding to the potential for adverse effects on public or private interests.

The Application

2. SPP has been authorized to be a Regional Transmission Organization (RTO), operating transmission facilities in all or part of eight states in the south-central United States.² Operating jurisdictional transmission facilities as an RTO makes an entity a public utility.³

3. Unitil is a public utility holding company with several subsidiaries, including two public utilities, UES and FG&E.

¹ 16 U.S.C. § 825d(b) (2000).

² *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 (2004), *order on reh'g*, 109 FERC ¶ 61,010 (2004).

³ *See* 16 U.S.C. § 201(b)(2)(e) (2000) (which defines a public utility as “any person who owns or operates” jurisdictional facilities). *See also PJM Interconnection*, 103 FERC ¶ 61,170 at P 17 (2003); *PJM Interconnection*, 105 FERC ¶ 61,294 at P 31 (2003).

4. Mr. Schoenberger became the Chairman of the Board and Chief Executive Officer of Unitil in 1997. He then became President of Unitil in 2003. He was elected to the Boards of Directors of FG&E and UES in 1998 and became President of both companies in 2003.⁴ Mr. Schoenberger was elected to the Board of Directors of SPP in 2003.

5. Notice of Mr. Schoenberger's application was published in the *Federal Register*,⁵ with interventions and protests due on or before January 12, 2005. None was filed.

Discussion

6. Section 305(b) of the Federal Power Act prohibits persons from concurrently holding positions as officer or director of a public utility and positions as officer or director of, among other companies, another public utility, unless the Commission authorizes the interlock upon a finding that neither public nor private interests will be adversely affected.

7. Upon review of Mr. Schoenberger's application, we cannot make such a finding and we will deny authorization.

8. In 1981, the Court of Appeals for the District of Columbia Circuit addressed section 305(b) and stated:

It will suffice to note that during the passage of the Public Utility Holding Company Act in 1935, Congress exhibited a relentless interest in, bordering on an obsession with, the evils of concentration of economic power in the hands of a few individuals. It recognized that the conflicts of interest stemming from the presence of the same few persons on boards of companies with intersecting interests generated subtle and difficult-to-prove failures in the arm's length bargaining process. Its overriding concern with eliminating the source of "evils result[ing] from an absence of arm's length bargaining" was expressed in the preamble to the Act which Congress explicitly referenced for guidance in interpreting all other provisions of the Act. The legislative history makes clear too that Congress intended the Commission to have the broadest authority to achieve its objective of ameliorating the perceived evils of

⁴ Insofar as Unitil, as distinct from its public utility subsidiaries, UES and FG&E, may not be a public utility, an interlock involving only Unitil would not be within the scope of section 305(b).

⁵ 69 Fed. Reg. 78,011 (2004).

interlocking corporate relationships in the utilities field. ⁶... The Act is prophylactic in nature; it allows the Commission to prevent, not merely remedy, abuses due to conflicts of interest. Thus, the Commission need not approve all applications for interlocks simply on the assurance, even if that assurance is backed by favorable history, that no such abuses will occur.⁷

9. The Commission, in turn, as early as 1940, explained that among the

“evils sought to be eliminated by the enactment of section 305(b)” were: (1) control over a large number and geographically widespread public utilities by a small group of individuals with perhaps a minimum of investment; (2) the evasion by means of common control of competition resulting in higher costs and poorer services to consumers; (3) the lack of arm’s length dealings between public utilities and organizations furnishing financial services or electrical equipment; (4) the employment of dummy directors designated solely for the purpose of executing the orders of those in control, and nominal directors who give little time and attention to the affairs of the companies; and (5) violations of laws, ethics, and good business practices by those holding such interlocking positions whereby such relationship is employed for their own benefit or profit, or for the benefit or profit of any other person or persons and to the detriment of the companies, their security holders or the public interest.⁸

10. Although section 305(b) is prophylactic in nature and prohibits the holding of these interlocks *ab initio*, Congress allowed the Commission latitude to permit otherwise proscribed interlocks upon a showing that neither public nor private interests will be adversely affected. Thus, the Commission’s regulations authorize interlocks between two or more public utilities, upon an informational filing, if the public utilities are part of the same public utility holding company system or, generally speaking, if the public utilities are affiliated (that is, one owns, wholly or in part, the other) and the “owned” public utility provides, as its primary business, transmission service to or electric power to the

⁶ *Hatch v. FERC*, 654 F. 2d 825, 832 n.14 (D.C. Cir. 1981) (Hatch).

⁷ *Id.* at 831-32.

⁸ *John Edward Aldred*, 2 FPC 247, 261 (1940) (Aldred); *Lelan F. Sillin, Jr.*, 33 FPC 1006, 1006-07 (1965); *Willis C. Fitkin*, 7 FERC ¶ 61,291 at 61,626-27 (1979); *George Fabian Brewer*, 15 FERC ¶ 61,020 at 61,036 (1981).

“owner” public utility.⁹ As to the former (public utility holding company system) interlocks, the Commission reasoned that a holding company by virtue of its control of the voting stock of its subsidiary public utilities already controls those utilities; that close federal and state regulation of holding companies and their subsidiary public utilities means that these interlocks would not impede regulation; that these interlocks could enable the holding company to control and operate its system more efficiently and economically; that case-specific approvals of these interlocks are not necessary to ensure full public disclosure of the interlocks; and that a review of the interlocks approved to that date indicated that the abuses that section 305(b) was intended to preclude had never been alleged to result from the holding of these interlocks.¹⁰ As to the latter (affiliated) interlocks, the Commission reasoned that none of the potential abuses appear to occur as a result of these interlocks. The Commission explained that the “owned” public utilities are essentially partnerships of “owner” public utilities with specific control arrangements in the initial agreements; that they were created for the purpose of taking advantage of economies of scale and sharing the risks of financing, constructing, and operating facilities for the joint benefit of the “owner” public utilities; and that, to that date, such interlocks had routinely been approved.¹¹

11. In contrast, the Commission historically has looked with disfavor on interlocks between two or more public utilities when the public utilities are not affiliated.¹² In *Fitkin*, the Commission explained that, as to interlocks between unaffiliated public utilities, “it is just such relationships which [section 305(b) of] the Federal Power Act seeks to curb.”¹³ The Commission further indicated that the holders of such interlocks could act in a manner which would be to the detriment of the public utilities and the public interest.¹⁴ In its order adopting automatic authorization for interlocks between affiliated public utilities, the Commission added that interlocks between unaffiliated public utilities would create potential conflicts of interest because the holders of such interlocks would be “performing duties for potentially competing systems.”¹⁵

⁹ 18 C.F.R. § 45.9 (2004); see also *Automatic Authorization for Holding Certain Positions that Require Commission Approval Under Section 305(b) of the Federal Power Act*, Order No. 446, FERC Stats. & Regs. ¶ 30,686 (1986) (*Automatic Authorization*).

¹⁰ *Id.* at 30,129-30.

¹¹ *Id.* at 30,131.

¹² *George A. Carlson*, 54 FPC 1211, 1212-13 (1975); *Willis C. Fitkin*, 7 FERC ¶ 61,291 at 61,626-27 (1979); see also *Automatic Authorization*, FERC Stats. & Regs. at 30,132.

¹³ *Willis C. Fitkin*, 7 FERC ¶ 61,291 at 61,626 (1979).

¹⁴ *Id.*

¹⁵ *Automatic Authorization*, FERC Stats. & Regs. at 30,132.

12. The Commission continues to believe that interlocks between unaffiliated utilities may result in competitive abuses. These competitive abuses may arise, for example, in competing to serve customers, in bidding for services, or in attracting new customers. By definition, unaffiliated utilities are just that, unaffiliated, and do not operate as a single coordinated electric system; the decisions of interlocked officers and directors may create just the kind of abuses envisioned by Congress in enacting section 305(b).¹⁶

13. Moreover, because the holder of an interlock between unaffiliated utilities would be participating in the management decisions of potentially competing utility systems, it does not appear possible to fashion effective, enforceable restrictions to limit that individual's participation in the business decisions of the two companies. Furthermore, restricting the participation of officers or directors in decisions involving competition for customers or services may undermine any benefit the utilities would otherwise receive from having that individual serve as an officer or a director on their respective boards. Consequently, authorization of an interlock between unaffiliated utilities with conditions is not an acceptable option.

14. Mr. Schoenberger concedes that the Commission generally has not granted authorization for interlocks between unaffiliated public utilities. However, he argues that his expertise in the field of electric transmission, generation planning and operation from his involvement with Unitil makes him an asset to SPP.

15. As noted above, section 305(b) is prophylactic in nature and is directed at precisely the kind of abuses that could arise if the same individual, regardless of whether he is well qualified, were to serve as an officer or to sit on the boards of directors of unaffiliated public utilities. Consistent with our discussion above, to eliminate any possibility that the abuses discussed above might occur, we shall deny Mr. Schoenberger's application for authorization to hold these interlocking positions.

¹⁶ *Hatch*, 654 F.2d at 831-32; *Aldred*, 2 FPC at 261.

Docket No. ID-4154-001

6

The Commission orders:

Robert G. Schoenberger's application for authorization to hold the interlocking positions of Director of SPP and President, Chairman of the Board, and Chief Executive Officer of Unitol, FG&E and UES is hereby denied.

By the Commission. Chairman Wood dissenting with a separate statement attached.
Commissioner Kelliher concurring with a separate statement
(S E A L) attached.

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Robert G. Schoenberger

Docket No. ID-4154-001

(Issued February 28, 2005)

WOOD, Chairman, *dissenting*:

I believe that pursuant to the test provided in section 305(b) of the Federal Power Act, neither public nor private interests would be adversely affected if Robert G. Schoenberger's application for an interlocking directorate is granted. Mr. Schoenberger has established that his relevant senior management expertise and experience would be an asset to SPP. In addition, he was chosen as a board member with complete independence from members and customers of SPP. I believe this Commission must be judicious in its application of this provision in order to ensure that Regional Transmission Organizations, which did not exist when section 305(b) was written, continue to be overseen by men and women with relevant experience. For this reason, I respectfully dissent.

Pat Wood III

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Robert G. Schoenberger

Docket No. ID-4154-001

(Issued February 28, 2005)

Joseph T. KELLIHER, Commissioner *concurring*:

As the order documents, Congress had "a relentless interest in, bordering on an obsession with, the evils of concentration of economic power in the hands of a few individuals"¹ because of the dangers to competition from interlocking company relationships. The U.S. Court of Appeals for the District of Columbia Circuit described section 305(b) as "prophylactic in nature."² In order for this Commission to apply section 305(b) in a prophylactic manner, the Commission has a duty to find late filers in violation of section 305(b).³

Mr. Schoenberger states in his December 13, 2004 application that he was "elected to the SPP Board of Directors in 2003"⁴ and "files this Application to allow [him] to continue to serve on the SPP Board"⁵ In fact, SPP's Minutes No. 96 of its October 27, 2004 Board of Directors/Members Committee Meeting show that Mr. Schoenberger actively participated at this meeting as an SPP Director.⁶ As stated in his application, Mr.

¹ *Hatch*, 654 F.2d at 831.

² *Id.* at 832.

³ It is immaterial that the Commission may have, on occasion, been inconsistent in its application of section 305(b) to late filers, or that the Commission's own regulations contain contrary language to the statute, because the plain language of the statute governs. As this Commission found in a June 22, 2004 order that reminded public utilities and their officers and directors of their obligations under section 305(b), we will not look favorably on untimely applications. *Federal Power Act Section 305(b) Obligations*, 107 FERC ¶ 61,290 (2004).

⁴ Schoenberger Application at 2.

⁵ *Id.* at 1.

⁶ See *Southwest Power Pool Board of Directors/Members Committee Meeting Minutes No. 96* (October 27, 2004) at <http://www.spp.org/Publications/BOD012505.pdf>.

Schoenberger became Chairman of the Board and Chief Executive Officer of Unitil, a public utility, in 1997 and was elected to the Boards of Directors of two affiliated public utilities in 1998 and served as President of the affiliated companies in 2003.⁷ Since the Commission granted SPP RTO status on October 1, 2004,⁸ there can be no doubt that Mr. Schoenberger concurrently held positions as officer of a public utility, Unitil, and a director of another public utility, SPP, without first obtaining Commission authorization.

I view non-compliance with statutory requirements to be a very serious matter. In addition to denying Mr. Schoenberger's application for interlocking directorate positions, I would also find him in violation of section 305(b) because he was a holder of interlocking directorate positions who did not seek prior Commission approval.⁹ Finally, while the Commission does not have civil penalty authority, I note that Mr. 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.

Joseph T. Kelliher

⁷ Schoenberger Application at 2-3.

⁸ *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,009 at P 1 (2004). Mr. Schoenberger must have been aware that SPP achieved RTO status because SPP's Minutes No. 96 of its October 27, 2004 Board of Directors/Members Committee Meeting indicate that SPP's President announced this fact with Mr. Schoenberger in attendance. See *Southwest Power Pool Board of Directors/Members Committee Meeting Minutes No. 96* (October 27, 2004) at <http://www.spp.org/Publications/BOD012505.pdf>.

⁹ It also appears that Mr. Schoenberger did not inform the Commission within 30 days of assuming the duties of his directorate positions of affiliated public utilities, as required under the Commission's regulations.