

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Douglas R. Oberhelman

Docket No. ID-3998-000

ORDER DENYING AUTHORIZATION TO HOLD INTERLOCKING POSITIONS

(Issued December 22, 2004)

1. On February 17, 2004, Douglas R. Oberhelman filed an application pursuant to section 305(b) of the Federal Power Act (FPA)¹ for Commission authorization to hold the interlocking positions of Group President of Caterpillar, Inc. (Caterpillar), Director of Union Electric Company (AmerenUE), Central Illinois Public Service Company (AmerenCIPS), Central Illinois Light Company (AmerenCILCO) and Ameren Energy Generating Company (AEG). As discussed below, the Commission will deny the application. This order is in the public interest because it enforces the clear requirements of section 305(b) of the FPA.

Application

2. AmerenUE, AmerenCIPS, AmerenCILCO, and AEG (Ameren Companies) are public utilities, as defined in section 201(e) of the FPA,² that own and operate electric generation, transmission and distribution facilities serving wholesale and retail electric customers in Illinois and Missouri. Caterpillar manufactures heavy equipment, diesel and natural gas engines, and industrial gas turbines. Caterpillar has supplied Ameren Companies with electrical equipment including power modules, turbines, and boilers. In 2000, Mr. Oberhelman states, Ameren Companies purchased from Caterpillar approximately \$22.34 million of electrical equipment, which is about 0.1 percent of Caterpillar's total sales (\$20.175 billion).³

¹ 16 U.S.C. § 825d(b) (2000).

² 16 U.S.C. § 824(e) (2000).

³ Mr. Oberhelman's application provided the Commission with numbers for purchases and sales between Ameren Companies and Caterpillar for 2000, but no numbers for 2001, 2002 or 2003. The application simply summarizes that "any other electrical equipment supplied by Caterpillar... has been *de minimis*."

3. Mr. Oberhelman serves as Caterpillar's Group President, overseeing Caterpillar's Asia-Pacific Division, global purchasing, and financial and legal services. Mr. Oberhelman was elected to the Boards of the Ameren Companies: AmerenUE effective April 22, 2003; AmerenCIPS effective April 22, 2003; AmerenCILCO effective May 20, 2003; and AEG effective May 27, 2003. After April 27, 2004, Mr. Oberhelman discontinued his services on the Boards of AmerenUE, AmerenCIPS, and AmerenCILCO. After May 27, 2004, he also discontinued his service on the Board of AEG.
4. Notice of Mr. Oberhelman's application was published in the *Federal Register*,⁴ with interventions and protests due on or before March 17, 2004. None was filed.

Discussion

5. Section 305(b) of the FPA prohibits persons from concurrently holding positions as officer or director of both a public utility and a company supplying electrical equipment to that public utility, unless the Commission authorizes the interlock upon a finding that neither public nor private interests will be adversely affected.
6. In examining Congress' intent in enacting section 305(b), the Commission has explained that "among the evils sought to be eliminated by the enactment of section 305(b)" was "the lack of arm's length dealings between public utilities and organizations furnishing financial services or electrical equipment."⁵ In this regard, the legislative history indicates that with respect to section 305(b) "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."⁶

⁴ 69 Fed. Reg. 11614 (2004).

⁵ *Paul H. Henson*, 51 FERC ¶ 61,104 at 61,231 (1990), citing *John Edward Aldred*, 2 FPC 247, 261 (1940)

⁶ *Hatch v. FERC*, 654 F.2d 825, 831 (D.C. Cir. 1981) (*Hatch*), citing, e.g., 79 Cong. Rec. 10379 (1935) (remarks of Representative Lea), 79 Cong. Rec. 8524 (1935) (remarks of Sen. Norris), and 15 U.S.C. § 79a(b)(2) (2000); see also *Paul H. Henson*, 51 FERC ¶ 61,104 at 61,230 n.5 (1990)(discussing this quotation).

7. The Commission has previously stated that, as a general principle, interlocking directorates involving a public utility and an electrical equipment supplier should not be permitted where the supplier is in a position to furnish an appreciable amount of the electrical equipment in any category purchased by a public utility.⁷

8. The Commission has conditionally granted several applications to hold interlocking positions between a public utility and an electrical equipment supplier based on a showing of a *de minimis* amount of business between them, both in reference to the electrical equipment supplier's overall sales and the public utility's overall purchases.⁸ However, the mere presence of *de minimis* sales by the electrical equipment supplier to the utility does not ensure that the applicant meets the required standard of showing that neither public nor private interests will be adversely affected and thus guarantee that the Commission will authorize the applicant's request to hold interlocking positions.⁹

9. The section 305(b) prohibition against interlocking positions is, as noted above, prophylactic in nature and designed to prevent abuse resulting from a conflict of interest.¹⁰ Specifically when dealing with an interlock between a public utility and an electrical equipment supplier, the Commission has explained that "any possible benefit to the two companies from having an individual serve both of them" has to be weighed against "the potential disadvantages to the public utility, its customers and others in the markets in which the utility and the supplier operate."¹¹

10. The Commission further notes that, in seeking authorization to hold interlocking positions, the applicant has the burden to justify the interlock and demonstrate that the interlock will not adversely affect public or private interests.¹²

⁷ *Lelan F. Sillin, Jr.*, 33 FPC 1006, 1007 (1965). The Commission also explained that section 305(b) is "directed to the possible future effect upon public or private interests and is not dependent upon the establishment that a person involved actually has operated in a manner inimical to the public interest." *Id.* In this regard, the D.C. Circuit has explained that the provision is "prophylactic in nature" and "allows the Commission to prevent, not merely remedy, abuses due to conflicts of interests." *Hatch*, 654 F.2d at 832.

⁸ *Dr. Gloria M. Shatto*, 34 FERC ¶ 61,303 at 61,558-59 (1986); *Walter B. Gerken*, 56 FERC ¶ 61,026 at 61,100 (1991).

⁹ *E.g.*, *Hatch*, 654 F.2d at 832 ("the Commission need not approve all applications for interlocks"); *accord George Fabian Brewer*, 15 FERC ¶ 61,020 at 61,036 (1981) ("the burden rests on the applicant").

¹⁰ *Hatch* 654 F.2d at 832.

¹¹ *Lelan F. Sillin, Jr.*, 33 FPC 1006, 1007 (1965).

¹² *George Fabian Brewer*, 15 FERC ¶ 61,020 at 61,036 (1981).

11. Here, Mr. Oberhelman has not met that burden. While the application for authorization provided, for 2000, the total sales made by Caterpillar and the percentage of Caterpillar's sales made to the Ameren Companies, the application did not specify what percentage of the Ameren Companies' purchases were made from Caterpillar. Furthermore, Mr. Oberhelman has not provided the Commission with any numbers for more recent years.¹³ Without this information, the Commission cannot adequately evaluate the business relationship between these two entities. As such, Mr. Oberhelman has not met his burden to justify the requested interlock.

12. Therefore, the Commission will deny Mr. Oberhelman's application for authorization to hold the interlocking positions of Group President of Caterpillar and Director of the Ameren Companies.

The Commission orders:

The application of Douglas R Oberhelman to hold the interlocking positions of Group President of Caterpillar and Director of the Ameren Companies is hereby denied.

By the Commission. Commissioner Kelliher concurring with a separate statement attached.

(S E A L)

Magalie R. Salas
Secretary

¹³ He also has not provided any indication of the likelihood or amount of any future sales from Caterpillar to the Ameren Companies.

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Joseph T. KELLIHER, Commissioner *concurring*:

I disagree with the basis for the Commission's denial of Douglas R. Oberhelman's application pursuant to FPA section 305(b) for authorization to hold interlocking directorate positions. The plain language of section 305(b) clearly states that "it shall be unlawful for any person to hold the position of officer or director of a public utility and the position of . . . officer or director of any company supplying electrical equipment to such public utility, unless the holding of such positions shall have been authorized by order of the Commission."¹ Since Mr. Oberhelman served as Caterpillar's (which has supplied electrical equipment to Ameren) Group President and at the same time served on the boards of several Ameren companies (all public utilities) without prior Commission approval, I believe that he was in violation of section 305(b).

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"² because of the dangers to competition from interlocking company relationships. As noted in the order, the U.S. Court of Appeals for the District of Columbia Circuit described section 305(b) to be "prophylactic in nature."³ It is hard to see how this Commission can apply section 305(b) in a prophylactic manner if it chooses to do so "after-the-fact." For these reasons, I believe that this Commission has a duty under the statute to find late filers in violation of section 305(b).

¹ 16 U.S.C. § 825d(b)(1) (2000).

² *Hatch*, 654 F.2d at 831.

³ *Id.* at 832.

It does not matter 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.⁴ Accordingly, I would deny Mr. Oberhelman's application because he was a holder of interlocking directorate positions who did not seek prior Commission approval.

Joseph T. Kelliher

⁴ *Federal Power Act Section 305(b) Obligations*, 107 FERC ¶ 61,290 (2004).