

145 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Fernando de Aguero

Docket No. ID-7249-000

ORDER DENYING AUTHORIZATION TO HOLD INTERLOCKING POSITIONS

(Issued December 11, 2013)

1. On October 11, 2013, Fernando de Aguero filed an application pursuant to section 305(b) of the Federal Power Act (FPA)¹ for Commission authorization to hold the interlocking positions of President of DES Wholesale, LLC d/b/a Diversified Energy Supply (DES Wholesale) and Chief Operating Officer (COO) of Mansfield Power and Gas, LLC (Mansfield Power). As discussed below, the Commission denies the application.

I. The Application

2. Mr. de Aguero is currently President of DES Wholesale. DES Wholesale is a public utility for purposes of FPA section 305(b) and is authorized to engage in the wholesale sale of electricity and related services at market-based rates.² Mr. de Aguero owns and controls 100 percent of DES Wholesale and is the sole officer of DES Wholesale.

3. Mr. de Aguero requests authorization to also hold the position of COO of Mansfield Power. Mansfield Power, a direct, wholly-owned subsidiary of Mansfield Energy Corp., is a public utility for purposes of FPA section 305(b). Mansfield Power is authorized to engage in the wholesale sale of energy, capacity, and ancillary services at market-based rates. Michael Mansfield owns 100 percent of the voting stock of Mansfield Energy Corp.

¹ 16 U.S.C. § 825d(b) (2012).

² DES Wholesale is a power marketer rather than a traditional public utility with a franchised service territory and a load-serving obligation.

4. According to Mr. de Agüero, the application should be granted because: (1) neither DES Wholesale nor Mansfield Power is a traditional public utility with a franchised service territory; (2) neither has captive customers; (3) neither owns or controls generation, transmission, or distribution facilities or inputs to electric power production; and (4) both are authorized by the Commission to make wholesale sales of electric energy at market-based rates.

II. Notice of Filing

5. Notice of Mr. de Agüero's application was published in the *Federal Register*, 78 Fed. Reg. 62,360 (2013), with interventions and protests due on or before November 1, 2013. None was filed.

III. Discussion

6. Upon review of Mr. de Agüero's application, we are not persuaded by the arguments in the application and therefore deny the requested authorization.

7. Section 305(b) of the FPA provides that "it shall be unlawful for any person to hold the position of officer or director of more than one public utility . . . unless the holding of such positions shall have been authorized by order of the Commission, upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby."³

8. In *Hatch v. FERC*, 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 of 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 interlocking corporate relationships in the utilities field. . . . The Act is prophylactic in nature; it

³ 16 U.S.C. § 825d(b) (2012).

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.⁴

9. Furthermore, we have previously explained that, among the “evils to be eliminated by the enactment of section 305(b),” are:

(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 order 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.⁵

10. Though section 305(b) is prophylactic in nature and thus prohibits interlocks *ab initio*, Congress allowed the Commission latitude to authorize 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 primary business of the “owned” public utility is to own or operate transmission or generating facilities to provide transmission service or electric power for sale to the “owner” public utility.⁶ The Commission has explained that, as to the latter (affiliated) interlocks, the “owned” public utilities are essentially partnerships of “owner” public utilities, and, furthermore, that the

⁴ *Hatch v. FERC*, 654 F.2d 825, 831-32 (D.C. Cir. 1981) (footnotes omitted).

⁵ *James S. Pignatelli*, 111 FERC ¶ 61,496, at P 12 (2005) (*Pignatelli*) (quoting *John Edward Aldred*, 2 FPC 247, 261 (1940) (*Aldred*)); *Robert G. Schoenberger*, 110 FERC ¶ 61,197, at P 9 (2005) (*Schoenberger*) (quoting *Aldred*, 2 FPC at 261).

⁶ *Pignatelli*, 111 FERC ¶ 61,496 at P 13; *Schoenberger*, 110 FERC ¶ 61,197 at P 10; *see also* 18 C.F.R. § 45.9(a) (2013).

“owned” public utilities were formed in order to take advantage of economies of scale and share the risks of financing, constructing, and operating facilities for the joint benefit of the “owner” public utilities.⁷ Thus, none of the potential abuses appear to occur as a result of these interlocks and so they are routinely approved.⁸

11. Conversely, the Commission regularly denies interlocks between two or more public utilities when the public utilities are not affiliated.⁹ In fact, because the holders of interlocks between unaffiliated utilities could act in a way that is adverse to the public utilities and the public interest, it is precisely these interlocks that section 305(b) of the FPA seeks to curtail.¹⁰ As the Commission noted in its order adopting automatic authorization for interlocks between certain public utilities, interlocks between unaffiliated utilities could produce conflicts of interest because the holders of such interlocks would be “performing duties for potentially competing systems.”¹¹ These abuses may arise in competing to serve customers, in bidding for services, or in attracting new customers.¹²

⁷ *Pignatelli*, 111 FERC ¶ 61,496 at P 13; *Schoenberger*, 110 FERC ¶ 61,197 at P 10.

⁸ *Pignatelli*, 111 FERC ¶ 61,496 at P 13; *Schoenberger*, 110 FERC ¶ 61,197 at P 10; *accord Paul H. Henson*, 51 FERC ¶ 61,104, at 61,231 (1990).

⁹ In this context, “affiliated” would mean where one company owns, wholly or in part, the other and the primary business of the “owned” public utility is to own or operate transmission service or electric power for sale to the “owner” public utility. 18 C.F.R. § 45.9(a)(2) (2013); *accord Pignatelli*, 111 FERC ¶ 61,496 at P 14; *Schoenberger*, 110 FERC ¶ 61,197 at P 11.

¹⁰ *Pignatelli*, 111 FERC ¶ 61,496 at P 14 (quoting *Willis C. Fitkin*, 7 FERC ¶ 61,291, at 61,626 (1979)); *Schoenberger*, 110 FERC ¶ 61,197 at P 11 (quoting *Fitkin*, 7 FERC ¶ 61,291 at 61,626).

¹¹ *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, at 30,132 (1986).

¹² *Pignatelli*, 111 FERC ¶ 61,496 at P 16; *Schoenberger*, 110 FERC ¶ 61,197 at P 12.

12. As section 305(b) is prophylactic in nature and aimed at precisely the kind of abuses that could arise if the same individual were to serve as an officer or to sit on the board of directors of unaffiliated public utilities,¹³ we shall deny Mr. de Aguero's application to hold these interlocking positions.

13. Finally, we note that, in support of his request for authorization to hold the position of President of DES Wholesale and COO of Mansfield Power, Mr. de Aguero contends that (1) neither DES Wholesale nor Mansfield Power is a traditional public utility with a franchised service territory; (2) neither has captive customers; (3) neither owns or controls generation, transmission, or distribution facilities or inputs to electric power production; and (4) both are authorized by the Commission to make wholesale sales of electric energy at market-based rates. In setting forth these factors as reasons why his application should be granted, Mr. de Aguero fails to identify any Commission precedent granting an application on this basis, and we are aware of no instance where the Commission has authorized such an interlock based on these factors.¹⁴ We are also not persuaded that such factors overcome the Commission's longstanding and well-documented concerns regarding interlocks among unaffiliated public utilities,¹⁵ particularly the concern that such interlocks could be detrimental to the arm's-length bargaining process, which would adversely affect competition and consumers. We note that this concern is especially salient here, where both companies are power marketers and/or have merchant generation operations with authorization to engage in the wholesale sale of electricity and related services at market-based rates, and thus would otherwise be expected to compete to serve customers, in bidding for services, or in attracting new customers. As such, we are also not persuaded by Mr. de Aguero's arguments to grant his application.

¹³ *See supra* note 8.

¹⁴ In fact, the Commission has recently denied an application for authorization to hold interlocking positions that raised the very same arguments. *See Mary Anne Brelinsky*, 144 FERC ¶ 61,065, at P 13 (2013).

¹⁵ *See supra* note 8.

The Commission orders:

Mr. de Aguero's application for authorization to hold the interlocking positions of President of DES Wholesale and COO of Mansfield Power is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.