

162 FERC ¶ 61,068
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Zac Perkins

Docket No. ID-8117-001

ORDER DENYING REHEARING

(Issued January 29, 2018)

1. As discussed below, we deny Mr. Perkins' request for rehearing of the April 27, 2017 letter order,¹ which denied Mr. Perkins' application filed pursuant to section 305(b) of the Federal Power Act (FPA)² for Commission authorization to hold the interlocking positions of Director of South Central MCN LLC (South Central MCN), and Director of Golden Spread Electric Cooperative, Inc. (Golden Spread).³

I. Background

2. Mr. Perkins states that Golden Spread is a public utility and a generation and transmission cooperative with 16 distribution cooperative members. Mr. Perkins states that he is a Director of Golden Spread by virtue of his being the Chief Executive Officer of one of Golden Spread's distribution cooperative members, Tri-County Electric Cooperative Inc. (Tri-County).⁴

3. Mr. Perkins also states that South Central MCN is a public utility, and also a transmission-only company that was formed to operate within the Southwest Power Pool,

¹ *Zac Perkins*, 159 FERC ¶ 62,097 (2017) (April Order). This letter order was issued pursuant to authority delegated to the Commission's staff. *See id.*; 18 C.F.R. § 375.307(a)(2)(iii) (2017).

² 16 U.S.C. § 825d(b) (2012).

³ Application of Zac Perkins for Authorization to Hold Interlocking Positions, Docket No. ID-8117-000 (Feb. 28, 2017) (Application).

⁴ Application at 3; Request for Rehearing of Zac Perkins, Docket No. ID-8117-001, at 1-2 (May 30, 2017) (Request for Rehearing).

Inc. (SPP). According to Mr. Perkins, South Central MCN has entered into a long-term agreement with Tri-County to jointly own and operate transmission assets within SPP. As part of that agreement, Tri-County is entitled to designate a person to serve as a Director of South Central MCN.⁵ In connection with that agreement, Mr. Perkins, a Director of Golden Spread, filed his Application, seeking authorization to also hold the position of Director of South Central MCN.

4. The Application was denied in a letter order, the April Order, that explained that the Commission generally disfavors interlocks between two or more unaffiliated public utilities, and that the reasons Mr. Perkins provided for justifying Commission authorization do not distinguish themselves from the corporate relationships that section 305(b) of the FPA was intended to curb and do not overcome the Commission's long-standing concerns regarding interlocks among unaffiliated entities.⁶

II. Rehearing Request

5. On May 30, 2017, Mr. Perkins filed a request for rehearing of the April Order. On rehearing, Mr. Perkins argues that the Commission failed to engage in reasoned decision-making by failing to fully articulate the basis for its denial of the Application. While the April Order stated that Mr. Perkins' arguments "do not distinguish themselves" from prior cases and "do not overcome the Commission's long-standing concerns," Mr. Perkins argues that the April Order did not articulate a satisfactory explanation as to why these statements are the appropriate finding, and did not substantively address the merits of the various arguments raised in the Application.⁷ On rehearing, Mr. Perkins argues that the Commission must either grant the Application or provide a well-reasoned explanation for its denial of the Application.

6. Mr. Perkins also argues that the Commission did not sufficiently consider the policy arguments raised by Mr. Perkins warranting approval of the Application.⁸ Mr. Perkins states that the April Order did not substantively address the arguments raised regarding South Central MCN's "unique business model of partnering" with municipal utilities, cooperative utilities, or joint action agencies (collectively, Public Power),⁹ or the significant policy goals related to transmission development and

⁵ *Id.* at 3.

⁶ April Order, 159 FERC at 64,199.

⁷ Request for Rehearing at 6.

⁸ *Id.* at 6-7.

⁹ *Id.* at 7.

Order No. 1000¹⁰ that are furthered by this model, by establishing what could be new interlocking directorate positions where a Public Power partner (or its affiliate) is jurisdictional.¹¹ Mr. Perkins further argues that the Commission did not address his explanation of how the potential interlocking directorate positions between Golden Spread and South Central MCN do not raise the type of concerns articulated by the Commission in previously restricting interlocking directorates, given that the two companies are not competitors but rather are essentially partners in a joint venture.¹²

7. Mr. Perkins asserts that, as he demonstrated in his Application, authorizing him to hold interlocking positions between Golden Spread and South Central MCN will bring clear and overriding benefits to the individual interests of both companies and the public interest being fostered by the Commission.¹³ In particular, Mr. Perkins argues that this type of appointment will help foster the Commission's goal of transmission development as espoused in Order No. 1000 and Order No. 2000,¹⁴ helping to bring Public Power entities to the transmission development table.¹⁵

8. According to Mr. Perkins, none of the harms that could arise from interlocking positions that have been previously enumerated by the Commission are present in this case.¹⁶ Mr. Perkins asserts that no interests, either public or private, will be adversely affected by his holding interlocking positions with Golden Spread and South Central

¹⁰ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

¹¹ Request for Rehearing at 7 (citing Application at 7-8).

¹² *Id.* (citing Application at 8-11).

¹³ *Id.* (citing *Hatch v. FERC*, 654 F.2d 825 (D.C. Cir. 1981) (*Hatch*)).

¹⁴ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

¹⁵ Request for Rehearing at 8-9.

¹⁶ *Id.* at 10 (citing *James S. Pignatelli*, 111 FERC ¶ 61,496, at P 12 (2005) (*Pignatelli*)).

MCN.¹⁷ Further, Mr. Perkins states that the Commission's primary concerns regarding interlocking positions with unaffiliated entities have centered on the potential for conflicts of interest and market manipulation, and that these concerns are not implicated in this case.¹⁸

III. Commission Determination

9. As discussed below, we deny Mr. Perkins' request for rehearing.

10. 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."¹⁹

11. In *Hatch v. FERC*, the Court of Appeals for the District of Columbia Circuit addressed section 305(b), and explained:

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 allows the Commission to prevent, not merely remedy, abuses due to conflicts of interest. Thus, the Commission need not approve all

¹⁷ *Id.* at 10-11.

¹⁸ *Id.* at 10-12.

¹⁹ 16 U.S.C. § 825d(b) (2012).

applications for interlocks simply on the assurance, even if that assurance is backed by favorable history, that no such abuses will occur.²⁰

12. Furthermore, the Commission has 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.²¹

13. Although 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.²² The Commission has explained that, as to affiliated interlocks, the “owned” public utilities are essentially partnerships of “owner” public utilities, and, furthermore, that the “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

²⁰ *Hatch*, 654 F.2d at 831-32 (footnotes omitted).

²¹ *Pignatelli*, 111 FERC ¶ 61,496 at P 12 (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).

²² *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) (2017).

“owner” public utilities.²³ Thus, none of the potential abuses appear to occur as a result of these interlocks and so they are routinely approved.²⁴

14. Conversely, the Commission regularly denies interlocks between two or more public utilities when the public utilities are not affiliated.²⁵ 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.²⁶ As the Commission has noted in granting authorization for interlocks between affiliated utilities, interlocks between unaffiliated utilities could produce conflicts of interest because the holders of such interlocks would be “performing duties for potentially competing systems.”²⁷ These abuses may arise in competing to serve customers, in bidding for services, or in attracting new customers.²⁸

15. Mr. Perkins argues that none of the concerns previously enumerated by the Commission, and described above, are present in his case.²⁹ As discussed above, section 305(b) is prophylactic in nature and aimed at preventing precisely the kind of abuses that could arise if the same individual were to serve as an officer of or to sit on the board of directors of unaffiliated public utilities; thus, section 305(b) bars such interlocks *ab initio* unless the Commission makes an affirmative determination to the

²³ *Pignatelli*, 111 FERC ¶ 61,496 at P 13; *Schoenberger*, 110 FERC ¶ 61,197 at P 10.

²⁴ *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).

²⁵ 18 C.F.R. § 45.9(a)(2) (2017); *accord Pignatelli*, 111 FERC ¶ 61,496 at P 14; *Schoenberger*, 110 FERC ¶ 61,197 at P 11.

²⁶ *Pignatelli*, 111 FERC ¶ 61,496 at P 14 (quoting *Willis C. Fitkin*, 7 FERC at 61,626 (1979) (*Fitkin*)); *Schoenberger*, 110 FERC ¶ 61,197 at P 11 (quoting *Fitkin*, 7 FERC at 61,626).

²⁷ *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).

²⁸ *See Pignatelli*, 111 FERC ¶ 61,496 at P 16; *Schoenberger*, 110 FERC ¶ 61,197 at P 12.

²⁹ Request for Rehearing at 10 (citing *Pignatelli*, 111 FERC ¶ 61,496 at P 12).

contrary.³⁰ Further, the Commission has previously stated that it “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.”³¹

16. We disagree with Mr. Perkins’ arguments that none of the concerns previously enumerated by the Commission are present in his case. Specifically, we disagree with Mr. Perkins’ assertion that his positions will not convey control over a large number and geographically widespread utilities,³² as Tri-County, Golden Spread, and South Central MCN operate in large portions of Oklahoma and Texas, as well as southwestern Kansas and parts of Colorado and New Mexico.³³ We also disagree with Mr. Perkins’ assertion that the proposed interlocking positions will not reduce competition since, according to Mr. Perkins, Tri-County, Golden Spread, and South Central MCN are not competing systems,³⁴ because the companies could well be in competition with each other at a future time. Indeed, in his Application, Mr. Perkins acknowledged that Golden Spread and South Central MCN are “located in approximately the same geographic area,³⁵ and that Golden Spread is a generation and transmission cooperative while South Central MCN’s focus is transmission development.³⁶ Therefore, we deny rehearing of the April Order.

17. Finally, we note that, in support of his request for authorization to hold the position of Director of South Central MCN while remaining Director of Golden Spread, Mr. Perkins contends that the Commission should have considered South Central MCN’s unique business model because this business model, and allowing Mr. Perkins to serve as a director of both South Central MCN and Golden Spread, will further Commission

³⁰ *Pignatelli*, 111 FERC ¶ 61,496 at P 13; *Schoenberger*, 110 FERC ¶ 61,197 at P 10; *accord Paul H. Henson*, 51 FERC at 61,231.

³¹ *Hatch*, 654 F.2d 825 at 831-32 (footnotes omitted). Thus, Mr. Perkins’ representation that he “will not employ either position to the detriment of either company” is not compelling, let alone dispositive. *See* Request for Rehearing at 11.

³² Request for Rehearing at 10.

³³ *Id.* at 12.

³⁴ *Id.* at 10-11.

³⁵ Application at 9; Request for Rehearing at 10.

³⁶ Application at 3-4. On rehearing, Mr. Perkins acknowledges that Golden Spread and South Central MCN both hold transmission facilities. Request for Rehearing at 11-12.

policy goals related to transmission development and Order No. 1000.³⁷ According to Mr. Perkins, this arrangement and its effect on those policy goals amount to “clear, overriding benefits” arising from Mr. Perkins’ interlocking positions.³⁸ However, at the outset we note that South Central MCN’s choice to adopt its particular “unique business model of partnering with [P]ublic [P]ower”³⁹ to develop transmission in the SPP region (and elsewhere) does not dictate that Mr. Perkins must be allowed to hold the requested interlocking directorates.⁴⁰ Likewise, whatever merit there may be generally to South Central’s approach to transmission development through co-development agreements with Public Power, that approach to transmission development (and any benefits that may, in turn, flow from that approach) do not dictate that Mr. Perkins is entitled to hold the requested interlocking directorates. Moreover, in setting forth his arguments for why the Application should have been granted, Mr. Perkins 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. We are also not persuaded that such factors overcome the Commission’s longstanding and well-documented concerns – reflecting, in turn, Congress’s concerns as spelled out in the FPA – regarding interlocks among unaffiliated public utilities, particularly the concern that such interlocks could be detrimental to, among other concerns as described above, the arm’s-length bargaining process, which would adversely affect competition and consumers.⁴¹

³⁷ Request for Rehearing at 7 (citing Application at 7-8).

³⁸ *Id.* at 7-8 (citing *Hatch*, 654 F.2d at 831).

³⁹ *Id.* at 7.

⁴⁰ We note that Mr. Perkins has not argued that South Central MCN’s “unique business model” requires that one person *must* serve as a director of both Golden Spread and South Central MCN. While Mr. Perkins also claims that South Central MCN’s business model grants Public Power a “seat at the table,” *see* Request for Rehearing at 8, we are not persuaded that Mr. Perkins’ holding otherwise proscribed interlocking directorates is essential for Public Power to participate in transmission development.

⁴¹ *Fernando de Agüero*, 145 FERC ¶ 61,207, at P 13 (2013); *Pignatelli*, 111 FERC ¶ 61,496 at P 13; *Schoenberger*, 110 FERC ¶ 61,197 at P 10; *accord Paul H. Henson*, 51 FERC at 61,231.

While Mr. Perkins describes Golden Spread as generation-focused and South Central MCN as a “Transco,” and thus not competing, *see* Request for Rehearing at 11-12, given that section 305(b) is prophylactic in nature, and focused on preventing, and not merely remedying after the fact, abuses due to the conflicts of interest that can

The Commission orders:

Mr. Perkins' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

arise from utility-utility interlocks, we are not persuaded that allowing interlocking directorates between unaffiliated utilities – here, a generation and transmission cooperative, *see* Application at 3; Request for Rehearing 11-12, and a Transco – would be consistent with section 305(b).