

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Michael J. Chesser

Docket No. ID-3966-001

ORDER DENYING AUTHORIZATION TO HOLD INTERLOCKING POSITIONS

(Issued April 14, 2004)

1. On December 30, 2003, Michael J. Chesser filed an application pursuant to section 305(b) of the Federal Power Act (FPA)¹ for Commission authorization to hold the interlocking positions of Chairman of the Board of Kansas City Power & Light (KCP&L), a public utility, and a Director of Itron, Inc. (Itron), a company which supplies electrical equipment to KCP&L. 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 effect on public or private interests.

The Application

2. KCP&L is a public utility, as defined in section 201(e) of the FPA,² that owns and operates electric generation, transmission and distribution facilities serving wholesale and retail electric customers in Kansas and Missouri. Itron manufactures and supplies electrical equipment, as defined in 18 C.F.R. § 46.2(f) (2003), such as meter reading-related equipment and software to KCP&L.

3. Mr. Chesser serves as the Chairman of the Board of KCP&L.³ He was elected/appointed to this position on October 1, 2003. Mr. Chesser was appointed a Director of Itron by its Board of Directors in August 1999 and was subsequently re-elected by the shareholders in 2000 and 2001. The application states that Mr. Chesser's

¹ 16 U.S.C. § 825d(b) (2000).

² 16 U.S.C. § 824(e) (2000).

³ Mr. Chesser also serves as Chairman of the Board and Chief Executive Officer (CEO) of Great Plains Energy Incorporated (GPE), a registered public utility holding company. KCP&L is a wholly-owned direct subsidiary of GPE. Mr. Chesser also serves as a Management Committee representative for Strategic Energy, LLC, which has a corporate relationship with KCP&L and is a subsidiary of GPE.

current term as Director of Itron expires in 2004 and that shareholders will elect his successor at the annual shareholders' meeting in May 2004. Mr. Chesser's application indicates that he seeks authorization to hold these interlocking positions until Itron's annual shareholders' meeting in May 2004.

4. Notice of Mr. Chesser's application was published in the Federal Register,⁴ with interventions and protests due on or before January 20, 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. (Because Itron supplies electrical equipment to KCP&L, a public utility, the requested interlock falls within section 305(b).)

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. 2346 (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) *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 suppliers' overall sales and the public utility's overall purchases.⁸ However, the mere presence of *de minimis* purchases by the utility from the electrical equipment supplier 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. In this case, the applicant is a member of the senior management of the public utility; Mr. Chesser serves as the Chairman of the Board of KCP&L. He wishes to continue to serve, until May 2004, as a Director of Itron.

10. Itron supplied KCP&L with meter reading-related equipment and related services and software worth approximately \$175,000 in 2002 (0.6% of KCP&L's non-fuel materials and supplies purchased during 2002) and \$355,000 from January through September 2003 (1.6% of KCP&L's non-fuel materials and supplies during that nine-month time period). The application does not indicate, however, what percentage of Itron's sales were made to KCP&L.

11. Currently, KCP&L and Itron have agreements for Itron to provide consulting services for load research sample design at a cost of \$10,000 and for a distributed asset optimization and field service optimization initiative analysis at a cost of \$20,000. Since

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

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 v. FERC*, 654 F.2d 825, 832 (D.C. Cir. 1981) ("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").

December 2002, KCP&L and Itron have had an Equipment Purchase and Software License Agreement for equipment worth approximately \$221,000. KCP&L “anticipates awarding a competitively bid joint use pole attachment analysis services contract to Itron” which will total approximately \$200,000 over a three year term. Additionally, KCP&L has issued another competitive request for proposals regarding mobile workforce management systems and it expects Itron to submit a bid. The projected value of the contract is approximately \$930,000 in 2004 with a total value of \$2.6 million over the contract period of three years. The application indicates that KCP&L plans to award this contract in March 2004 and states that the successful bidder “may be Itron.”

12. While KCP&L’s purchases from Itron to date represent a comparatively small share of KCP&L’s total purchases,¹⁰ KCP&L is on the verge of contracting for \$2.6 million in mobile workforce management systems and Itron may be the successful bidder. This contract, if Itron wins the bid, would increase KCP&L’s purchases from Itron substantially and mean that they would no longer be *de minimis*.¹¹ Moreover, as described above, Mr. Chesser is a member of the senior management of KCP&L. As a consequence, we will deny Mr. Chesser’s request to hold interlocking positions between KCP&L and Itron.

13. 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.¹² 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.”¹³ Here, given the size of the contract that Itron may win from KCP&L, we cannot find that the benefit outweighs the disadvantages.

14. The Commission further notes that, in seeking authorization to hold interlocking positions, the burden rests with the applicant to justify the interlock and demonstrate that the interlock will not adversely affect public or private interests.¹⁴ We feel that, particularly given the size of the potential business between the two (as well as the senior management position that Mr. Chesser holds), Mr. Chesser has not met that burden.

¹⁰ Again, we do not know what percentage of Itron’s total sales were to KCP&L.

¹¹ *See supra* note 6.

¹² *Hatch v. FERC*, 654 F.2d 825, 832 (D.C. Cir. 1981).

¹³ *Lelan F. Sillin, Jr.*, 33 FPC 1006, 1007 (1965).

¹⁴ *George Fabian Brewer*, 15 FERC ¶ 61,020 at 61,036 (1981).

15. Therefore, the Commission will deny Mr. Chesser's application for authorization to hold the interlocking positions of Chairman of the Board of KCP&L and Director of Itron.

The Commission orders:

The application of Michael J. Chesser to hold the interlocking positions of Chairman of the Board of KCP&L and Director of Itron is hereby denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.