CENTER FOR ENVIRONMENTAL ACCOUNTABILITY

REPLY COMMENTS OF THE

CENTER FOR ENVIRONMENTAL ACCOUNTABILITY

Reply Comments on Federal Power Act

Section 203 Blanket Authorizations for Investment Companies

185 FERC ¶ 61,192 (December 19, 2023)

Docket No. AD24–6–000

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I. Introduction

The Center for Environmental Accountability ("CEA") submits this reply comment to express its support for reform of the Federal Energy Regulatory Commission's ("FERC" or "Commission") approach to granting and enforcing blanket authorizations under Section 203 of the Federal Power Act ("FPA") and to respond to the arguments made by asset managers and their allies defending the *status quo*.

Under Section 203 of the FPA, the Commission must find that the transfer of ownership of jurisdictional assets is consistent with the public interest.[1] In implementing this provision, the Commission explained that the leading harm to the public interest it was concerned about anticompetitive effects that would hurt ratepayers.[2] As a result, FERC reasonably concluded that "when a purchaser of a minority interest in a public utility lacks the ability to influence control over that acquired public utility, the Commission will not consider the purchase a consolidation of utility assets and therefore the acquisition will not adversely impact competition in any market."[3] And so whether or not a blanket authorization is consistent with the public interest turns principally on an asset manager's "ability to influence control."[4]

Though their animating concerns may differ, the initial comments of both a coalition of Republican attorneys general and of a group of blue state ratepayer advocates agree that the Commission should revise its policy.[5] So do the comments of the Transmission Access Policy Study Group ("TAPS"), whose membership is largely composed of transmission-dependent utilities that are either public power agencies or member owned electrical cooperatives.[6] And so too do the comments of Consumer's Research, the Manhattan Institute, and the American Enterprise Institute.[7]

To each of these commentors it is obvious that large investment companies like Blackrock, Vanguard, and State Street ("the Big Three") are using their enormous "passive" holdings to exert control over FERC jurisdictional public utilities. The Big Three combined own, on average, 25.8 percent of the 22 largest publicly traded utility companies, are the top three owners in more than

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[1] 16 U.S.C. § 824b.
[2] *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315 (2005).
[3] *BlackRock, Inc*., 179 FERC ¶ 61,049 at P 15 (2022).
[4] *Id.*
[5] Comments of Republican Attorneys General (Mar. 26, 2024) (eLibrary Accession No. 20240327-5039); Comments of State Ratepayer Advocates (Mar. 26, 2024) (eLibrary Accession No. 20240326-5226).
[6] Comments of Transmission Access Pol'y Study Grp (Mar. 26, 2024) ("TAPS Comments") (eLibrary Accession No. 20240326-5166).
[7] Comments of Consumers' Research (Mar. 26, 2024) (eLibrary Accession No. 20240327-5057); Comments of Manhattan Institute (Mar. 26, 2024) (eLibrary Accession No. 20240327-5023); Comments of American Enterprise Institute (Mar. 18, 2024) (eLibrary Accession No. 20240318-5153).

half, and are among the top six owners of every single one.[8] Combined, the Big Three own between 21 percent and 31.5 percent of each company examined and Vanguard alone owns an average of 11.5 percent.[9] With this ownership, these asset managers exert control in direct violation of the public interest requirements of Section 203 and in violation of whatever blanket authorizations they may have received. While the particular evidence of control or its anticompetitive effects varies from comment to comment, all agree that FERC must apply greater scrutiny in its blanket authorization process and take appropriate measures to make sure that such control does not continue.

In contrast, the comments defending the *status quo*, denying that the large asset managers exercise control over utilities, come from the asset managers themselves and trade associations that represent or are controlled by asset managers. In the latter category are comments from the American Council of Renewable Energy ("ACORE"), whose members include asset managers, the Edison Electric Institute ("EEI"), the trade association for the utilities whose largest shareholders are the large asset managers, and the Electric Power Supply Association ("EPSA"), whose members are entangled in a complicated web of ownership with asset managers.[10] Far from dispelling concerns over control, this alliance demonstrates it, showing just how intertwined the asset managers have become with FERC jurisdictional entities during the present blanket authorization regime.

Consider ACORE, a commenter representing the renewable energy industry. ACORE includes among its "Leadership Council Members" executives from BlackRock, State Street, and other asset managers and financial institutions.[11] A BlackRock executive is on ACORE's board of directors.[12] And BlackRock is among its "Executive Sponsors"—"the top echelon of ACORE supporters."[13] This is all entirely unsurprising: ACORE's self-declared mission is to "[u]nite finance, policy and technology to accelerate the transition to a renewable energy economy."[14] It *exists* to facilitate asset manager control of public utilities.

Unsurprisingly, the comments from these organizations do little to rebut the evidence of control presented in the record. Instead, they make weak burden shifting arguments, saying that it is the

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[8] Manhattan Institute Comments at 4.
[9] *Id.*
[10] Comments of the American Council on Renewable Energy (Mar. 26, 2024) ("ACORE Comments") (eLibrary Accession No. 20240326-5235); Comments of the Edison Electric Institute (Mar. 26, 2024) ("EEI Comments") (eLibrary Accession No. 20240326-5180); Comments of the Electric Power Supply Association (Mar. 25, 2024) ("EPSA Comments") (eLibrary Accession No. 20240325-5192).
[11] ACORE, *Leadership Council Members as of October 2022*, https://perma.cc/D86L-XAEF.
[12] *Board of Directors*, ACORE, https://perma.cc/PTZ7-BNLT (last visited Apr. 25, 2024).
[13] *Executive Sponsors*, ACORE, https://perma.cc/WR36-CFWH (last visited Apr. 25, 2024).
[14] *Mission & History*, ACORE, https://perma.cc/TR63-TRCY (last visited Apr. 25, 2024).

Commission that must prove that the asset manager's control is inconsistent with the public interest or that what looks like "control" is *actually* just advocacy for good corporate governance that would happen even without the asset manager's interference.[15] The current policy of insouciance is good, they explain, because it "facilitate[s] a lower carbon future."[16] In other words the asset managers are not exercising control and it's good that they are.

CEA submits these comments to rebut these arguments. The asset managers have publicly admitted that they control public utilities. Indeed, they are proud of how they have used this control to pressure utilities to adopt their preferred public policies. But that is not the asset managers' decision to make. It is the Commission's duty "to ensure that all jurisdictional transactions subject to section 203 are consistent with the public interest."[17] Common ownership by large asset managers—if not actively restrained—flattens the market, limits competition, and harms the public interest.

The Commission must, at a minimum, increase its scrutiny of blanket authorization applications and begin enforcing the anti-control commitments in the blanket authorizations that it has previously granted. The Commission should also institute a generic proceeding to make clear what practices constitute "control" and what steps investment companies must take to demonstrate that they are no longer exercising "control" over public utilities. These steps are necessary for FERC to fulfill its statutory obligation to only allow the acquisition of securities of public utilities if such transactions are consistent with the public interest.

II. The Asset Managers Freely Admit That They Control Public Utilities.

"It is an old saying: see the bear in his own den before you judge of his conditions."

– C.S. Lewis, *The Horse and His Boy*

The asset managers and their allies present a united front to FERC, renouncing any ambition on the part of the asset managers to exercise "control" over public utilities. They are gaslighting the

[15] ACORE Comments at 1 ("[T]he Commission offers no evidence that the current policy does not meet the public interest standard."); Comments of Capital Research and Management Company at 3 (Mar. 26, 2024) ("CRMC Comments") (eLibrary Accession No.20240327-5025) ("[A]lthough it speculates on theoretical concerns, the [Notice of Inquiry ("NOI")]does not set forth any evidence demonstrating that Blanket Authorizations have caused actual harm to public utilities or the ratepayers they serve."); EEI Comments at 4 ("[The Commission] neither presents concrete evidence that would support changes to the Commission's existing policy nor explains how or why the current policy is inadequate.").

[16] EEI Comments at 3; *see also id.* at 9 ("The Commission should not abandon this imperative at such a critical point in the energy transformation; rather, the Commission should focus on finding ways to support utilities in their efforts to finance cost-intensive transmission and clean generation infrastructure.").

[17] Order No. 669, 113 FERC ¶ 61,315 at P 4; *see* 16 U.S.C. § 824b(a)(4).

Commission.[18] In every other context, the asset managers are not shy about how they use their holdings to pursue their objectives including public policy goals.

In its comment on this docket, BlackRock insists that it "does not exercise control over the day-to-day management or operations of any public utility."[19] Similarly, Vanguard maintains that "no Vanguard Fund invests to control or influence the business decisions or strategies of the companies in which it invests."[20] Defending its members' largest shareholders, EEI adds that "large investment funds with blanket authorization … do not dictate or restrict utility operations or drive the implementation of particular public policy goals."[21]

But outside of Commission proceedings they sing a different tune.

Consider BlackRock. In a January 2020 letter to clients, BlackRock's CEO Larry Fink announced that BlackRock is pushing companies to disclose "plan[s] for operating under a scenario where the Paris Agreement's goal of limiting global warming … is fully realized."[22] In the same letter, Fink threatened that BlackRock would be "increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them."[23]

In July of that year, BlackRock made its specific plans clearer. The asset manager explained that it had identified 244 companies—including several public utilities—that had made insufficient progress on climate change and that face "material financial risks in the transition to a low-carbon economy."[24] It published this list to put the companies "on watch," giving them 12 to 18 months to meet climate-related goals before the asset manager took more active measures.[25] BlackRock freely advertised its "ability to influence control."[26]

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[18] *See What is Gaslighting?*, Nat'l Domestic Abuse Hotline, https://perma.cc/858M-9RE4 (last visited Apr. 25, 2024).
[19] Comments of BlackRock, Inc. at 3 (Mar. 26, 2024) (eLibrary Accession No. 20240326-5242).
[20] Comments of The Vanguard Group, Inc. at 5 (Mar. 22, 2024) (eLibrary Accession No. 20240322-5241).
[21] EEI Comments at 4–5.
[22] Larry Fink, Annual Letter to CEOs (2020) ("Fink 2020 CEO Letter"), *available at* https://perma.cc/3UF7-ECH9.
[23] *Id.*
[24] Emma Penrod, *BlackRock Censures Seven Utility Companies for Lack of Climate Action, Warns of Other Penalties*, Util. Dive (July 17, 2020), https://perma.cc/3YNV-9UBV.
[25] *Id.*
[26] *BlackRock, Inc.*, 179 FERC ¶ 61,049 at P 15.

So has Vanguard. Vanguard has explained that its "Investment Stewardship team has engaged with … utilities and mining companies significantly exposed to thermal coal."[27] Through this engagement, Vanguard has pushed public utilities to take a number of actions like "set targets in alignment with [the Paris Agreement and Glasgow Climate Pact] goals," to make disclosures ensuring board directors have "relevant skills, experiences, and education/training … across material climate-related topics," and to demand explanations of how utility boards "oversee[] the capital allocation process (capital expenditures and operating expenses) in the context of the applicable goals of the Paris Agreement and an expected net-zero transition."[28] In other words, Vanguard has made clear that it expects the public utilities whose assets it holds to shift their investments from generation assets that emit carbon dioxide to those that do not. These decisions about generation mix are at the very heart of how a utility operates.

Vanguard also expects the utilities' adherence to the Paris Agreement's policy goals to extend to "corporate political involvement and lobbying."[29] Vanguard expects this adherence would entail that utilities not push back on laws and regulations that would result in "alignment with the Paris Agreement goals," including presumably, proposed legislative or regulatory regimes that the utility might believe would harm its ability to compete or lead to costly rate hikes for its customers. The Paris Agreement may not be binding on the United States,[30] but Vanguard and BlackRock expect the companies whose securities they hold to bind their ratepayers to it.

This is control. While "control" is not defined in Section 203 or its regulations, parallel definitions make clear that this behavior is sufficient. Black's Law Dictionary defines "control" as "[t]he direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee."[31] The Commission's definition in its regulations under the parallel regulations of Section 205 are similar: control "means the direct or indirect authority, whether acting alone or in conjunction with others, to direct or cause to direct the management policies of an entity. A voting interest of 10 percent or more creates a rebuttable presumption of control."[32] Similarly, courts have explained that in the securities context, control means "the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[33]

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[27] John Galloway, *Vanguard's Expectations for Companies with Significant Coal Exposure*, Harv. L. Sch. F. on Corp. Governance (Jan. 7, 2022), https://perma.cc/3C9A-7ZS9.
[28] *Id.*
[29] *Id.*
[30] *See* U.S. Const. art. II, § 2, cl. 2 (requiring the concurrence of two thirds of the United States Senate for the President to make treaties).
[31] *Control*, Black's Law Dictionary (11th ed. 2019).
[32] 18 C.F.R. § 358.3(a)(3).
[33] *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1473 (2d Cir. 1996) (quoting 17 C.F.R. § 240.12b-2).

This is precisely what the large asset managers are doing. By using "direct" power (proxy votes) or "indirect power" (engagement or pressure campaigns "in conjunction with others") the asset managers have sought to "govern" the "policies" of large public utilities and to "oversee" their activity. This power has been exercised via voting shares and through other more indirect means. In some contexts, like clean energy goals, these efforts have been remarkably successful. That's why ACORE's defense that "[n]umerous investor-owned utilities have … established clean energy goals of their own"[34] rings hollow. That the utilities have enacted these goals while asset managers have pushed for them is evidence of control, not its absence. The record of this docket is filled with examples of how asset managers have consistently used their ownership to pressure utilities to adopt policies the asset managers prefer. Is it surprising that utilities have complied? Utilities' widespread adoption of emissions targets is evidence that the asset managers' efforts to influence control are *working*.

III. The Asset Managers' Control is Inconsistent with the Public Interest.

Given the overwhelming state of the evidence, it is not surprising that most of the commentors in the asset managers' coalition move quickly past the issue of whether or not asset managers control public utilities, and into arguments about how that control isn't actually so bad. Several of these commentors blithely assert that the current blanket authorization policy protects the public interest but offer no evidence to that effect.[35] Others go farther, suggesting that the burden of proof should be flipped and that it is the Commission that must prove that the current policy is inconsistent with the public interest before it can be reexamined,[36] that reconsidering the blanket authorization policies exceeds the Commission's statutory authority under Section 203,[37] or that

[34] ACORE Comments at 5.
[35] *See generally* Comments of the Asset Management Group of the Securities Industry and Financial Markets Association at 2–4 (Mar. 26, 2024) ("SIFMA AMG Comments") (eLibrary Accession No. 20240326-5072) ("The Commission's Regulation of Investment Advisor Practices Under the Section 203 Blanket Authorization Order Process is Robust and Comprehensive"); BlackRock Comments at 2 ("The Commission's blanket authorization policy remains consistent with the public interest. …").; *id.* at 3 & nn.9–10 (BlackRock's own blanket authorization deemed consistent with the public interest); CRMC Comments at 1 ("The robust review conducted by the Commission in connection with its approval and renewal of Blanket Authorizations, as well as the compliance and reporting conditions included in each such authorization, provide the Commission with visibility to investment company holdings and ensure that relevant investors will not control U.S. Traded Utilities."); EEI Comments at 2 ("The Commission's current section 203(a)(2) blanket authorization policy ensures that any underlying transactions are consistent with the public interest …."); EPSA Comments at 3 ("EPSA believes the FPA Section 203(a)(2) blanket authorization framework is generally working well"); Comments of Investment Company Institute at 2 (Mar. 26, 2024) ("ICI Comments") (eLibrary Accession No. 20240326-5183) ("[W]e urge the Commission not to change its policy as it has been successful in advancing the goal of encouraging investment in public utility companies.").
[36] *See supra* note 15.
[37] EPSA Comments at 6–9 ("The Commission's Reconsideration of Policies Regarding Large Investment Companies and Evaluation of Control Under FPA Section 203 Extends Beyond Its Statutory Authority").

the Commission is compelled by Section 203 to issue blanket authorizations unless it can prove public harm.[38]

Not so. The Commission was correct when, in Order No. 669, it explained that to comply with its statutory obligations FERC must "ensure that all jurisdictional transactions subject to section 203 are consistent with the public interest."[39] Thus, while commentors are correct that Section 203 *does* instruct that the Commission "shall approve" transactions, the Commission is only to do this after "it finds that the proposed transaction will be consistent with the public interest."[40] Under longstanding FPA case law, the "burden is on [the applicant] … of showing affirmatively that the acquisition or merger is consistent with the public interest."[41]

The above describes the public interest standard FERC is required to apply when approving a single transaction. In the context of a blanket authorization, the burden is necessarily heightened. That is because when the Commission issues it blanket authorization it is not finding that one individual transaction is consistent with the public interest, but that *all potential future transactions* by the company seeking the authorization will be in the public interest. In the case of the asset managers, this means that they must demonstrate not merely that they have not harmed the public interest, but that they have affirmatively taken steps that make it impossible for them to do so in the future.

Proving such a negative, even if the standard for "consistent with the public interest" is best construed as an "absence of harm," is not easy. As explained above, the Commission's primary concern in its public interest analysis is competition. FERC promotes the "orderly development of plentiful supplies of electricity … at reasonable prices"[42] through the protection of competition.[43] If asset managers have an "ability to influence control" over public utilities, this discourages that competition. And if transactions harm competition, then they are inconsistent with the public interest, unless the anti-competitive effects can be mitigated. In the Section 205 context, a "voting

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[38] SIFMA AMG Comments at 4–5 ("The Commission is Compelled by Law under Section 203 to Confer Blanket Authorizations on Eligible Applicants"); *id.* at 4 ("The statutory text that directs the Commission leaves no room for debate: consistency with the public interest, for Section 203 purposes, simply means the absence of harm."); *id.* at 5 ("The Commission should recognize that the language of FPA Section 203, on its face, requires the Commission to approve Section 203 applications, which include those seeking Blanket Authorization, if there is no actual harm to the public interest.").
[39] Order No. 669, 113 FERC ¶ 61,315 at P 4.
[40] 16 U.S.C. § 824b(a)(4).
[41] *Pac. Power & Light Co. v. Fed. Power Comm'n*, 111 F.2d 1014, 1017 (9th Cir. 1940); *see* also 18 C.F.R. § 358.3(a)(3) (explaining that under Section 205 "[a] voting interest of 10 percent or more creates a rebuttable presumption of control.").
[42] *Nat'l Ass'n for Advancement of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976).
[43] *See Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 758–59 (1973) (explaining that the Commission "clearly carries with it the responsibility to consider, in appropriate circumstances, the anti-competitive effects of regulated aspects of interstate utility operations.").

interest of 10 percent or more creates a rebuttable presumption of control."[44] In Section 203, holding "any security with a value in excess of $10,000,000"—the value which triggers Commission scrutiny—presumably creates the same presumption, and an applicant would be required to affirmatively show that control is impossible and thus that anticompetitive harms will not occur.[45]

The link between asset managers' horizontal ownership, anticompetitive effects, and the public interest standard are not speculative. The comments of the state ratepayer advocates explain the growing body of literature that suggests that broad horizontal ownership poses precisely the risk that the Commission's regulations aim to prevent:

> Academic research posits that such "horizontal ownership" of ostensibly competing companies can generate powerful anti-competitive incentives. The reason is straightforward: when an investor owns multiple or all competitors within a market, the reigning incentive is no longer to maximize profitability of any single firm, but rather to do so across the portfolio. The investor is incentivized to avoid actions that may reduce profits industry-wide, even if those actions may be competition-enhancing and economically rational from the perspective of the individual firm. In other words, horizontal ownership drives investors, and the firms they own, to act like monopolists—not competitors.[46]

In other words, the common ownership of public utilities by large asset managers has a flattening effect, subverting the competition that the Commission relies on to ensure utilities are acting in the public interest.

One obvious example is the one-size-fits-all approach asset managers have taken to climate policy. As detailed above, asset managers like BlackRock and Vanguard have systematically pressured public utility companies to achieve emissions "targets in alignment with [the Paris Agreement and Glasgow Climate Pact] goals" to minimize "material financial risks in the transition to a low-carbon economy."[47] It is arguable that the costs of such carbon abatement by the utilities might be exceeded by overall returns to BlackRock or Vanguard's portfolio. But it is not at all obvious that this would result in benefits for individual utilities or their ratepayers.

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[44] 18 C.F.R. § 358.3(a)(3).
[45] 16 U.S.C. § 824b.
[46] State Ratepayer Advocates Comments at 8.
[47] Galloway, *supra* note 27; Penrod, *supra* note 24.

Some utilities might reason that committing to these goals would not serve their interests because it might be difficult and expensive to build the necessary infrastructure to achieve the targeted emissions reductions. Aligning some utilities' emissions targets with the Paris Agreement would inevitably require an increase in wind and solar as a share of their resource mix. But wind and solar construction throughout the U.S. have frequently been stymied by objections over land use and other substantial issues.

Wind turbines require approximately three times more land than solar panels and one hundred times more land than natural gas or nuclear generation.[48] As a result, wind and solar construction has often been rejected by locals who would prefer to keep that land for something else. For example, the plan to build America's largest solar farm in Nevada was scrapped because it would deface the top of a local mesa.[49] And the town of Swanton, Vermont, voted 731 to 160 to reject a seven-turbine wind project that would have disrupted a skyline view.[50] Indeed, as of January 2024, more than 600 wind and solar projects have been rejected across the United States.[51]

Even if these new generation facilities can be built, they will also require the building of new high voltage transmission lines to connect them to the rest of the bulk electric system. If anything, these transmission projects are even harder to locate than the generation facilities themselves, as residents risk losing forests and agricultural land for projects that are billed as servicing distant cities. One recent example is the rejection of the $1 billion New England Clean Energy Connect by an overwhelming 59 percent of voters in Maine, which hamstrung Massachusetts's renewable importation plans.[52]

Some public utilities may conclude that it would not be in their best interest to set emissions targets because it could result in prohibitively expensive electric service. Because of the way solar and wind resources interact with restructured electricity markets, some studies show that regions with higher penetration of wind and solar energy have much higher wholesale electricity prices.[53] While the mechanisms are complicated some studies suggest that this is because the intermittency of wind and solar generation causes market clearing prices to be more vulnerable to the

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[48] John van Zalk & Paul Behrens, *The Spatial Extent of Renewable and Non-renewable Power Generation*, 123 Energy Pol'y 83, 86–87 (2018), https://doi.org/10.1016/j.enpol.2018.08.023.
[49] Gabriella Angeleti, *Plans Scrapped for Solar Project that would Disrupt Michael Heizer's Double Negative*, Art Newspaper (July 26, 2021), https://perma.cc/YNK2-3MBC.
[50] Robert Bryce, *The Windmills of Bernie's Mind*, Wall St. J. (Feb. 7, 2016), https://www.wsj.com/articles/the-windmills-of-bernies-mind-1454880639.
[51] *Renewable Rejection Database*, Robert Bryce, https://perma.cc/GS8K-JSR6 (accessed Jan. 26, 2024).
[52] David Iaconangelo, *$1B Transmission Smack Down May Upend Northeast Renewables,* E&E News (Nov. 12, 2021), https://subscriber.politicopro.com/article/eenews/2021/11/12/1b-transmission-smack-down-may-upend-northeast-renewables-282991.
[53] Severin Borenstein & James Bushnell, *The US Electricity Industry After 20 Years of Restructuring*, 7 Ann. Rev. Econ. 437 (2015), https://doi.org/10.1146/annurev-economics-080614-115630.

price of high-cost marginal resources, namely natural gas. One study calculated that from 2006 to 2016, consumers in these markets have seen an average price increase of 8.0 percent and annual loss of $11.7 billion.[54] As a result, in 2022, electricity prices in every region except Texas were higher than in 2021, and even Texas (ERCOT) saw prices on an upward trend after excluding the spike caused by Winter Storm Uri in February 2021.[55] Prices in PJM, ISO-NE, and MISO during Summer 2022 were more than double the previous year's prices.[56]

Some public utilities may conclude that moving their systems towards a high proportion of intermittent energy systems could have serious reliability consequences. Wind energy generates on average about 35 percent of its total nameplate capacity and solar less than 25 percent. This can be somewhat compensated for by an increase in total capacity, but because reduced generation for wind and solar is largely dependent on the weather, it tends to be correlated, like when the sun goes down or when weather patterns disrupt wind or solar power. That's why regions with increased penetrations of wind and solar have faced increasing concerns about grid reliability. The North American Electric Reliability Corporation ("NERC")'s Long-Term Risk Assessment for 2023–2027 found that most of the country is at elevated risk of blackouts, with the Midwest and California having a high-risk of adequacy shortfall during even normal peak conditions.[57] Even regions without high risks of adequacy shortfall could be undermined by factors including "climate, economic, regulatory, and policy drivers."[58]

In its comment, ACORE cites studies to argue that financial institutions "pursue investments in renewable energy for myriad reasons that are financially material" such as their "risk and return profiles."[59] For some FERC jurisdictional utilities this may be true. But for others it almost certainly is not. BlackRock, Vanguard, and other asset managers pushing utilities to achieve emission reductions make no such distinctions. Instead, they push a uniform policy whereby they pressure every utility to adopt the same goals and the same set of strategies that are not guaranteed to be the best fit for individual utilities.

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[54] Alexander MacKay & Ignacia Mercadal, *Deregulation, Market Power, and Prices: Evidence from the Electricity Sector* 24–25 (MIT Ctr. Energy & Env't Pol'y Rsch., Working Paper No. 2022-008, Apr. 2022), https://perma.cc/4XA9-QPJN.
[55] *Wholesale U.S. Electricity Prices Were Volatile in 2022*, Energy Info. Admin. (Jan. 10, 2023), https://perma.cc/A7E8-Z245.
[56] *Id.*
[57] NERC, *2022 Long-Term Reliability Assessment* (Dec. 2022), https://perma.cc/T8AJ-V6B7.
[58] NYISO, *2023–2032 Comprehensive Reliability Plan* 6, 48 (Nov. 28, 2023), https://perma.cc/G2RD-8F9S.
[59] ACORE Comments at 5.

Joshua Macey and Aneil Kovvali, in a recent article about the corporate governance of utilities, note that this sort of pressure—when spread horizontally across an industry—can harm the ability of a regulator to protect the public interest.[60] Their article refers to the influence of an "activist" investor, but the mechanism of action they posit precisely aligns with the active influence exercised by BlackRock, Vanguard, and others.[61] Kovvali and Macey explain that:

> An activist could … coordinate positions and pricing across the public utility companies in its portfolio. In principle, this type of coordination should be checked by the presence of regulators who set rates. But the regulators may rely on the conduct of other similarly-situated utilities when setting rates. If the utilities all take coordinated positions, regulators will lose the benefit of information required to set rates effectively.[62]

Though no one is suggesting asset managers are coordinating utility pricing, they are, by their own admission, coordinating the adoption of specific emissions targets. These uniform targets necessarily result in utilities adopting a more uniform approach to the issue than they would in the absence of this coordination. As a result, regulators like the Commission lack a counterfactual rate to compare this coordinated strategy with and are consequently less able to ensure rates are just and reasonable.

The political salience of emissions goals makes them the most obvious example of how asset managers influence control to the detriment of competition. But concerns over the anti-competitive effects of such common ownership is not limited, as ACORE would have it, to "sources broadly deriding investments in lower emission generation resources."[63] In this proceeding alone, a group of ratepayer advocates, an association of public power agencies, and a coalition of Republican attorneys general have all urged FERC to address the same issue. Additionally, both Commissioner Christie (R) and Commissioner Clements (D) have expressed their sympathy for the concerns Public Citizen—typically regarded as left of center advocacy group—raised about the absence of Commission scrutiny of the effects of horizontal control in BlackRock's most recent blanket authorization proceeding.[64] These concerns span the political spectrum and warrant the attention of the Commission.

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[60] Aneil Kovvali & Joshua C. Macey, *The Corporate Governance of Public Utilities*, 40 Yale J. on Reg. 569 (2023).
[61] *Id.* at 613.
[62] *Id.*
[63] ACORE Comments at 3.
[64] *BlackRock, Inc.*, 179 FERC ¶ 61,049 (Clements, Comm'r, concurring at PP 2–3); *id.* (Christie, Comm'r, concurring at PP 2–6).

The Commission must act to address the anticompetitive effects of broad horizontal shareholding to fulfill its obligations to protect the public interest. Section 203 imposes "an obligation … to consider antitrust policies" when considering whether a proposed transaction "satisfies [its] 'public interest' standard."[65] Thus, *pace* EPSA, the development of measures to scrutinize and mitigate the consequences would *not* contravene Section 203 but is required by it.[66]

At a minimum, the Commission's failure to directly address the issues raised here could render future blanket authorizations vulnerable to legal challenge. The Administrative Procedure Act ("APA") requires agencies to engage in "'reasoned decisionmaking.'"[67] For the "agency's decisionmaking to be rational, it must respond to significant points raised" before it. [68] An agency action that "entirely failed to consider an important aspect of the problem" will fail this requirement.[69] There is more than enough evidence in this docket to demonstrate that the anti-competitive effects of horizontal ownership are at least an "important aspect of the problem." The Commission will have to squarely address the arguments raised here in order for any future orders to survive basic APA review in the courts. Whatever the Commission decides to do, it cannot ignore the issue.

IV. The Commission Must Apply Greater Scrutiny to Section 203 Blanket Authorizations.

The evidence of control presented in this record and its anticompetitive consequences requires that the Commission take appropriate steps to determine the scope of this control and mitigate it. CEA recommends that the Commission take two actions to rectify the situation.

The Commission must more thoroughly scrutinize future applications and begin enforcing the anti-control commitments in the blanket authorizations it has previously granted.

The Commission's blanket authorizations are granted on the condition that their recipients "may not exercise control over the day-to-day management or operations of any U.S. Traded Utility whose voting securities are acquired pursuant to the Blanket Authorizations."[70] Up to this point, the Commission has taken companies at their word and has not looked beyond the averments

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[65] *Kan. Power & Light Co. v. Fed. Power Comm'n*, 554 F.2d 1178, 1184 (D.C. Cir. 1977).

[66] *See* EPSA Comments at 6–9 ("The Commission's Reconsideration of Policies Regarding Large Investment Companies and Evaluation of Control Under FPA Section 203 Extends Beyond Its Statutory Authority").

[67] *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

[68] *Allied Loc. & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000) (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977)).

[69] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

[70] *See, e.g.*, *BlackRock, Inc*., 179 FERC ¶ 61,049 at P 7.

contained in blanket authorization applications.[71] The Commission has admitted that it limits its analysis of the question of control to the "assurances" that the asset managers themselves have made.[72] This is clearly insufficient.

A greater level of scrutiny must be applied. In their joint statement on a Vanguard delegated order, Commissioners Danly and Christie explained that "[a]llowing asset managers to self-certify is not sufficient" for the Commission to protect the public interest.[73] The Commissioners were unable to bring that scrutiny to bear—Vanguard's most recent blanket authorization went into effect by operation of law—but their statement lays out a blueprint for higher scrutiny that the Commission should follow in future blanket authorization proceedings.[74]

First, the Commissioners should identify references that an applicant makes to its own internal policies, guidelines, and contractual arrangements that it argues prevents it "'from acquiring or holding securities with the effect or for the purpose of exercising control'"[75] and ask the applicant to produce such documents. This will help the Commission to ensure that these are more than mere paper guarantees and provide the Commission with a fuller understanding of the internal rules that govern an applicant.

Second, the Commissioners should ask the applicant to describe the interactions and communications between the applicant and the boards and management of public utilities about "the operation or retirement of generating or other assets, the future or planned purchase or divestiture of generating or other assets, or the development of integrated resource plans."[76] This information goes to the degree to which an applicant is actually controlling utilities and provides the information necessary for a more searching review.

Third, to better explore control, the Commission should hold hearings on applications for blanket authorizations as intervenors in past proceedings have urged.[77] An administrative law judge or

[71] *Id.* P 15. (Stating Commission determination is "[b]ased on Applicants' representations").
[72] *Id.* P 19 (Rejecting Public Citizen's concerns about control "because we find that Applicants have provided assurances sufficient to demonstrate that they will not be able to influence control over U.S. Traded Utilities").
[73] Joint Statement of James P. Danly, Comm'r, & Mark C. Christie, Comm'r, Regarding The Vanguard Group, Inc. et al., Docket No. EC19-57-002, at P 6 (May 9, 2023) (eLibrary Accession No. 20230509-4000).
[74] Joint Statement of James P. Danly, Comm'r, & Mark C. Christie, Comm'r, Regarding The Vanguard Group, Inc. et al., Docket No. EC19-57-001, at PP 7–9 (Aug. 11, 2022) (eLibrary Accession No. 20220811-4002).
[75] *Id.* P 10.
[76] *Id.* P 11 (Information for Reauthorization of the Existing Blanket Authorization Part I.C).
[77] Protest of Public Citizen, Inc., Docket No. EC16-77-002 (March 11, 2022) (eLibrary Accession No. 20220311-5268).

the Commission itself could gather evidence and build a record to apply the appropriate level of scrutiny to blanket authorization applications.[78]

Fourth, as a remedial measure, the Commission should initiate hearings on the blanket authorizations already in effect, to ensure that the more searching review advocated here is applied to the companies that already hold these public utilities.

The Commission should institute a generic proceeding to clarify what practices constitute "control."

Given its previous unwillingness or inability[79] to scrutinize the issue of control in individual proceedings, the Commission should pursue a generic proceeding to implement additional conditions in its blanket authorizations. There are two basic options the Commission could pursue.

The first option is to adopt the State Ratepayer Advocates' proposal that the asset managers "be required to put their shares in a drawer."[80] If they wish to be treated as passive investors, then the asset managers must actually be passive. The State Ratepayer Advocates suggest that this means that asset managers would not "engage in any interactions and communications with the utility or utility holding company" and would not "take any actions" with their utility stock except "holding it, selling it, or engaging in a specified list of exempt transactions."[81] To make this firewall effective, asset managers would also need to stop taking these actions indirectly. That would mean withdrawing from and ending participation in groups like Climate Action 100+ or the Net-Zero Asset Managers Initiative or ACORE.

A second option would be to permit asset managers to engage with public utilities but only on matters which do not affect rates or the performance of the bulk power system. In this way, asset managers would be permitted to exercise some influence over public utilities to the extent that influence did not touch things like rates, generation mix, transmission, or topics that directly influence those, like political engagement. This policing of the public interest would not eliminate all risk of anticompetitive effects,[82] but it would at least be consistent with the core of the "public interest" standard in the FPA. As the Supreme Court has explained, the "principal purpose of"

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[78] 16 U.S.C. § 824b(a)(4) ("After notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest ….").
[79] The delegated order in the Vanguard proceeding may be an indication that the Commission lacked a quorum due to recusals.
[80] State Ratepayer Advocates Comments at 22.
[81] *Id.*
[82] State Ratepayer Advocates Comments at 8.

the FPA "was to encourage the orderly development of plentiful supplies of electricity … at reasonable prices."[83]

The Commission should advance these measures in a notice of proposed rulemaking and solicit feedback on their merit and whether they would be sufficient to mitigate the concerns over the anticompetitive effects that the current blanket authorization policy creates.

V. Conclusion

FERC must take immediate action to revise its blanket authorization policy to eliminate investment companies' ability to control public utilities.

Marc Marie
President
Center for Environmental Accountability
marc@environmentalaccountability.org

[83] *Nat'l Ass'n for Advancement of Colored People*, 425 U.S. at 669–70.