174 FERC ¶ 61,213
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

NextEra Energy, Inc. Docket No. EL21-14-000
Evergy, Inc.
American Electric Power Company, Inc.
Exelon Corporation
Xcel Energy Services Inc.

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued March 18, 2021)

1. On October 30, 2020, NextEra Energy, Inc. (NextEra), American Electric Power Company, Inc., Evergy, Inc., Exelon Corporation, and Xcel Energy Services Inc. on behalf of Xcel Energy Inc. (Petitioners) filed a petition for declaratory order regarding affiliation under section 205 of the Federal Power Act (FPA)[1] of an institutional investor that has been granted blanket authorization under FPA section 203(a)(2)[2] and reporting requirements for entities with passive interests, two issues that they argue arise from Order Nos. 860 and 860-A.[3] While we deny the request for declaratory order, we provide guidance that will address, in part, the concerns Petitioners raise, as discussed below.

I. Petition

2. Petitioners request that the Commission find: (1) that no affiliation arises under section 205 when institutional investors acquire up to 20% of the voting securities of utilities[4] pursuant to a section 203(a)(2) blanket authorization order; and (2) that public

[1] 16 U.S.C. § 824d.

[2] 16 U.S.C. § 824b(a)(2).

[3] *Data Collection & Analytics & Surveillance for Mkt.-Based Rate Purposes*, Order No. 860, 168 FERC ¶ 61,039, at P 5 n.10 (2019), *order on reh'g and clarification*, Order No. 860-A, 170 FERC ¶ 61,129 (2020).

[4] For purposes of this order, "utilities" are defined as transmitting utilities, electric utility companies, or holding company systems containing such entities.

utilities remain free to conclude, without obtaining case-specific Commission rulings, that the issuance of particular types of securities do not convey control, and therefore do not create any regulatory approval requirements under the FPA. Petitioners argue that, without this first declaration, utilities will be mistakenly viewed as affiliates under the Commission's regulations, even though the affiliation is not real. Petitioners contend that these false affiliations will harm the public interest. Regarding the second requested declaration, Petitioners assert that prior Commission precedent supports their request. Petitioners' arguments are discussed in more detail below.

II. Notice of Filing and Responsive Pleadings

3. Notice of Petitioners' October 30, 2020 filing was published in the *Federal Register*,[5] with interventions and protests due on or before November 30, 2020. Timely motions to intervene were filed by the following entities: Calpine Corporation; Public Citizen, Inc. (Public Citizen); Duke Energy Corporation (Duke); Pacific Gas & Electric Company; Alliant Energy Corporate Services, Inc.; Consolidated Edison Development, Inc.; DTE Electric Company; Electric Power Supply Association; San Diego Gas & Electric Company; Southern Company Services, Inc.; American Municipal Power, Inc.; Eversource Energy Service Company; Vistra Corp. (Vistra); NRG Energy, Inc. (NRG); National Rural Electric Cooperative Association; Transmission Access Policy Study Group (TAPS); Edison Electric Institute (EEI); Southern California Edison Company (SoCal Edison); Portland General Electric Company (Portland General); American Public Power Association (APPA); Berkshire Hathaway Energy Company (Berkshire Hathaway); and Ameren Services Company, Dominion Energy Services, Inc., and NiSource, Inc. (together, Supporting Parties). The Independent Market Monitor for PJM Interconnection, L.L.C. (IMM) filed an out-of-time motion to intervene.

4. Timely comments were filed by NRG, Vistra, Duke, EEI, SCE, Portland General, Berkshire Hathaway, and Supporting Parties. Timely protests were filed by Public Citizen, TAPS, APPA, and American Antitrust Institute (AAI).

5. On December 15, 2020, Petitioners filed a response to the protests. On December 16, 2020, IMM filed a motion for leave to answer and answer to the comments and protests. On December 30, 2020, TAPS filed a motion for leave to answer and answer. On December 31, 2020, Petitioners filed an answer to IMM's December 16, 2020 answer. On January 12, 2021, IMM filed a motion for leave to answer and answer to Petitioners' December 31, 2020 answer.

[5] 85 Fed. Reg. 71,892 (Nov. 12, 2020).

III. Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant the late-filed motion to intervene given IMM's interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

7. Petitioners request that the Commission reject IMM's answer filed on December 16, 2020. Petitioners argue that they sought an expedited ruling on this petition and time matters in this case. Petitioners argue that the Commission gave interested parties until November 30, 2020, to intervene and comment or protest and on December 7, 2020, IMM moved for a late intervention. Petitioners argue that the intervention correctly addressed the four-part test for obtaining late intervention but did not address whether granting the intervention would disrupt the proceeding.[6]

8. IMM states that Petitioners' arguments requesting rejection of its answer as procedurally improper have no merit and should be disregarded. IMM explains that Petitioners do not respond to the substantive arguments raised by IMM, but instead object that IMM's answer disrupts the proceeding. IMM argues that its answer contributes to a complete record, facilitates decision-making, and should be accepted.[7]

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2) (2020), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept the answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

10. As discussed below, we deny Petitioners' requests that the Commission: (1) find that no affiliation arises under section 205 when institutional investors acquire up to 20% of the voting securities of utilities pursuant to section 203(a)(2) blanket authorization orders; and (2) declare that public utilities remain free to conclude, without obtaining case-specific Commission rulings, that the issuance of particular types of securities do not convey control, and therefore do not create any regulatory approval requirements

[6] Petitioners December 31, 2020 Response at 1-3.

[7] IMM January 12, 2021 Motion for Leave to Answer and Answer at 2.

under the FPA.[8] However, while we deny Petitioners' requests, we take this opportunity to clarify the Commission's views regarding: (1) the relationship between institutional investors that acquire ownership interests in public utilities pursuant to a 203(a)(2) blanket authorization, and the public utilities in whom those interests are acquired; and (2) the relationship between public utilities with common upstream ownership by institutional investors that acquire their interests pursuant to a 203(a)(2) blanket authorization. We believe these findings, coupled with changes the Commission proposes in a companion order to the relational database,[9] will address, in part, Petitioners' concerns regarding their possible affiliation with other public utilities solely by virtue of common upstream ownership by institutional investors that acquire their interests pursuant to a 203(a)(2) blanket authorization.

1. Affiliation for purposes of section 205 where institutional investors acquire up to 20% of the outstanding voting securities of utilities pursuant to a section 203(a)(2) blanket authorization order

a. Petition

11. Petitioners first request that the Commission find that no affiliation arises under section 205 where an institutional investor is granted blanket authorization under section 203(a)(2) to acquire up to 20% of the voting securities of a public utility. Petitioners argue that the Commission authorized such acquisitions under blanket authorization orders that impose conditions precluding any exercise of control, and that this lack of control removes any basis for finding affiliation under section 205.[10]

12. Petitioners assert that the Commission's prior orders granting section 203(a)(2) blanket authorization to financial institutions have found a lack of control that an institutional investor would otherwise have by virtue of acquiring 10% or more of the outstanding voting securities of a public utility. Specifically, Petitioners assert that the conditions established in these blanket authorization orders take the underlying securities transactions outside the scope of the definition of "affiliate" under the "unless otherwise ordered by the Commission" language under 18 C.F.R. § 35.36(b).[11] For example,

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[8] *See* Petition at 1-2.

[9] *Data Collection for Analytics & Surveillance & Mkt.-Based Rate Purposes*, Notice Seeking Comment, 174 FERC ¶ 61,214 (2021).

[10] Petition at 1.

[11] *Id.* at 3-4. Section 35.36(b) states that "[t]he provisions of this subpart apply to all Sellers authorized, or seeking authorization, to make sales for resale of electric energy,

Petitioners note that the order granting *The Vanguard Group, Inc*. section 203(a)(2) blanket authorization states:

> In all cases, the Applicants commit not to exercise any control over the day-to-day management and operations of any U.S. Traded Utility whose voting securities are acquired pursuant to the authorizations requested in this application, except pursuant to separate authorizations under FPA section 203.[12]

13. In addition, Petitioners maintain that the blanket authorization orders allow holdings above 5% only when the holder of the blanket authorization files a Schedule 13G with the Securities and Exchange Commission (SEC) and prohibit holdings above 10% for any single fund unless that fund receives separate section 203 authorization for that acquisition. Petitioners note that the Commission has explained that, to file a Schedule 13G, the filing entity must have no intention (and its holdings and actions have no material effect) of changing or influencing the control of the issuer.[13] Petitioners assert that, with these conditions and others, no control is acquired when an institutional investor acquires up to 20% of the voting securities of any utility under a section 203 blanket authorization order.

14. Petitioners contend that this conclusion is supported by the Commission's decision in *Legg Mason, Inc, its Subsidiaries, Accounts and Funds Listed in Exhibit A*, where the Commission determined that, when an institutional investor acquires the securities of a utility under a section 203(a)(2) blanket authorization order, the underlying utility does not need any corresponding blanket authority to dispose of those securities under section 203(a)(1).[14] According to Petitioners, the conditions imposed in these blanket authorization orders transform what would otherwise be voting securities into passive investments from the perspective of the utility.

15. Petitioners argue that the same conclusion should hold true for FPA section 205 purposes. Petitioners maintain that, given that there is no control transferred when an

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capacity, or ancillary services at market-based rates unless otherwise ordered by the Commission." 18 C.F.R. § 35.36(b) (2020).

[12] Petition at 28-29 (quoting *The Vanguard Group, Inc.*, 168 FERC ¶ 62,081, at 64,220 (2019) (*Vanguard*)).

[13] *Id.* at 29 (quoting *Vanguard*, 168 FERC at 64,220 n.4).

[14] *Id.* at 29-30 (quoting *Legg Mason, Inc, its Subsidiaries, Accounts and Funds Listed in Exhibit A*, 121 FERC ¶ 61,061, at P 18 (2007) (*Legg Mason*)).

institutional investor acquires up to 20% of a utility's voting securities, no new affiliation can be created, and thus a market-based rate seller should have no obligation to make any filings under section 205. Petitioners contend that the Commission recognized this conclusion in *Calpine Energy Services, L.P.*,[15] in which the Commission confirmed that whether a market-based rate seller is required to make a change in status filing under section 205 to note a new affiliation depends on whether the utility sought section 203 approval for the underlying disposition of securities.[16] Specifically,

> *To the extent the seller has made a section 203 filing that it submits is being made out of an abundance of caution and thus has voluntarily consented to the Commission's section 203 jurisdiction, the seller will be required to incorporate this same assumption in its market-based rate change in status filing* (e.g., if the seller assumes that it will control a jurisdictional facility in a section 203 filing, it should make that same assumption in its market-based rate change in status filing and, on that basis, inform the Commission as to whether there is any material effect on its market-based rate authority).[17]

Petitioners maintain that this language provides that, when questions arise about control in the context of acquisitions of a public utility's securities, the public utility determines, initially, whether it needs to take regulatory action under section 203 and 205. Petitioners thus argue that this language from *Calpine* does not require a utility to make filings under section 205 when the utility declines to make a filing under section 203 because there is no change in control caused by the same acquisition of securities. While Petitioners acknowledge that *Calpine* did not expressly say that a decision not to file under section 203 means no filing is needed under section 205, Petitioners contend that *Calpine* implies that conclusion when coupled with the Commission's finding in *Ad Hoc Renewable Energy Financing Group*.[18]

16. Petitioners assert that, because the security holdings at issue here cannot create control for purposes of section 203, those same holdings cannot create control for

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[15] 113 FERC ¶ 61,158 (2005) (*Calpine*).

[16] Petition at 30.

[17] *Id.* (quoting *Calpine*, 113 FERC ¶ 61,158 at P 14 (emphasis added by Petitioners and citations omitted)).

[18] *Id.* at 31 (citing *Ad Hoc Renewable Energy Fin. Group*, 161 FERC ¶ 61,010, at P 16 (2017) (*Ad Hoc*)).

purposes of section 205. Petitioners contend that the Commission's precedent uses the same analysis under sections 203 and 205 to determine the presence or absence of control, which they argue is supported by the Commission's observation in *Ad Hoc*:

> Although the determination in *AES Creative* was made under FPA section 205 rather than FPA section 203, *the issue under both provisions of the Federal Power Act is the same*: do the interests at issue give the holders control over the activities of the company, or are the interests passive in nature?[19]

17. According to Petitioners, this outcome comports with Order Nos. 860 and 860-A. Petitioners argue that, in those rules, the Commission determined that a section 205 change in status filing would not be required if the utility at issue had a case-specific determination that the underlying investment is passive.[20] Petitioners contend that the Commission did not specifically address whether its prior blanket authorization orders issued to institutional investors constituted case-specific determinations of passivity.[21] They assert that the Commission was not presented in Order No. 860-A with its determination in *Legg Mason* confirming that public utilities whose securities are acquired under a blanket authorization order do not have section 203 obligations because the investments are passive by definition, given the conditions in the blanket authorization order.[22]

18. Although Petitioners acknowledge that 18 C.F.R. § 35.42 (2020) requires a change in status filing for any new affiliations not previously disclosed to the Commission, they contend that this provision necessarily assumes the securities at issue carry control because an affiliate relationship exists where an entity holds 10% or more of the "voting securities" of a public utility.[23] Petitioners maintain that the Commission has already found that an institutional investor acquiring up to 20% of the voting securities of a public utility under a blanket authorization order is holding a passive investment that does not create control and thus does not trigger any section 203 filing obligation for the public utility. Petitioners argue that it necessarily follows that no affiliate relationship is

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[19] *Id.* (quoting *Ad Hoc*, 161 FERC ¶ 61,010 at P 16 (emphasis added by Petitioners)); *see also AES Creative Resources, L.P.*, 129 FERC ¶ 61,239 (2009) (*AES Creative*).

[20] Petition at 31.

[21] *Id.* at 32.

[22] *Id.*

[23] *Id.* at 33 (citing 18 C.F.R. § 35.36(a)(9)).

created by these investments because they have been rendered passive by the conditions the Commission imposed on the acquiring institutional investors. Petitioners therefore assert that, by imposing these conditions, the Commission "otherwise ordered" that no affiliation would exist under 18 C.F.R. § 35.36.

19. Petitioners contend that, if the Commission finds that institutional investors are affiliates, fully compliant market-based rate filings would become complicated and burdensome. Petitioners argue that any information on affiliation they would submit would be outdated before it is ever submitted. Petitioners assert that, with the quarterly filings required by the section 203(a)(2) blanket authorization orders and presumably if the Commission allows an extra 30 days to make change in status filings,[24] market-based rate sellers would ultimately file duplicative and outdated information 75 days after the end of the quarter. Petitioners suggest that those holdings could drop below 10% after the seller submits that change in status filing, leading to an unnecessary update.[25] Further, Petitioners argue that requiring the submission of inaccurate affiliate information risks misleading the public by adding false data points to suggest that institutional investors with a section 203(a)(2) blanket authorization will be the "ultimate upstream affiliate," and not the ultimate corporate parent or holding company of the utility.[26]

20. According to Petitioners, without their requested relief, pursuant to 18 C.F.R. § 35.36(a)(9)(iv), many utilities will be considered affiliates under the common control of institutional investors that acquire securities under section 203(a)(2) blanket authorization orders. Petitioners contend that such affiliation would be temporary as holdings of utility securities could change, complicating these affiliate relationships.[27]

21. Petitioners add that there are consequences to these public utilities being considered affiliates of each other. Petitioners ask whether a market power analysis for a public utility must treat resources held by another utility as affiliate holdings because an institutional investor owns 10% or more of each, and ask what happens to that affiliation if institutional investor holdings change. Petitioners also ask whether an

[24] Petitioners acknowledge that market-based rate sellers have no reason to know if an institutional investor has acquired 10% or more of its holdings and thus a clarification to the change in status requirements may be required to allow more time for sellers to make any requisite change in status filings. *Id.* at 35.

[25] *Id.*

[26] *Id.* at 8.

[27] *Id.* at 35.

Edgar-Allegheny[28] showing would be required if one utility sought to enter into a power purchase agreement with another utility when an institutional investor holds 10% or more of the securities of both utilities. Petitioners further ask whether the Commission's affiliate pricing regulations would apply to public utilities contracting with each other for non-power goods or services when an institutional investor owns 10% or more of the securities of each. In addition, Petitioners ask whether this affiliation would impact the Commission's implementation of its qualifying facilities regulations. Petitioners ask whether section 203 applications would need to list these affiliate relationships and what impact they may have on the Commission's section 203 public interest analysis. Petitioners also ask about whether, as a result of these affiliations, interlocking directorates among competitors become commonplace.[29]

22. In addition, Petitioners argue that, if institutional investors that are found passive for section 203 purposes are treated as affiliates under 18 C.F.R. § 35.36(a)(9)(i) and thus become an "ultimate upstream affiliate" once Order No. 860 takes effect, filing requirements would become impossible to satisfy, particularly if the Commission's regulations are allowed to automatically impute cross-affiliation. Petitioners further contend that such affiliation may result in the loss of certain exemptions from PUHCA 2005 reporting requirements.[30]

23. Petitioners maintain that their request for relief comports with the goal in Order Nos. 860 and 860-A to streamline information about the ownership of market-based rate sellers. Petitioners assert that information about these institutional investors is already submitted pursuant to section 203(a)(2) blanket authorization reporting requirements and that, as a result, granting Petitioners' relief will not compromise the Commission's objectives.

24. Lastly, Petitioners suggest that one possible outcome here that would improve the status quo, but would be difficult to defend logically or on judicial review, is for the Commission to rule that, although an institutional investor with a section 203(a)(2) blanket authorization order that holds 10% or more of a public utility's voting securities is an affiliate of that public utility, the Commission will not find "common control" under

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[28] *Boston Edison Co. Re: Edgar Electric Energy Company*, 55 FERC ¶ 61,382 (1991); *Allegheny Energy Supply Company, LLC*, 108 FERC ¶ 61,082 (2004) (*Edgar-Allegheny*).

[29] Petition at 9-10 (footnotes omitted).

[30] *Id.* at 37. Petitioners explain that, for example, if NextEra were deemed an affiliate of a traditional public utility outside of Florida, it may no longer qualify for the single-state holding company system exemption from the Public Utility Holding Company Act of 2005 (PUHCA 2005) reporting requirements. 42 U.S.C. § 16451 *et seq*.

18 C.F.R. § 35.36(a)(9)(iv) among the utilities who are 10% or more owned by that institutional investor. Petitioners argue, however, that the Commission cannot rationally reach this conclusion. Specifically, Petitioners contend that, if there is no "common control" among multiple utilities, then the Commission must necessarily conclude that there is no control of any single utility at the outset.[31]

b. Comments in Support

25. NRG, Vistra, Duke, EEI, SoCal Edison, Portland General, Berkshire Hathaway, and Supporting Parties each support the Petition. NRG argues that the Petition's solution, that the Commission recognize in the market-based rate program, "control" determinations already made in a section 203(a)(2) blanket authorization order, is narrowly tailored and reasonable. NRG argues that this is because the section 203(a)(2) blanket authorizations already include the Commission's reliance on evidence and conditions demonstrating that institutional investors that acquire public utilities lack the ability to exert control.[32] NRG argues that finding cross-affiliation with public utilities would paint an inaccurate picture of electric industry.[33] NRG further argues that failing to recognize "control" determinations will also impose enormous burden on market-based rate sellers, with the publicly traded companies and market-based rate subsidiaries lacking holdings information current enough to satisfy deadlines in 18 C.F.R. § 35.34(b) and (d) if those provisions are triggered when institutional investors acquire 10% or more of their voting securities.[34]

26. Vistra also supports the Petition's requested clarification, arguing that since the Commission found no control in acquisitions under a blanket authorization in the section 203 side, this finding should be similarly applied to find no new affiliation under section 205. Vistra also argues there should be no obligation to make any notice filings under section 205.[35]

27. Duke supports the Petition and its analysis and urges the Commission to rule affirmatively on it, arguing that investments by institutional investors are passive with no control and that the industry does not have accurate real-time information concerning the number of shares an institutional investor owns, which fluctuate frequently. Duke argues

[31] Petition at 38 n.82.

[32] NRG November 30, 2020 Comments at 2.

[33] *Id.* at 3.

[34] *Id.* at 3-4.

[35] Vistra November 30, 2020 Comments at 2-5.

that reporting these updates in the relational database will be an issue because the public utility does not have timely access to this information, and by the time a change in status filing is made, it is possible the institutional investor no longer meets the 10% threshold for being considered an affiliate.[36]

28. EEI argues that the Commission should affirm that the conditions placed on institutional investors that have a section 203(a)(2) blanket authorization necessarily means that these entities do not have control, and that holdings by these entities do not trigger any section 205 filing requirements for the electric utility. EEI argues that "no affiliate relationship is created under section 205 of the FPA by these investments because they have already been rendered passive by the conditions imposed on the acquiring institutional investors under their blanket authorization."[37] EEI also argues that, by imposing these conditions, the Commission should find that it has "otherwise ordered" that no affiliation would exist under section 35.36 and that no filing needs to be made under section 205. EEI requests that the clarification applies to all market-based rate sellers under section 35.36(b) without the need for individual petitions.[38] EEI supports the idea that institutional investors are in the best position to update the Commission, not market-based rate sellers, and market-based rate sellers would be at risk of noncompliance due to outdated information.[39] Further, EEI contends that the requested clarification would also avoid consequences of public utilities becoming affiliated with each other by virtue of their affiliation with a common institutional investor owner.[40]

29. SoCal Edison supports the Petition and requests clarification on this issue to address consequences of an overly broad application of affiliate reporting requirements. SoCal Edison argues, that, in granting blanket authorizations under section 203, the Commission has ruled that covered institutional investors holding between 10% and 20% of the voting securities of an investor-owned utility are not affiliates because their ownership has been rendered passive by the conditions in the blanket authorization. SoCal Edison also argues that no reportable affiliate relationship should be created under section 205 based on this passive ownership and lack of control, therefore the Commission should confirm it has "otherwise ordered" on this issue under 18 C.F.R. § 35.36(b). SoCal Edison also argues that, due to this passive ownership and

[36] Duke November 30, 2020 Comments at 1-2.

[37] EEI November 30, 2020 Comments at 10.

[38] *Id*. at 10-13.

[39] *Id.* at 14-15.

[40] *Id.* at 16.

lack of control, investor-owned utilities have not been required to seek Commission approval when their voting securities are acquired. SoCal Edison suggests that, if investor-owned utilities were required to rely on institutional investors' quarterly filing information they would not likely be in position to verify or accurately report changing ownership. SoCal Edison also suggests that, if an institutional investor were to hold more than 10% of the voting securities of two or more unrelated investor-owned utilities, the investor-owned utilities and the institutional investors could be subject to additional restrictions based on common control and cross-affiliation.[41]

30. Portland General supports the Petition and EEI's comments. Portland General agrees that the timing disparity between financial reporting and regulatory requirements could create compliance issues and outdated filing information, and as an example it points to the varying ownership percentage in PGE's securities throughout Vanguard's quarterly compliance filings. Portland General agrees that denying the request will continue the status quo, which results in unnecessary regulatory uncertainty Portland General also supports the request to continue to allow utilities to determine the passivity of an institutional investor's voting security investment.[42]

31. Berkshire Hathaway requests clarification of the Commission's application of its affiliate regulations and argues that granting the relief requested in the Petition would provide consistency across the regulations. Berkshire Hathaway argues that the risk of the creation of "shadow affiliation" among the utilities in institutional investors funds, which are companies that have no common cause or communication, could create regulatory burden for the Commission and difficulties for companies, without providing any additional protections for markets or customers.[43] Berkshire Hathaway states that, for these reasons, it supports the resolution by the petition that institutional investors who acquire shares on the secondary market be found to be passive owners for purposes of FPA sections 203 and 205. Berkshire Hathaway also states that the Commission has stated utilities cannot be expected to make change in status filings under FPA section 205 if the change in circumstance is not within the knowledge and control of the applicant, since shares are unknowingly acquired through public trading and secondary transactions.[44] Berkshire Hathaway argues that the Commission has previously faced this issue in the petition for guidance by the Electric Power Supply Association, where the

[41] SoCal Edison November 30, 2020 Comments at 2-4.

[42] Portland General November 30, 2020 Comments at 3-4.

[43] Berkshire Hathaway November 30, 2020 Comments at 1-2.

[44] *Id.* at 4.

Commission issued a notice of proposed rulemaking.[45] Berkshire Hathaway argues that an investor has no ability to control wholesale power sales or transmission activities should be found to be passive, and that conditions in 203 blanket authorizations indicate a lack of control over the utilities.[46]

32. Supporting Parties also support the requested relief for this issue. According to Supporting Parties, there is no reasonable basis to conclude that control should function differently between sections 203 and 205.[47] Supporting Parties argue that the Commission's regulations support Petitioners' requested relief as 18 C.F.R. § 35.36(b) provides a "safety value against false positives in the affiliate definition."[48] Supporting Parties argue that there are similar safety valves in other parts of the Commission's regulations.[49] Supporting Parties reiterate the consequences of the Commission failing to grant the Petition.[50]

2. Protests

33. Public Citizen requests that the Commission dismiss the Petition, arguing that allowing asset management firms, such as BlackRock, Vanguard, and State Street to evade affiliation even when controlling 20% of public utilities will harm the public interest and result in unjust and unreasonable rates. Public Citizen argues that institutional investors operating investment funds tracking market indices have come to dominate the U.S. economy, and in actuality, these investment funds frequently take controlling stakes in companies across an entire sector, directing millions of voting shares in numerous market competitors—and that this horizontal control across market rivals is harming and stifling competition. Public Citizen asserts that it is probable that utilities filed their Petition in consultation with, or with the active consent of, some of these institutional investors, which would raise additional concerns about the influence the funds have on the behavior of the public utilities. Public Citizen argues that the Commission's current reliance on blanket authorizations to grant institutional investors

[45] *Id.* at 4-6 (citing *Control & Affiliation for Purposes of Mkt.-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, 130 FERC ¶ 61,046 (2010)).

[46] *Id.* at 6-7.

[47] Supporting Parties Comments at 7-9.

[48] *Id.* at 11.

[49] *Id.* at 11-14 (referencing 18 C.F.R. §§ 35.43 & 35.44).

[50] *Id.* at 14-16.

and public utilities relief from affiliation when the institution controls as much as 20% of the public utility is problematic because the role of institutional investors has changed since the Commission began issuing these authorizations after EPAct 2005. Public Citizen requests that the Commission dismiss the Petition in favor of hosting a technical conference or issuing a notice of inquiry in order to comprehensively assess the circumstances by which institutional investors have shifted investment trends in public utilities and how institutional investors may be undermining competition and threatening just and reasonable rates.[51] Public Citizen further argues that Petitioners' support of extending to section 205 proceedings exemptions to institutional investors that control up to 20% of public utilities will significantly undermine the transparency of ownership of Commission-jurisdictional public utilities.[52]

34. TAPS opposes the Petition. TAPS argues that Petitioners seek declaratory relief that would: (1) change the affiliate definition in 18 C.F.R. § 35.36 (a)(9)(i); and (2) eliminate the affirmative disclosure obligation concerning new passive owners in 18 C.F.R. § 35.37(a)(2), both of which were established in Order No. 860. TAPS argues that declaratory relief is thus an impermissible collateral attack on the Commission's regulations and a final rule, and that the petition recycles arguments that were raised in requests for rehearing and clarification of Order No. 860 and recently rejected in Order No. 860-A. Thus, TAPS argues that the Petition should be denied on procedural grounds alone.[53] In addition, TAPS notes that Petitioners fail to explain how the Commission can grant their requested relief when the Commission determined, in Order No. 860-A, that to do so would require changing the definition of affiliate and ultimate upstream affiliate in 18 C.F.R. §§ 35.36(a)(9)(i) and 35.36(a)(10).[54] TAPS therefore argues that the requested relief is an impermissible collateral attack.[55]

35. TAPS also argues that adopting the Petition could undermine the function of the relational database. TAPS contends that Petitioners are raising concerns before the relational database is functional and that, even if the relational database reveals "mega-utilities," then it is serving its intended purpose. TAPS states that it and others have cautioned that the Commission's delineation of passive ownership may not go far enough to protect against anticompetitive conduct. For example, TAPS explains that

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[51] Public Citizen November 30, 2020 Protest at 1-2.

[52] *Id.* at 2-3.

[53] TAPS November 30, 2020 Protest at 4-5.

[54] *Id.* at 7-8.

[55] *Id.* at 8-12 (citing *Analysis of Horizontal Mkt. Power under the Fed. Power Act*, 138 FERC ¶ 61,109 (2012)).

expert testimony submitted in Docket No. RM11-14 detailed that the Commission's no-control and passive ownership provisions leave loopholes and substantial opportunities for abuse in control and influence, information revelation and exchange, and incentive alignment when it comes to partial ownership.[56]

36. APPA requests that the Commission deny the Petition because it represents a collateral attack on existing Commission regulations, as recently amended in Order Nos. 860 and 860-A. APPA argues that the Petition effectively seeks to change the Commission's regulations adopted in those orders, and that the Commission already addressed Petitioner's first request on rehearing.[57] APPA argues that in the section 203(a)(2) blanket authorization proceedings, the Commission did not issue any order lifting the applicability of market-based rate regulations, and points out that potentially impacted parties were not put on notice that section 203 blanket authorizations granted in those cases would be applied in the market-based rate context.[58] APPA adds that, notably, several blanket authorization orders specifically indicate that they would not relieve market-based rate sellers of the obligation to submit change in status filings under the Commission's market-based rate regulations. APPA argues that there is likely value in understanding the extent of institutional investors' ownership interests in public utilities with market-based rates. APPA argues that there are three competitive concerns: (1) influence and control of a rival's operations and affairs; (2) disclosure and exchange of non-public, competitively sensitive information between rival companies; and (3) the inherent profit sharing with a rival firm that results from partial cross or common ownership, which gives each firm an incentive to compete less vigorously with the other to increase their profits at the expense of consumers.[59]

37. AAI requests that the Commission deny the Petition because it would expand a "safe harbor" for horizontal shareholding from section 203 to section 205 and weaken oversight of competition, impeding the Commission from fulfilling its statutory responsibilities.[60] AAI explains that partial ownership can potentially harm competition via incentives, influence, and information. For example, AAI points to research that indicates that even without violating their fiduciary obligations, asset managers can influence the decision-making of the firms in which they hold securities, through corporate governance rights, or executive compensation packages that reward industry

[56] *Id.* at 12-15.

[57] APPA November 30, 2020 Protest at 2-4.

[58] *Id.* at 6.

[59] *Id.* at 6-8.

[60] AAI November 30, 2020 Comments at 2.

performance in addition to individual firm performance.[61] AAI argues that granting Petitioners' request on this issue would decrease transparency and impact the Commission's ability to: (1) monitor institutional investors' ownership in multiple, potentially competing, jurisdictional entities; (2) evaluate competition issues in wholesale power markets that would flow from such monitoring; and (3) fulfill its statutory responsibilities to protect competition and ratepayers under FPA sections 203 and 205.[62]

3. Answers

38. Petitioners argue that no one disputes the central thesis that the conditions the Commission imposed in the blanket authorizations preclude the exercise of control, rendering passive any investments made in public utilities under those blanket authorizations. Petitioners argue that by limiting these blanket authorizations to circumstances where the investor has filed a Schedule 13G with the SEC, the Commission precluded any exercise of control of the type that might give rise to substantive concerns about affiliate relationships.[63] Petitioners argue that no one meaningfully disputes the path of the legal logic regarding the interpretation of the "unless otherwise ordered by the Commission" language in the definition of affiliate in section 35.36(a)(9) applying to the blanket authorization orders, and that this interpretation does not require changes to the Commission's regulations. Petitioners also contend that no one disputes that problematic consequences would occur if the Petition were denied. Petitioners argue that the improper collateral attack bought up protestors is improperly applied because there is no need to change the regulatory text to implement the requests in the Petition.[64]

39. In addition, Petitioners argue that no one rebuts the consequences of denying the Petition, and that the protests that argue that competition would be harmed by granting the petition are wrong because neither the Commission nor any interested party has found any issues with the blanket authorization orders since they have been issued. Petitioners argue that the protestors who argue that granting the Petition will obscure transparency are wrong, because the quarterly reports are filed by the institutions holding blanket authorizations and thus there is already full transparency. Petitioners note, however, that if the Commission wants to add a field to the relational database where, for example, the upstream owner of Florida Power and Light Company is NextEra, but there is also an entry for institutional investors that own 10% or more of NextEra's stock, that would not

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[61] *Id.* at 2-5.

[62] *Id.* at 5-6.

[63] Petitioners December 15, 2020 Response at 1.

[64] *Id.*

be too difficult, provided that the timing of such updates to the relational database is keyed off the filings that the institutional investors holding a blanket authorization make with the Commission. Petitioners state that they are concerned with the other harmful effects of finding affiliation, and while they do not understand why it is helpful or appropriate, as long as it is clear that a market-based rate seller does not have to list investors acting under a blanket authorization order until a reasonable time after the filing of the quarterly reports required by those orders, it is possible to provide for the entry of those data points.[65]

40. IMM agrees with comments arguing that Petition should be denied because Petitioners did not establish that compliance poses undue burdens. IMM explains that the Petition is a collateral attack on reporting rules in Order No. 860, that a new rulemaking would be necessary to grant Petitioners' requests, and that the deadline for rehearing is long past.[66] IMM argues that the approach advocated by Petitioners would interfere with the ability of the Commission to detect and prevent the growth of market power in the industry it regulates. IMM further explains that orders granting blanket authorizations for ownership under section 203 are conditional and temporary, and that they concern mergers and acquisitions, not ongoing market activity. IMM agrees with AAI that market power concerns relating to affiliate relationships concern more than control.[67]

41. TAPS argues that, even if the Commission was to entertain Petitioners' argument, section 203 blanket authorization does not exempt the recipient from the Commission's market-based rate reporting requirements and the authorizations state that transactions authorized under FPA section 203 are subject to the Commission's market based rate reporting requirements. TAPS asserts that Petitioners are not asking the Commission to interpret its new regulation but rather seeking the creation of an exception to the regulation.[68] TAPS argues that Petitioners' response undermines their allegations of consequences if the Petition is denied, and Petitioners concede that it "would not be too difficult" to report institutional investors that own 10% or more of an entity.[69] TAPS

[65] *Id.* at 2-3.

[66] IMM December 16, 2020 Answer at 5.

[67] *Id.* at 2-5.

[68] *Id.* at 2-4.

[69] *Id.* at 4.

argues that Petitioners' concern is not reporting, but rather the new relational database revealing affiliation.[70]

a. Commission Determination

42. We deny Petitioners' request that the Commission find that no affiliation arises under section 205 when institutional investors acquire up to 20% of the voting securities of utilities pursuant to section 203(a)(2) blanket authorization orders. Under 18 C.F.R. § 35.36(a)(9)(i), institutional investors that own 10% or more of the outstanding voting securities of the utility pursuant to a section 203(a)(2) blanket authorization order are affiliates of those utilities through ownership of voting securities. However, as discussed below, we agree with Petitioners that the conditions in the section 203(a)(2) blanket authorization orders are designed to prevent institutional investors from exercising control over the utilities whose voting securities they acquire. Accordingly, as discussed below, we find that, with the conditions in the section 203(a)(2) blanket authorization orders, there is no common control to make those utilities affiliates of each other under 18 C.F.R. § 35.36(a)(9)(iv).

43. Petitioners' argument on this issue is two-fold. First, Petitioners contend that the section 203(a)(2) blanket authorization orders render the acquired voting securities "passive" and that no affiliation results under 18 C.F.R. § 35.36(a)(9)(i). We disagree. The conditions imposed in a section 203(a)(2) blanket authorization order do not convert any acquired voting securities from voting to "passive" securities; rather, they affect only whether institutional investors can exercise control over the utilities whose voting securities they acquire for purposes of determining whether there is a change in control over jurisdictional facilities under section 203.

44. For example, in *Legg Mason*, the applicants proposed, among other things, a number of conditions to limit their ability to exercise control over the voting securities they proposed to acquire.[71] The Commission made clear that the conditions that the

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[70] *Id.*

[71] Applicants proposed, among other things, the following conditions to limit their ability to exercise control over the utilities whose voting securities they proposed to acquire: (1) all acquisitions of securities made pursuant to the requested authorizations will be securities of publicly traded public utilities, ensuring that the authorized acquisitions would be driven by public market considerations rather than a privately held public utility's ownership of particular physical assets; (2) all acquisitions of public utility securities made by the applicants' subsidiaries pursuant to the requested authorizations will be made in a fiduciary capacity on behalf of the applicants' funds or accounts, and the applicants' subsidiaries will make no acquisitions for their own account; (3) no individual applicant fund or account will own 10% or more of the

applicants proposed, along with certain other requirements, addressed its concerns regarding possible transfers of control over a public utility or jurisdictional facilities,[72] but the Commission did not specify that the *securities* themselves were now "passive." Rather, the nature of the securities owned by institutional investors remains the same – i.e., voting securities – regardless of the conditions provided for in the section 203(a)(2) blanket authorization order.

45. In addition, the securities acquired pursuant to a section 203(a)(2) blanket authorization order are not the same as non-voting, passive securities with limited consent/veto rights as established in *AES Creative*.[73] For example, the securities held by institutional investors allow the owner or holder thereof to vote on shareholder proposals to have a say in the direction or management of the affairs of the company. As a result, such securities are not substantively similar to the securities that the Commission found to be passive securities in the market-based rate context in *AES Creative*. It is precisely because these securities are voting securities that the conditions in the section 203(a)(2) blanket authorization orders are necessary to prevent the exercise of control.

46. The second part of Petitioners' argument relies on their interpretation that the section 203(a)(2) blanket authorization orders indicate that the securities being acquired by the institutional investors are outside of the scope of the "affiliate" definition under 18 C.F.R. § 35.36(b). We also disagree.

47. Section 35.36(b) specifies that "[t]he provisions of this subpart apply to all Sellers authorized, or seeking authorization, to make sales for resale of electric energy, capacity or ancillary services at market-based rates *unless otherwise ordered by the*

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outstanding voting securities of any one public utility; (4) the applicant funds or accounts receiving investment management services from any one applicant subsidiary or group will not collectively own (and therefore the applicant subsidiary or group will not beneficially own for purposes of the Securities and Exchange Act of 1934) more than 20% of the outstanding voting securities of any one public utility. *Legg Mason*, 121 FERC ¶ 61,061 at P 12 (citing 15 U.S.C. § 78a *et seq.*).

[72] *Id.* P 26.

[73] In *AES Creative*, the Commission has found that securities with only limited consent and veto rights necessary to protect investments are defined as passive securities that do not convey control. *AES Creative*, 129 FERC ¶ 61,239 at PP 25-28 (quoting *Solios Power LLC*, 114 FERC ¶ 61,161, at PP 9-10 (2006)). The Commission distinguished between rights that give an investor the "authority to manage, direct, or control the activities" of a company and rights that give investors "only those limited rights necessary to protect their . . . investments." *Id*. P 25 (quoting *Solios Power LLC*, 114 FERC ¶ 61,161 at PP 9-10).

Commission."[74] Petitioners contend that the section 203(a)(2) blanket authorization orders are Commission orders finding that institutional investors subject to the blanket authorization orders are no longer "affiliates" pursuant to 18 C.F.R. § 35.36(b).

48. However, Petitioners' reliance on 18 C.F.R. § 35.36(b) is misplaced. In each section 203(a)(2) blanket authorization order, the Commission made no statement regarding a lack of affiliation for market-based rate purposes. For example, in *Legg Mason*, the Commission was silent about any effect on affiliation for purposes of section 205. With no express order from the Commission under 18 C.F.R. § 35.36(b), the section 203(a)(2) blanket authorization orders thus do not relieve their recipients from relevant FPA section 205 requirements, and the definition of affiliate under 18 C.F.R § 35.36(a) fully applies to institutional investors subject to the section 203(a)(2) blanket authorization orders. Moreover, the Commission has never stated in other contexts that the section 203(a)(2) blanket authorization orders also embody a decision by the Commission under 18 C.F.R. § 35.36(b).[75]

49. Furthermore, section 35.36(a)(9)(i) specifies that affiliation occurs if any person "owns, controls, *or* holds with power to vote, 10[%] or more of the outstanding voting securities of a" public utility.[76] Petitioners do not dispute that the institutional investors with section 203(a)(2) blanket authorization own these voting securities. Rather, Petitioners' argument would improperly narrow this definition of affiliation to focus only on control, and effectively eliminate affiliation based on ownership or an entity holding, with the power to vote, a public utility's voting securities. Petitioners' interpretation is thus not consistent with the plain text of section 35.36(a)(9)(i), which specifies that any person that has acquired 10% or more of the voting securities of public utility is that public utility's affiliate under section 35.36(a)(9)(i), and there is no exception from that regulation if that person is an institutional investor subject to conditions in a section 203(a)(2) blanket authorization order.

50. Petitioners also point to *Calpine* to support their assertion that whatever assumptions are made regarding control for section 203 purposes must also be made for section 205 purposes. However, Petitioners' reliance on *Calpine* is equally misplaced. In *Calpine*, the Commission addressed what an entity needs to file in a change in status

[74] *Id.* § 35.36(b).

[75] In fact, 18 C.F.R. § 35.36(b) addresses market-based rate seller-specific authorization under section 205, so it is not clear how a section 203(a)(2) authorization for an institutional investor acquiring voting securities would necessarily translate into a market-based rate seller-specific finding under section 205 that the "affiliate" definition does not apply.

[76] 18 C.F.R. § 35.36(a)(9)(i) (emphasis added).

filing under section 205. The Commission clarified that a seller making a change in status filing is required to state whether it has made a filing pursuant to section 203.[77] Recognizing that some entities submit section 203 filings out of an abundance of caution based on an assumption of change in control, the Commission stated that to the extent an entity makes such a section 203 filing and in doing so makes an assumption about change in control, it should rely on that same assumption in its section 205 change in status filing. Contrary to what Petitioners argue, *Calpine* does not state that a party's decision not to request authorization under section 203 means that no filing is required under section 205. Instead, *Calpine* addresses a specific fact pattern to clarify what an entity should include in its section 205 change in status filing. *Calpine* does not address how the Commission will or should address the interaction of sections 203 and 205, which is the issue raised in this proceeding.

51. For this same reason, *Ad Hoc* does not support Petitioners' argument. In *Ad Hoc*, the Commission carried over the findings in *AES Creative* into the section 203 context and held that the passive equity interests in public utilities or public utility holding companies identified in *AES Creative Resources* do not constitute voting securities for purposes of section 203 only. As a result, the Commission also found that acquirers of these passive interests identified in *AES Creative Resources* do not require prior Commission authorization under section 203 to acquire those passive interests. The securities subject to the section 203(a)(2) blanket authorizations discussed herein are voting securities, not passive non-voting securities consistent with *AES Creative*, which is why a section 203(a)(2) blanket authorization is required to acquire the securities.

52. However, we agree with Petitioners that, as a result of the conditions in a section 203(a)(2) blanket authorization order, the institutional investors subject to a section 203(a)(2) blanket authorization order lack the ability to control the utilities whose voting securities they acquire. Accordingly, because those conditions prevent institutional investors from exercising control over those utilities, we find that there is no common control to make those utilities affiliates of each other under 18 C.F.R. § 35.36(a)(9)(iv),[78] so long as their institutional investor owners remain under the conditions imposed in a section 203(a)(2) blanket authorization order. As a result of this clarification, the Commission's various affiliate restrictions would not apply between

[77] *Calpine*, 113 FERC ¶ 61,158 at P 14.

[78] Under section 35.36(a)(9)(iv), an affiliate of a specified company can also mean "[a]ny person that is under common control with the specified company."

utilities, including market-based rate sellers, whose securities are owned by a common institutional investor pursuant to a section 203(a)(2) blanket authorization.[79]

53. We believe that a lack of affiliation under 18 C.F.R. § 35.36(a)(9)(iv) between and among utilities whose voting securities are commonly owned by an institutional investor will alleviate many of Petitioners' concerns regarding the consequences of institutional investors owning utilities. For example, once Order No. 860 takes effect,[80] every "ultimate upstream affiliate" must be identified in the relational database. Petitioners' concern is that the database will link together all utilities that list an institutional investor as a common ultimate upstream affiliate as affiliates, with all of the associated regulatory consequences, such as those utilities' assets being listed in each other's asset appendix. However, while institutional investors must be identified as ultimate upstream affiliates if they own 10% or more of the voting securities of a utility with market-based rate authorization,[81] utilities with market-based rate authorization will not be required to link assets with other utilities with market-based rate authorization by virtue of the fact that they are both owned by an institutional investor pursuant to a section 203(a)(2) blanket authorization order. To implement the clarification herein regarding affiliation under 18 C.F.R. § 35.36(a)(9)(iv), we are proposing a change to certain information to be filed

[79] However, this does not mean that such utilities could never be considered affiliates based on other factors. For example, if public utilities have a common upstream affiliate whose ownership of those public utilities is not subject to a section 203(a)(2) blanket authorization, these public utilities are affiliates of each other under 18 C.F.R. § 35.36(a)(9)(iv).

[80] In order to more efficiently track affiliation and reduce burden on filers, in Order No. 860, the Commission explained that it will collect certain information, including certain affiliate information, currently filed in the market-based rate program in a relational database. So that the relational database could link market-based rate sellers through their affiliates to allow for the automatic generation of a complete asset appendix based solely on information submitted into the relational database, the Commission required that market-based rate sellers must provide information on their ultimate upstream affiliates. Order No. 860, 168 FERC ¶ 61,039 at PP 5, 121. Ultimate upstream affiliate means furthest upstream affiliate(s) in the ownership chain, i.e., each of the upstream affiliate(s) of a market-based rate seller, who itself does not have 10% or more of its outstanding voting securities owned, held or controlled, with power to vote, by any person (including an individual or company). *Id.* P 5 n.10; *see also* 18 C.F.R. § 35.42(a)(2)(v).

[81] 18 C.F.R. § 35.36(a)(10).

in the relational database, which is addressed more specifically in a concurrently issued order.[82]

54. In addition, we take this opportunity to reiterate public utilities' reporting obligations in the relational database and clarify how those obligations apply when institutional investors acquire voting securities in public utilities pursuant to a section 203(a)(2) blanket authorization order. Petitioners and other parties assert that they face a significant burden in tracking and reporting regularly shifting ownership interests held by institutional investors that are acquired through public trading pursuant to those institutional investors' section 203(a)(2) blanket authorizations. However, the Commission has held that reporting obligations "should extend only to changes in circumstances within the knowledge and control of the applicant."[83] Furthermore, in Order No. 860, the Commission required that all updates to the market-based rate relational database will be due on the 15th day of the month following a change.[84] We believe these parameters provide a reasonable framework for handling any uncertainty regarding fluctuating ownership interests by institutional investors operating pursuant to a section 203(a)(2) blanket authorization. Specifically, the relational database reporting obligation does not require daily or even weekly tracking of ownership information; rather, a market-based rate seller must update that information at most monthly, and then only to the extent it has knowledge of new ownership information by an institutional investor that requires a change from the market-based rate seller's existing reported information.[85] We also believe that updating reported information based on the quarterly reports filed by institutional investors section 203(a) blanket authorizations would be appropriate if that is the means through which a market-based rate seller receives knowledge of any updated ownership information.

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[82] Notice Seeking Comment, 174 FERC ¶ 61,214 (2021).

[83] *Reporting Requirement for Changes in Status For Public Utilities With Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097, at P 27 (2005).

[84] Order No. 860, 168 FERC ¶ 61,039 at P 8.

[85] Therefore, to the extent a market-based rate seller gets updated ownership information, it may not actually require any change to the database at all. For example, if a market-based rate seller has already identified, as an ultimate upstream affiliate, an institutional investor that has acquired, pursuant to its section 203(a)(2) blanket authorization, more than 10% of the voting securities in that seller or an upstream affiliate, then no change to the relational database would be required unless the market-based rate seller becomes aware that the institutional investor's ownership interest dropped below 10%, or exceeded 20%, of the voting securities.

55. We believe that Petitioners' other concerns will also be largely alleviated by these findings, given that those concerns are premised on: (1) the asserted burden of reporting institutional investor affiliate relationships that might regularly change due to fluctuating ownership stakes acquired through public trading; and (2) cross-affiliation occurring between utilities commonly owned by an institutional investor pursuant to a section 203(a)(2) blanket authorization order.[86] Petitioners also specifically raise concerns regarding whether NextEra and other holding companies could retain their waivers[87] from PUHCA 2005 if NextEra, for example, were deemed an affiliate of a traditional public utility operating outside of Florida. We clarify that because of our holding that the utilities owned by a common institutional investor by virtue of a section 203(a)(2) blanket authorization are not affiliated with each other, NextEra is not affiliated with other utilities whose securities were also acquired pursuant to a section 203(a)(2) blanket authorization order, NextEra's waiver from PUHCA 2005 is unaffected.

56. We acknowledge protestors' concerns regarding increased horizontal shareholding and partial ownership among institutional investors, such as the institutional investors that are the subject of the Petition.[88] These protestors maintain that horizontal shareholding can: (1) blunt unilateral incentives to compete; (2) result in greater influence over decision-making to compete less aggressively or to coordinate conduct; (3) and facilitate the sharing of non-public, competitively sensitive information between rivals, leading to anticompetitive outcomes. These protestors also argue that granting Petitioners' request would greatly reduce transparency into which institutional investors are common owners of public utilities, especially those that compete in the same product and/or geographic markets. We agree with these protestors' concerns. One of the goals of Order Nos. 860 and 860-A was to increase transparency into upstream affiliation and ownership information of market-based rate sellers while reducing the burden of the reporting entities.[89] To effectively analyze whether sellers could exercise horizontal or vertical market power, and whether sellers' affiliates could engage in any of the above behavior, the Commission requires an ongoing disclosure of the sellers' affiliates and the

[86] *See supra* P 21.

[87] Although Petitioners describe NextEra as having an "exemption" from PUHCA 2005 by virtue of it being a single-state holding company system, NextEra instead has a waiver from PUHCA 2005. 18 C.F.R. § 366.3(c)(1).

[88] These commenters indicate that horizontal shareholding occurs when institutional investors that transact on behalf of individual investors own securities in companies that compete in the same product and/or geographic markets.

[89] *Cf.* Order No. 860, 168 FERC ¶ 61,039 at PP 121, 126-127, 129.

sellers reporting of affiliates' assets.[90] For this reason, we deny Petitioners' request; however, as discussed above, we find that while institutional investors remain affiliates of the public utilities whose securities are acquired pursuant to a section 203(a)(2) blanket authorization, those public utilities are not affiliates of each other by virtue of their common upstream institutional investor owner.

4. Whether public utilities may deem certain securities passive and whether owners of those passive securities need to be identified in market-based rate change in status filings

a. Petition

57. Petitioners' second request is for the Commission to declare that public utilities remain free to conclude, without obtaining case-specific Commission rulings, that the issuance of particular types of securities does not convey control and, therefore, does not create any regulatory approval requirements under the FPA. Petitioners explain that the Commission has found that it was acceptable for utilities to reach their own decisions about passivity when they conclude that prior Commission guidance provided sufficient clarity. Petitioners explain that this policy flowed naturally from long-standing Commission precedent that the burden is on the utility in the first instance to determine whether a security is passive, and suggests that this applies to securities as long as the issuer of those securities has decided that they fall within the "passivity" criteria described in *AES Creative*.[91]

58. According to Petitioners, Order Nos. 860 and 860-A recognize this policy only in part. Petitioners maintain that, although there is no obligation to treat the issuance or transfer of these passive securities as an event triggering a change in status filing under section 205, the Commission required a one-time "affirmation" in the narrative of a change in status filing identifying the ultimate upstream affiliate of all passive securities.[92] Petitioners explain that the Commission further stated that this requirement

[90] Order No. 697-A, 123 FERC ¶ 61,055 at n.258. While Petitioners are correct that the section 203(a)(2) blanket authorization orders require Schedule 13G filings with the Commission 45 days after the end of every quarter, the information in these Schedule 13G filings is limited to amount of voting securities institutional investors own in publicly traded holding companies. These filings contain no information linking these holding companies to any public utility with market-based rate authority.

[91] Petition at 39.

[92] *Id.*

would not apply if the utility had obtained a case-specific determination that a security was passive. Petitioners ask the Commission to modify this statement.[93]

59. Petitioners contend that the Commission erroneously assumed in Order No. 860-A that its prior decisions required a utility to seek a ruling about whether a particular category of securities is passive. Petitioners reference the Commission's statement that: "[c]onsistent with current Commission policy, Sellers must continue to disclose new passive owners should the Seller acquire them unless those Sellers received case-specific determinations as to passivity and reporting obligations under a declaratory order."[94] Petitioners suggest that Order No. 860-A cites to Order No. 697-A's statement that a market-based rate seller must identify its affiliates and upstream ownership, but Petitioners argue that such statement should not be understood to stand for the proposition that entities not deemed affiliates, because they hold only passive interests, still must be identified as affiliates.[95]

60. Petitioners assert that the Commission's decision in Order No. 816 supports this view that market-based rate sellers need not include assets and generation for which passive interests have been claimed as part of their horizontal market power indicative screens, provided that the market-based rate seller can demonstrate such interests are compliant and consistent with passivity as established in *AES Creative*.[96] Petitioners maintain that, when the Commission noted in Order No. 816 that market-based rate sellers must be able to demonstrate passivity according to *AES Creative*, the Commission did not require those sellers to make any express statement or showing. In Petitioners' view, this statement from Order No. 816 simply requires that a market-based rate seller must be ready to defend its determination of passivity based on prior Commission precedent if asked.[97] Although Petitioners note that, when market-based rate sellers or applicants assert conclusions about passivity and compliance with *AES Creative*, staff sometimes requires an explanation as to the basis of those conclusions before staff can act on a delegated basis, Petitioners do not equate this to obtaining a prior ruling from the

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[93] *Id.* at 39-40.

[94] *Id.* at 40 (quoting Order No. 860-A, 170 FERC ¶ 61,129 at P 32).

[95] *Id.* at 40-41.

[96] *Id.* at 41 (citing *Refinements to Policies & Procedures for Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 816, 153 FERC ¶ 61,065, at PP 273 & n.359, 284 (2015), *order on reh'g*, Order No. 816-A, 155 FERC ¶ 61,188 (2016)).

[97] *Id.*

Commission itself.[98] Petitioners also argue that the Commission has never stated that it must make a finding of passivity in this context and that the Commission has acknowledged in Order No. 860-A that, even when a market-based rate applicant claims that certain investments are passive, the Commission itself makes no findings on that issue.[99]

61. Petitioners argue that this is consistent with the Commission's previous view that the burden of determining whether an investment is passive rests with the public utility in the first instance. Petitioners contend that Order No. 816 simply cites generally to *AES Creative* for this proposition. Petitioners similarly contend that, although market-based rate sellers may choose to make a showing if they are in doubt, *AES Creative* does not require an express finding of passivity in the market-based rate context.[100] Petitioners request that the Commission clarify that securities that a public utility deems passive need not be set forth in the narrative of the utility's change-in-status filings.

b. Comments and Protests

62. NRG and Vistra support the Petition as to this issue as well.[101] EEI also supports the Petition on this issue and adds that, although Order Nos. 860 and 860-A require a one-time affirmation in the narrative of a change in status filing providing the ultimate upstream affiliates of all passive securities, this requirement would not apply if the utility had obtained a case-specific determination that a security was passive. EEI contends that sellers are less likely to know where non-voting securities are involved as SEC regulations do not require Schedule 13G filings with respect to non-voting securities. EEI asserts that, as a result, requiring an affirmation places an undue risk on the reporting party who has no way of determining such information. EEI requests further clarification that electric utilities can continue to determine the passivity of securities, as the Commission in *Ad Hoc* found that it was acceptable for electric utilities to make determinations regarding passivity when they conclude prior Commission guidance provided sufficient clarity. EEI argues that this is consistent with Commission precedent

[98] *Id.*

[99] *Id.* at 42.

[100] *Id.*

[101] *See* NRG November 30, 2020 Comments at 4; Vistra November 30, 2020 Comments at 5-6.

in the *Supplemental Policy Statement*[102] that the burden is on the utility in the first instance to determine whether a security is passive. EEI asserts that, by requiring a one-time affirmation in a change in status filing and by indicating that the requirement would not apply if the utility obtained a case-specific determination that a security is passive in Order Nos. 860 and 860-A, the Commission created regulatory uncertainty.[103]

63. APPA disagrees with the Petition on this issue and argues that the request is at odds with the Commission's regulations promulgated in Order Nos. 860 and 860-A and their preambles. APPA argues that the Petition provides no reason for the Commission to revisit its previous decisions.[104] IMM makes arguments similar to those of APPA.[105] TAPS also disagrees with the Petition, arguing that the Commission already rejected the requested relief on this issue and that the requested relief should be considered a collateral attack as well.[106]

64. TAPS also argues that identification of new passive owners is critical. For example, TAPS explains that, if one seller improperly concludes that an owner is passive and does not report it as an ultimate upstream affiliate in the relational database, the relational database will fail to draw connections between related entities.[107] TAPS adds that requiring that sellers at least identify passive owners in its narrative and affirm that the ownership interests are passive provides some degree of assurance that sellers have, in fact, made an effort to verify that those ownership interests meet the requirements of *AES Creative*.[108] TAPS argues that, if the seller never identifies its passive owners in the first place, the Commission will be unable to determine whether it has adequate information about the seller's passive owners to grant market-based rate authority. Moreover, TAPS argues that there is no burden associated with this requirement as

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[102] *FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060, at P 41 (2007) (*Supplemental Policy Statement*), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008).

[103] EEI November 30, 2020 Comments at 16-17.

[104] APPA November 30, 2020 Protest at 8-9.

[105] IMM December 16, 2020 Answer at 5.

[106] TAPS November 30, 2020 Protest at 5-6, 8-12.

[107] *Id.* at 15.

[108] *Id.* at 15-16.

Petitioners concede that, even under their proposed approach, public utilities would have an obligation to determine whether an investment is passive.[109]

c. Answers

65. Petitioners argue that no party meaningfully challenges their views on reliance on prior Commission precedent to determine whether investments are passive.[110]

66. TAPS disagrees, arguing that many parties highlighted problems with Petitioners' request to eliminate market-based rate sellers' obligation to affirm and identify passive owners in the narratives of their market-based rate filings. TAPS, for examples, notes that, according to IMM, "granting the [P]etition would be harmful to competition."[111]

d. Commission Determination

67. We deny Petitioners' request that the Commission declare that public utilities remain free to conclude, without obtaining case-specific Commission rulings, that the issuance of particular types of securities do not convey control, and therefore do not require passive owners to be identified in market-based rate change in status filings submitted under FPA section 205. As explained below, we clarify that, as articulated in Order Nos. 697-A, 860, and 860-A, the Commission's policy remains that all owners, passive or otherwise, should be identified in the narratives of market-based rate filings.

68. In Order No. 697-A, the Commission explained that a seller seeking market-based rate authority must provide information regarding its affiliates and its corporate structure or upstream ownership. The Commission explained that, to the extent a seller's owners are themselves owned by others, the seller seeking to obtain or retain market-based rate authority must identify those upstream owners. The Commission concluded that sellers must trace upstream ownership until all upstream owners are identified. The Commission further explained that sellers must also identify all affiliates.[112] The Commission reaffirmed this policy in Order No. 860.[113]

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[109] *Id.* at 16.

[110] Petitioners December 15, 2020 Response at 4.

[111] TAPS December 30, 2020 Answer at 2.

[112] Order No. 697-A, 123 FERC ¶ 61,055 at n.258.

[113] Order No. 860, 168 FERC ¶ 61,039 at P 112 (citing Order No. 697-A, 123 FERC ¶ 61,055 at n.258).

69. In Order No. 860, the Commission also articulated and codified its current and future policy with respect to identifying and disclosing passive ownership interests. Currently, where those owners are passive, they must make a demonstration that the ownership interests or securities at issue comport with *AES Creative*.[114] When Order No. 860 takes effect, market-based rate sellers must continue to disclose their passive owners in the narrative of their market-based rate filing, but they are no longer required to make a demonstration regarding whether the securities held by their owners are passive, consistent with *AES Creative*.[115] Rather, they must make a simple affirmation that the securities comport with *AES Creative*, unless they have received case-specific reporting requirements in a declaratory order. Moreover, if a market-based rate seller is uncertain as to whether an investment is passive, the seller may file a petition for declaratory order to clarify the issue.[116]

70. Petitioners' argument in this regard contradicts the Commission's established policy regarding identifying owners in the narratives of market-based rate filings. Order No. 816, as they note, states that no assets need to be included in a seller's horizontal market power screen if they involve passive ownership, provided that the seller can demonstrate that the ownership interests are passive. Petitioners then argue that the Commission has never required an express demonstration, only that sellers must be ready to defend a belief that the ownership interests are passive. This view is counter to the Commission's policy set forth in Order No. 697-A that all owners must be disclosed in market-based rate filings.[117] Although we agree with Petitioners that only *affiliated assets* must be included in a horizontal market power analysis, we disagree that the requirement in Order No. 697-A to disclose ownership is limited to affiliates. Although Petitioners are correct, as the Commission has acknowledged in Order No. 860, that the Commission does not make a finding of passivity in its orders granting market-based rate authority,[118] the Commission's policy remains that all owners, passive or otherwise, should be identified in the narratives of market-based rate filings. Although Order No. 860 provides that market-based rate sellers may now affirm whether the ownership interests of their passive owners meets the requirements of *AES Creative*,

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[114] *Id.* P 137.

[115] *Id.*

[116] *Id.* P 140.

[117] "A seller seeking market-based rate authority must provide information regarding . . . its corporate structure or upstream ownership . . . . Sellers must trace all upstream ownership until all upstream owners are identified." Order No. 697-A, 123 FERC ¶ 61,055 at n.258.

[118] Order No. 860, 168 FERC ¶ 61,039 at P 137.

rather than make a demonstration in this regard, the requirement to identify all owners, including passive owners, in the narratives of market-based rate filings, remains in effect.

The Commission orders:

The petition for declaratory order is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Danly and Commissioner Chatterjee are concurring with a joint statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

NextEra Energy, Inc. Docket No. EL21-14-000
Evergy, Inc.
American Electric Power Company, Inc.
Exelon Corporation
Xcel Energy Services Inc.

(Issued March 18, 2021)

DANLY, Commissioner, with whom CHATTERJEE, Commissioner joins, *concurring*:

1. We fully support the holding in today's order finding that entities under the common control of institutional investors who have received blanket authorizations under Federal Power Act section 203(a)(2)[1] (institutional investors) are not affiliates. This is the most significant issue raised by the Petitioners,[2] and this holding is compelled by the underlying findings that the Commission makes in granting those blanket authorizations, i.e., that the conditions placed on the authorizations prevent the institutional investors from exercising control through their purchase of securities.

2. We also agree with today's ruling that our past orders granting the blanket authorizations did not constitute holdings that securities purchased by the institutional investors are passive investments or that the institutional investors are not affiliated with the companies whose securities they purchase under those blanket authorizations. Further, we support our ruling that we should not waive the application of section 35.36(a)(9)(i) of our regulations,[3] which defines an affiliate as any person that owns 10% or more of a company's voting securities, to institutional investors.

3. Nevertheless, we write separately to express our view that, under our current regime, there is little to no value in listing institutional investors as the ultimate upstream affiliate of market-based rate sellers in the relational database. Our granting of the blanket authorizations is premised on our finding that the institutional investors can exercise no control over the utilities whose securities they have purchased. In granting

[1] 16 U.S.C. § 824b(a)(2).

[2] NextEra Energy, Inc. (NextEra), American Electric Power Company, Inc., Evergy, Inc., Exelon Corporation, and Xcel Energy Services Inc. on behalf of Xcel Energy Inc. (Petitioners).

[3] 18 C.F.R. § 35.36(a)(9)(i) (2020).

the blanket authorizations, we made a finding that the acquisition would not adversely affect competition.[4] The conclusion that the institutional investors cannot exercise control or influence sellers in a way that affects market power is bolstered by our holding that sellers under common control of an institutional investor are not affiliates.

4. Given those predicate determinations, we cannot understand why the Commission believes it important to include institutional investors in a database that is designed to enable the Commission to monitor the opportunity for market-based rate sellers (sellers) to exercise market power. For the same reason, we do not understand why the Commission should require change in status filings to be made whenever an institutional investor's ownership of the seller's voting securities crosses the 10% threshold in either direction. To the extent that a particular institutional investor's ownership of voting securities ever becomes relevant to the Commission because it may have violated the conditions of its authorization, that information is easily ascertainable from the quarterly informational filings we require as a condition of granting the blanket authorizations, which provide transparency into each institutional investor's ownership of the securities of market-based rate sellers.[5]

5. There is a simple solution that would allow the Commission to eliminate the requirement to include institutional investors in the relational database and in change of status filings without waiving the applicability of section 35.36(a)(9)(i) of our regulations. Section 35.36(b) provides: "The provisions of this subpart apply to all Sellers authorized, or seeking authorization, to make sales for resale of electric energy, capacity or ancillary services at market-based rates *unless otherwise ordered by the Commission.*"[6] Here the Commission could have—and in our opinion should have — used this authority to order that sellers are not obligated to report institutional investors in the relational database or to make change in status filings when institutional investors cross the 10% voting security threshold. The Commission would also need to make a minor amendment to its relational database regulations to provide that when an institutional investor is the ultimate upstream affiliate, sellers should instead list the next highest upstream affiliate in the database. For example, subsidiaries of NextEra should list NextEra as the ultimate upstream affiliate in the database if any institutional investor owns 10% or more of NextEra pursuant to a blanket authorization. This amendment would be similar to the amendment proposed in the Notice Seeking Comments issued

[4] *See, e.g.*, *Legg Mason, Inc.*, 121 FERC ¶ 61,061, at P 26 (2007).

[5] *See, e.g.*, *id.* P 30.

[6] 18 C.F.R. § 35.36(b) (emphasis added).

today which is aimed at the implementation of the Commission's ruling in this proceeding regarding cross-affiliation.[7]

6. We appreciate that the Commission has acted to reduce the burden on sellers resulting from the requirement to include institutional investors in the relational database and in change-in-status filings. But a pointless regulatory burden is a pointless regulatory burden, no matter how small.

For these reasons, we respectfully concur.

_____	_____
James P. Danly	Neil Chatterjee
Commissioner	Commissioner

[7] *Data Collection for Analytics & Surveillance & Mkt.-Based Rate Purposes*, 174 FERC ¶ 61,221 (2021).