UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Federal Power Act Section 203 Blanket Authorizations for Investment Companies	)	Docket No. AD24-6-000

REPLY COMMENTS OF THE INDEPENDENT MARKET MONITOR FOR PJM

Pursuant to Rule 211 of the Commission's Rules and Regulations,[1] Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor ("Market Monitor") for PJM Interconnection, L.L.C. ("PJM"),[2] submits these reply comments responding to comments filed on the Notice of Inquiry issued in the proceeding on December 19, 2023 ("NOI") by the Vanguard Group, Inc. on March 22, 2024 ("Vanguard"); by Electric Power Supply Association on March 25, 2024 ("EPSA"); by Asset Management Group of the Securities Industry and Financial Markets Association on March 26, 2024 ("SIFMA AMG"); by Edison Electric Institute on March 26, 2024 ("EEI"); by Investment Company Institute on March 26, 2024 ("ICI"); by Maryland Office of People's Counsel, et al. on March 26, 2024 ("State Entities"); by American Council on Renewable Energy on March 26, 2024 ("ACORE"); and by BlackRock, Inc. on March 26, 2024 ("BlackRock") in response to the Commission's Notice of inquiry on Federal Power Act Section 203 Blanket Authorizations for Investment Companies, issued on December 19, 2023 ("NOI").

Section 203(a)(2) of the Federal Power Act provides:

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1 18 CFR § 385.211 (2023).

2 Capitalized terms used herein and not otherwise defined have the meaning used in the PJM Open Access Transmission Tariff ("OATT"), the PJM Operating Agreement ("OA") or the PJM Reliability Assurance Agreement ("RAA").

> No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of $10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10,000,000 without first having secured an order of the Commission authorizing it to do so.[3]

Under this provision, investment companies, a type of holding company, cannot take a position in an electric utility company exceeding $10,000,000, directly or indirectly, without obtaining prior approval. Such prior approval can be obtained through a blanket authorization. With a blanket authorization, an investment company is exempt from having to submit each individual jurisdictional transaction to the Commission for prior review.

The NOI explains (at P 5) that the Commission has "issued blanket authorizations, on a case-specific basis to investment companies, that allowed the acquisitions of securities in public utilities over the $10 million threshold established by EPAct 2005 and up to 20% of the outstanding voting securities of a given public utility." The Commission grants blanket authorizations subject to conditions, including "limitations on the amount of both collective ownership and ownership of securities for each individual fund, governing policies, and status as beneficial owners eligible to file Schedule 13G under the Securities' and Exchange Act of 1934."[4] The "governing policies" refers primarily to the condition included in blanket authorizations limiting "control [of] the public utility, including control over the day-to-day management and operations of the utility, or holding company thereof."[5] The intent of this provision is to limit blanket authorizations to investment companies that seek passive

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[3] 16 U.S.C.. § 824e(c)(2).

[4] NOI at P 5 & n.13.

[5] NOI at P 12, citing *BlackRock, Inc.*, 131 FERC ¶ 61,063 (2010).

beneficial ownership of an interest in an electric utility company without exercising control over the company. The Commission seeks to "'encourage greater investment in utilities by mutual funds,' provided that the Commission can perform continuing oversight in accordance with section 203 of the FPA."[6]

These comments should be accepted because they clarify the issues and contribute to a complete record, thereby facilitating the decision making process.

I. COMMENTS

A. Definition of Public Utility

A public utility is defined by the FPA as "any person who owns or operates facilities subject to the jurisdiction of the Commission," i.e., "any person who owns or operates" facilities for "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce" (16 USC § 824(e)). The definition of public utility includes not only traditional investor owned utilities, but also power marketers, regional transmission organizations, and independent system operators. Facilities can be "paper facilities," e.g., contracts, books & records, etc."

B. Establishing Rules to Prevent Market Power Does Not Require Evidence of the Exercise of Market Power.

Some commenters (SIFMA AMG at 4, ACORE at 1, 4-5; EEI at 4; BlackRock at 3) argue that there is no evidence of any attempt from large investment companies trying to influence public utilities' management or operations.[7] That assertion is irrelevant, regardless of whether the assertion is true. The rules discussed in the NOI are about the existence and potential accumulation of structural market power. The existence of structural market power permits the exercise of market power in a variety of behaviors. As

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[6] NOI at P 5, citing *Capital Research & Management Co.*, 116 FERC ¶ 61,267 at P 28 (2006).

[7] SIFMA AMG at 4, ACORE at 1, 4-5; EEI at 4; BlackRock at 3.

the Commission has long recognized, market power rules need to be part of the market design, even before markets are created. Market power rules help establish the rules ahead of time so that they are clear to all. Market power rules help to maintain the competitiveness of markets which is essential to just and reasonable rates. Market power rules help create confidence in the competitiveness of markets which is essential for all market participants.

All who pay attention to market power and competition issues in wholesale power markets are familiar with the argument, often incorrect, that specific patterns of ownership and specific anticompetitive behaviors are not prohibited because there is no explicit rule against them. The accumulation of structural market power should be clearly prohibited before market participants attempt to undermine the competitiveness of market, not after. The Commission has good reason to act to create and enforce rules that prevent the accumulation of structural market power, based on the facts about the market, regardless of whether any participant can be shown to have attempted to exercise market power.

According to the State Entities (at 7, Attachment), Vanguard was the largest investor in eight out of the 10 largest publicly traded U.S. utilities in 2023, seven of which are PJM market participants, with an average of 10 percent ownership. On average, the three largest index fund managers, Vanguard, BlackRock and State Street, together called the Big Three, own 23.8 percent of the 10 largest publicly traded U.S. utilities.[8] This only accounts for ownership in companies that are publicly traded. The Big Three total ownership in privately held companies is unknown, because ownership less than 10 percent is not required to be reported to the Commission under the Commission Rules for blanket authorizations.[9] The Big Three ownership share in the publicly traded utilities creates sufficient market power concern for the Commission to revisit the current blanket

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[8] State Entities at Attachment.

[9] 18 CFR § 33.1(c)(2)(ii), (c)(12).

authorization policy without any assertions that any company has attempted to exercise market power in any form.

Relying on the eligibility of SEC 13G filing is not a solution as some commenters suggested.[10] As the Commission acknowledged,[11] the filing of form 13G is informational and is not a representation that the investment is purely passive, with no intention of influencing the basic business decisions of the issuer. The Commission should establish its own rules and procedures to ensure the appropriate monitoring of the growing influence from investment companies in public utilities.

Relevant ownership of public utilities is not limited to ownership of publicly traded public utilities or the publicly traded securities of public utilities. The definition of ownership should be broad enough to encompass all forms of ownership of public utilities.

C. Market Power Regulation Should Not Rely on Market Participants' Voluntary Efforts.

Investment companies can influence public utilities' management and operation decisions without being directly involved in day to day operations. Although investment companies do not "typically" advocate for particular goals during proxy voting as EEI (at 6) suggested, EPSA (at 6) recognized that "companies seeking investments necessarily and naturally take investor preferences into account." As the Commission suggested in its question, Q16 (at 15), confining the exercise of market power only to day to day operations misses the kind of influence that investment companies may wield over other types of public utilities' decisions. Decisions about when to retire generating units are one example. Decisions about what type of resources to invest in are another example. The implementation of long term goals affects market prices, which means the potential impact

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[10] Vanguard at 5, BlackRock at 3–4, EEI at 8, SEFMA AMG at 3–4; ICI at 8–9.

[11] 157 FERC ¶ 61,064 at P4.

on the long term goals of public utilities should be considered when evaluating whether an exemption is appropriate.

State Entities (at 6-10, 13-15) provide numerous examples of how investment companies with blanket authorizations have influenced public utilities' decisions without being directly involved with daily operations. With proxy voting, investment companies can nominate members to the board of directors, demand to replace a CEO, or approve/disapprove shareholder proposals, all of which have a direct influence on the market and may also affect day to day operations. The Commission's current regulations do not address investment companies' proxy voting policies. Vanguard states that they have adopted proxy voting policies and procedures (at 7) and BlackRock also states that they voluntarily publish insights regarding their investment stewardship activities (at 3). The level of transparency of proxy voting procedures is provided on a voluntary basis by Vanguard and BlackRock, but there are no Commission rules and it is not enforced by the Commission.

Even if the transparency of proxy voting policies is ensured, it is possible for investment companies to influence public utilities' business decisions and long term planning through proxy voting or other approaches. The Commission cannot rely on the investment companies' goodwill for them not to nominate directors, not to submit shareholder proposals and not to threaten to buy/sell shares to influence corporate behavior as Vanguard stated (at 8). The Market Monitor supports State Entities' proposal (at 22) to require an investor who wishes to be treated as passive (granted a blanket authorization of any kind) not to engage in any interactions with the utility or the utility holding company, and not to take any actions concerning the utility or the investor's shares in the utility other than holding it, selling it, or engaging in a specified list of exempt transactions.

The Commission should require enforceable and publicly stated rules governing proxy voting and other investment company actions that meet defined standards preventing any attempt to influence company decisions or policies as a condition to obtain

blanket authorization of any kind. The Commission should also define the consequences of violating these rules.

The Commission's ability to address anticompetitive behavior should be ongoing. Blanket authorizations should not be granted except where the applicant is willing to meet significant conditions that permit ongoing review and, when needed, penalties including termination of the blanket authorization.

The authorizations should ensure access to information sufficient to permit monitoring. The authorizations should include penalties for noncompliance, including termination. Penalties and termination provision should be enforceable and enforced.

D. The Commission Should Reduce the Ownership Threshold for Granting Blanket Authorization.

The Market Monitor agrees with State Entities that the Commission should lower the threshold for granting generic and case specific blanket authorizations (at 12-17). The Market Monitor recommends lowering the 10 percent threshold for generic blanket authorization to five percent as the State Entities proposed, or lower; and the 20 percent threshold for case specific blanket authorization to the same five percent, or lower. It is not clear why the limits should be different for generic and case specific. The relevant actions are all individual cases, regardless of whether the authorization is blanket or case specific.

Current Commission policy grants blanket authorization if the transfer of the ownership of voting securities in a public utility is less than 10 percent. It also grants case specific blanket authorizations for large investment companies with a limitation of voting securities ownership to 20 percent across the portfolio within an investment company. There have been cases, however, where an investor with less than five percent of voting securities appointed boards of directors or replaced a CEO.[12] These examples directly

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[12] FirstEnergy makes deal to give 2 board seats to activist investor Carl Icahn, Akron Beacon Journal (Mar. 16, 2021) <*https://eu.beaconjournal.com/story/business/2021/03/16/activist-investor-icahn-near-deal-get-2-firstenergy-board-seats/4719852001/*>; Elliott campaign results in chief's exit from US power

contradict any assumption that an investor with less than 10 percent of voting shares cannot influence public utilities' business decisions.

The role of market regulation is to prevent the accumulation of structural market power, which helps ensure just and reasonable rates. Ignoring the fact that less than a specified percent of ownership can influence public utilities' decisions and ultimately just and reasonable rates would undermine the competitive and efficient functioning of the market. The Commission should require regular and periodic review of all blanket authorizations. The Commission should review all ownership of public utilities in these periodic reviews regardless of when the ownership occurred. Blanket authorizations should, without exception, impose conditions on all investments, including preexisting investments. There are many ways to exercise control, none of which can be ignored, consistent with protecting the public interest in regulation through competition. Some examples include: agreements to coordinate market behavior and use of common consultants.

II. CONCLUSION

The Market Monitor respectfully requests that the Commission afford due consideration to these comments as the Commission resolves the issues raised in this proceeding.

Respectfully submitted,

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company NRG, Financial Times (Nov. 20, 2023) <https://www.ft.com/content/b0debddb-c68d-4d32-8e21-90d1cc6271bf> .

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Dated: April 25, 2024