

The Market Monitor agrees that the Petition constitutes an improper collateral attack on the reporting rules promulgated in Order No. 860.³ The deadline for rehearing is long past. The Petition is a collateral attack on Order No. 860. The Petition should be rejected, or, if not rejected, denied for lack of merit.

I. ANSWER

A. Transparency is Essential to Competition.

Granting the petition would be harmful to competition, and the Market Monitor agrees with comments explaining that harm. The petition goes too far. The petition asks for a broad ruling that would preclude any future finding of affiliation based on ownership of voting shares of up to 20 percent by certain financial institutions and would remove requirements for reporting those institutions' ownership.

Transparency is paramount. It was, in fact, on the topic of market power abuse in the finance industry, including the financial institutions' ownership in American infrastructure industries, that Justice Louis Brandeis said, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."⁴ While circumstances have evolved since 1913, market concentration still requires regulatory checks and full disclosure of ownership arrangements continues to be needed in both the utilities and the financial industries.

The Commission staff has appropriately asserted its authority and fulfilled its obligation to collect financial ownership information from utilities. The approach advocated by Petitioners would interfere with the ability of the Commission to detect and prevent the

³ See Motion to Intervene and Protest of the American Public Power Association ("APPA"), Docket No. EL21-14 at 3-5; *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, Order No. 860, 168 FERC ¶ 61,039 (2019) ("Order No. 860"), *order on reh'g and clarification*, Order No. 860-A, 170 FERC ¶ 61,129 (2020) ("Order No. 860-A").

⁴ Brandeis, Louis D. (1914). *Other People's Money*, Chapter 5. (Louis D. Brandeis School of Law Library, University of Louisville, <<https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-by-louis-d.-brandeis>>, accessed December 14, 2020.)

growth of market power in the industry it regulates. It also interferes with the market monitors' ability to detect and investigate the exercise of market power and market manipulation.

The Commission should not revise Order No. 860 to create a safe harbor allowing financial institutions to acquire voting securities of public utilities at levels up to 20 percent with no affiliate regulatory consequence under Section 205, including applications for market based rates authorization.

Petitioners want to apply a 20 percent safe harbor for Section 205 matters with reference (at 2–3) to blanket authority granted to various financial institutions under FPA Section 203(a)(2) to acquire up to 20 percent of the publicly traded voting securities of public utilities. The comparison is not valid. The orders granting blanket authorization for ownership under Section 203 are conditional and temporary.⁵ Section 203 concerns review of mergers and acquisitions, not ongoing market activity. The exemption orders do not imply preemptive conclusions about ongoing market power reviews under Section 205. The Commission has already determined in Order No. 860-A that “it would not be appropriate for the Commission to sever the chain of affiliation with respect to holders of publicly traded securities and preemptively find that they are not ultimate upstream affiliates.”⁶ There is no logical reason that the relaxation of the obligation to submit 203 applications based on certain financial ownership should be extended to preclude all review of ownership by those financial institutions by the Commission.

The Market Monitor disagrees with Petitioners and supporting commenters that overt and explicit “control” is the only issue relevant to determining what information on

⁵ See, e.g., *The Vanguard Group, Inc., Order Granting Blanket Authorizations*, 168 FERC ¶ 62,081 (August 9, 2019).

⁶ Order No. 860-A at P 11.

affiliation is needed in order to review applications under FPA Section 205, or FPA Section 203.⁷

The Market Monitor agrees with comments explaining that market power concerns related to affiliate relationships concern more than control.⁸ The American Antitrust Institute points out (at 3): “The antitrust agencies look to three major factors to determine how partial ownership transactions can potentially harm competition: incentives, influence, and information.” AAI explains in its comments (at 2–4) that the antitrust agencies view partial ownership of competitors by financial institutions as harmful to competition and cites research evidencing the harm.

There is good reason to report information on passive owners in the relational database created under Order No. 860. Market participants can engage in anticompetitive behavior and collude without being under common permanent active ownership and control. Reporting on beneficial ownership, even if it could be deemed passive in form, is needed to support the Commission’s ongoing market monitoring.

The Commission should deny the request that it delegate to public utilities its regulatory authority to determine whether the issuance of particular types of securities do not convey control.⁹ Such a delegation of authority would be improper,¹⁰ even if did not create an obvious conflict of interest. The point of Order No. 860 is to require market participants to provide information to the Commission sufficient for the Commission to make informed decisions. The Commission may or may not find affiliation or other

⁷ See Petitioners at 27–33; Motion to Intervene and Comments in Support of Petition of Ameren Services Company, Dominion Energy Services, and NiSource, Docket No. EL21-14 (November 30, 2020) at 5–7 (“Ameren, et al.”).

⁸ See Comments of the American Antitrust Institute, Docket No. EL21-14-000 (November 30, 2020) (see also Petition at 4–5); APPA at 6–8.

⁹ See Petition at 38–42.

¹⁰ See, e.g., *City of Tacoma v. FERC*, 331 F.3d 106, 356 (2003).

relationship based on that information. It is important that the Commission have the information and the opportunity to evaluate all relevant corporate relationships as the need arises.

The Commission rightly rejected, in Order 860-A, requests for rehearing on the question of reporting requirements for entities without case specific Commission determination on passivity. The Commission should continue to enforce the reporting requirements for all owners, except where the Commission provided a case specific waiver of reporting obligations.

The Petitioners' second request (at 2) 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 do not convey control, and therefore do not create any regulatory approval requirements under the FPA" seeks to overturn a ruling that has already been rejected on rehearing. The second request is overly broad.

B. Order No. 860 Does Not Pose an Undue Burden on the Industry.

The Market Monitor disagrees with Petitioners (at 33–37) and commenters arguing that compliance poses undue burdens. There is no reason why Petitioners cannot provide the requested information to meet the Commission's requirements under the rule. Petitioners routinely report comparable information to a range of regulatory authorities.

In an industry characterized by permanent structural market power and regulated through competition, participants must be prepared to cooperate and provide timely and accurate information on ownership.

C. The Petition Should Be Rejected as an Improper Collateral Attack.

The Market Monitor also agrees with concerns raised that the Petition constitutes an improper collateral attack on the reporting rules promulgated in Order No. 860.¹¹

¹¹ See APPA at 3–6.

Petitioners acknowledge (at 3) that the Petition is really a request for rehearing of findings in Order No. 860-A:

Under section 35.36(a)(9)(i) of the Commission's regulations, an "affiliate" is defined as any entity holding 10 percent or more of the voting securities of a public utility. [footnote omitted] Building on that definition, the Commission stated in Order No. 860-A that its regulations include no exemption for financial institutions that hold publicly traded securities, meaning that "to exempt these entities from this definition would require a change to the affiliate definition in [section] 35.36(a)(9)(i) because the determining criterion is voting securities." [footnote omitted] Given the Commission's regulations and statements in Order No. 860-A, the Commission Staff has contacted numerous public utilities to prompt FPA section 205 filings to report new affiliate relationships with financial institutions.

Petitioners describe nothing more than Commission staff implementing the Commission rules. A new rulemaking would be necessary to grant the requested relief. The deadline for rehearing is long past. The Petition is a collateral attack on Order No. 860. The Petition should be rejected, or, if not rejected, denied for lack of merit.

II. MOTION FOR LEAVE TO ANSWER

The Commission's Rules of Practice and Procedure, 18 CFR § 385.213(a)(2), do not permit answers to answers or protests unless otherwise ordered by the decisional authority. The Commission has made exceptions, however, where an answer clarifies the issues or assists in creating a complete record.¹² In this answer, the Market Monitor provides the Commission with information useful to the Commission's decision making process and

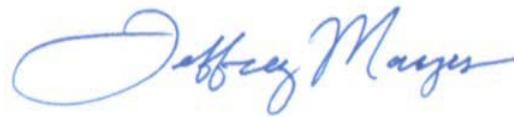
¹² See, e.g., *PJM Interconnection, L.L.C.*, 119 FERC ¶61,318 at P 36 (2007) (accepted answer to answer that "provided information that assisted ... decision-making process"); *California Independent System Operator Corporation*, 110 FERC ¶ 61,007 (2005) (answer to answer permitted to assist Commission in decision-making process); *New Power Company v. PJM Interconnection, L.L.C.*, 98 FERC ¶ 61,208 (2002) (answer accepted to provide new factual and legal material to assist the Commission in decision-making process); *N.Y. Independent System Operator, Inc.*, 121 FERC ¶61,112 at P 4 (2007) (answer to protest accepted because it provided information that assisted the Commission in its decision-making process).

which provides a more complete record. Accordingly, the Market Monitor respectfully requests that this answer be permitted.

III. CONCLUSION

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

Respectfully submitted,



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Dated: December 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Eagleville, Pennsylvania,
this 15th day of December, 2020.



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