March 26, 2024

Federal Energy Regulatory Commission
Office of the Secretary
888 First Street NE,
Washington, DC 20426

Submitted via FERC Online Portal *https://ferconline.ferc.gov/eFiling.aspx*

Re: Docket No. AD24–6–000, Notice of Inquiry, Federal Power Act Section 203 Blanket Authorizations for Investment Companies

Dear Chairman Phillips and FERC Commissioners:

The States of Utah, Indiana, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wyoming (the "States"), through the undersigned Attorneys General, submit this initial comment to the Notice of Inquiry ("NOI")[1] on the Federal Energy Regulatory Commission's ("FERC" or "Commission") policy for providing blanket authorizations for investment companies under Section 203(a)(2) of the Federal Power Act ("FPA"), 16 U.S.C. § 824b(a)(2). This comment also discusses what constitutes control of a public utility in evaluating holding companies' requests for blanket authorization and what factors FERC should consider when evaluating control over public utilities as part of such a request. This comment focuses on asset managers, which are a subset of investment companies that manage investment funds on behalf of clients and owe such clients fiduciary duties. But the principles in this comment apply to other types of investment companies as well.

Introduction and Summary of Comment

FERC's practice for granting company-specific blanket authorizations to asset managers under Section 203(a)(2) must have three critical requirements to achieve the pro-competitive and consumer-protection focus of the FPA. First, asset managers must limit their ownership to 20% or less. Second, asset managers must pledge to FERC that they will function as passive investors.[2] Third, recipients of blanket authorizations must commit to follow their fiduciary duties to their investors. As Commissioner Christie recognized, there is a clear—and unacceptable—potential for conflicts when asset managers "appear to be acting not as passive investors simply seeking the

[1] *See* 88 Fed. Reg. 88900 (Dec. 26, 2023).

[2] *See, e.g., BlackRock, Inc.*, 179 FERC ¶ 61,049 at ¶ 13 (2022).

best risk-based returns for their clients but instead appear to be *actively* using their investment power to affect how the utility meets its own public service obligations."[3]

FERC should focus on enforcing these requirements. Importantly, this would include requiring asset managers to obtain FERC approval as a "holding company" related to membership in any horizontal associations that seek to influence utilities' operations. The definition of "holding company" is broad and covers an "association" or unincorporated "organized group" consisting of a horizontal association *and* its investor signatories acquiring shares in utilities. *See infra* Part II(A). Therefore, such holding companies must receive FERC approval. FERC must also enforce its longstanding 20% limit on ownership across any association whose purpose or activities include influencing company operations.

To the extent that FERC decides to modify its existing policies, such modification should not in any way limit the applicability of the FPA to all holding companies covered by the broad statutory language (including horizontal associations), but rather should only strengthen the existing policies. In particular, FERC should reinforce the requirement that if an asset manager joins an organization or association whose purpose is to influence portfolio company operations through proxy voting or engagement, then: 1) such membership must be considered for the passive ownership requirement (which the association would very likely fail for the reasons discussed below), and 2) the ownership of each member of such association must be aggregated for purposes of the 20% overall ownership limit (which many large associations, such as the Net Zero Asset Manager's Initiative ("NZAM"), would also very likely fail).

Finally, to ensure that asset managers that receive blanket authorizations are not improperly influencing or controlling utilities in a manner that is not consistent with the public interest under the FPA, the Commission should require commitments not just to refrain from controlling utilities in the sense of owning a certain percentage of the utility's shares, but also to refrain from using lower percentages of share ownership to influence control or day-to-day operations of such utilities. The Commission should also require a clear commitment by asset managers not to coordinate their engagement, votes, or investment decisions with any external groups or organizations, unless the Commission has approved involvement in such groups or organizations as part of the blanket authorization for the asset manager. In addition, to understand and monitor how asset managers can exercise control, the Commission should require specific reports by asset managers of every instance when such asset managers voted contrary to the recommendation of utility management on a shareholder proposal or board of director nomination, as well as an explanation of how such votes were consistent with the asset manager's commitments to FERC. Asset managers should also be required to report on all engagements with utilities.

[3] 88 Fed. Reg. 88904.

Comment

I. The States' Interests in this NOI

A. The States Are Directly Impacted by the Issues Raised in the NOI Because Utilities in Their Jurisdictions Have Been Subject to Coordinated Pressure Campaigns, and Electricity Purchasers Have Been Subject to Inflated Prices

Over the past few years, the States have uncovered and witnessed an unprecedented pressure campaign to use the financial system to push companies in the real economy—including electric utilities—to adopt environmental policies and targets aligned with net zero by 2050. And particularly concerning for purposes of this comment, consumers are suffering from high inflation in the electricity sector. "In nominal terms, the average monthly electricity bill for residential customers in the United States *increased 13%* from 2021 to 2022, rising from $121 a month to $137 a month."[4] Further, "average residential electricity prices next year [are forecast to] reach their *highest level in almost three decades*."[5]

Key components of the financial system have been used to impose activist policy preferences on companies that are not required by applicable law and thus have not been approved by the democratic process. Specifically, activists enlisted asset managers to use their assets under management (AUM) to force utilities to set early targets to decommission fossil-fuel based generating assets and replace them with wind and solar on a scale that has never before been seen and is not technologically feasible.[6] Moreover, the International Energy Agency's *Net Zero Roadmap*, shows Electricity Generation Shares for all fossil fuels being cut from 61% in 2020 to 26% by 2030 and to 2% by 2050.[7] This is clearly a dramatic change in utility operations. On top of this, it does not appear that the activists' environmental goals are even realistic given China's actions,[8] and the U.S. Deputy Secretary of Energy could not even say if aligning even the *entire*

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[4] U.S. Energy Information Administration, *U.S. residential electricity bills increased 5% in 2022, after adjusting for inflation* (May 31, 2023) (emphasis added), https://www.eia.gov/todayinenergy/detail.php?id=56660.

[5] Robert Walton, *US electricity prices outpace annual inflation* (Mar. 13, 2024) (emphasis added), https://www.utilitydive.com/news/us-electricity-prices-rise-customer-eia-outlook/710113/.

[6] *See* Part I(B)(3), *infra* (providing statements from asset managers about why they withdrew from CA100+); *see also* Part III, *infra* (providing examples for BlackRock).

[7] IEA, *Net Zero by 2050: A Roadmap for the Global Energy Sector* at 31, 199 (Table A.3: Electricity), https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf.

[8] *See, e.g.*, "*China Continues Coal Spree Despite Climate Goals*," The Guardian (Aug. 29, 2023), https://www.theguardian.com/world/2023/aug/29/china-coal-plants-climate-goals-carbon (China approved 106 GW of new coal plants in 2022); Vijay Jayarej, "*Beijing's Coal Boom Is Here to Stay*," Real Clear Energy (Nov. 20, 2023), https://www.realclearenergy.org/articles/2023/11/20/beijings_coal_boom_is_here_to_stay_993518.html (China approved 52 GW of coal power in first-half 2023 and has 136 GW in construction—188 GW total)

U.S. economy with net zero by 2050 would have a material impact on global temperatures.[9]

Nonetheless, these targets have harmful real-world consequences. The transition to "net zero," by an asset manager's own admission, will result in a "rise in inflation" and "can introduce inflationary pressures."[10] Similarly, a utility stated that stricter carbon limitations by governments "has the potential to limit or curtail our operations, including the burning of fossil fuels at our coal-fired power plants."[11] Logically, investors imposing these same limitations will have the same effects on utility operations. And as discussed above, inflation is a major concern in the electric utility industry. With high energy prices being a source of economic pain for our States' citizens, we find the presence of "inflationary pressures" from a coordinated push to impose environmental targets very concerning. We also are concerned about maintaining a reliable electric grid in our States. Horizontal agreements and environmental and social initiatives should not be used to circumvent the democratic process, limit competition, or harm reliability.

One example of the pressure campaign involves PacifiCorp, which serves Utah and other states. In 2021, the California Public Employees Retirement System (CalPERS) introduced a shareholder proposal for Berkshire Hathaway, Inc., PacifiCorp's ultimate owner, relating to so-called "climate risks." It sought "[a]n examination of the feasibility of the Company establishing science-based, [GHG] reduction targets, consistent with limiting climate change to well-below 2ºC."[12] One large asset manager, BlackRock, noted "that the company 'is not adapting to a world where environmental, social, governance (ESG) considerations are becoming much more material to performance,'" and this dissatisfaction "prompted other institutional investors to express their discontent, increasing pressure on the company to modify its approach."[13] Berkshire Hathaway is a Climate Action 100+ (CA100+) focus company, meaning it is one of the 170 companies that

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[9] *See*, U.S. Senator John Kennedy, "*Kennedy to Biden Official: You Want Us to Spend $50T, and You Don't Know If It's Going to Reduce World Temperatures?*" (May 4, 2023), https://www.kennedy.senate.gov/public/2023/5/kennedy-to-biden-official-you-want-us-to-spend-50t-and-you-don-t-know-if-it-s-going-to-reduce-world-temperatures.

[10] BlackRock, *Managing the Net-Zero Transition* at 2 (Feb. 2022), https://www.blackrock.com/corporate/literature/whitepaper/bii-managing-the-net-zero-transition-february-2022.pdf; BlackRock, *Climate-related risk and the energy transition* at 1 (Mar. 2023), https://www.blackrock.com/corporate/literature/publication/blk-commentary-climate-risk-and-energy-transition.pdf.

[11] NorthWestern Energy, 2021 Form 10-K at p. 21, https://www.sec.gov/ix?doc=/Archives/edgar/data/73088/000007308822000019/nwe-20211231.htm

[12] Berkshire Hathaway Inc., *Schedule 14A* at page 11 (March 15, 2021), https://www.sec.gov/Archives/edgar/data/1067983/000119312521080418/d938053ddef14a.htm

[13] Jason Halper *et al.*, *Investors and Regulators Turning up the Heat on Climate-Change Disclosures* (Oct. 4, 2021), https://corpgov.law.harvard.edu/2021/10/04/investors-and-regulators-turning-up-the-heat-on-climate-change-disclosures/ (citing Dawn Lim and Geoffrey Rogow, *BlackRock at Odds With Warren Buffett's Berkshire Hathaway Over Disclosures*, Wall St. J., May 6, 2021, https://www.wsj.com/articles/blackrock-at-odds-with-warren-buffetts-berkshire-hathaway-over-disclosures-11620306010).

CA100+ is targeting for activist pressure.[14] *See* Part I(B)(2), *infra*. At the time of this proposal, BlackRock and CalPERS were both CA100+ members. Although the shareholder proposal did not pass, PacifiCorp nonetheless acted consistent with this investor pressure by accelerating closure target dates of two coal plants, Huntington and Hunter, from 2036 and 2042, respectively, to 2032 for both.[15] Two other coal plants are expected to stop burning coal before 2030.[16] PacifiCorp may have multiple reasons for the closures, but responding to coordinated pressure by asset managers and other owners is not a legitimate one. Consumers will be harmed if their costs go up or reliability decreases because of early closures based on activist pressure campaigns.

Another example of coordinated pressure involves American Electric Power Co., Inc. ("AEP"), which serves customers in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia.[17] AEP is a CA100+ focus company.[18] AEP reports that it has a strategy to achieve "net zero carbon dioxide emissions by 2045, with an interim goal to cut emissions 80% from 2005 levels by 2030."[19] Moreover, AEP reports that it intends to cut its percentage of electricity generation from coal from 42% to 17% by 2033 and increase its percentage of generation from hydro, wind, solar, and pumped storage from 21% to 50% during the same time period.[20] However, CA100+ has graded AEP in every top-level category other than 2050 ambition as not meeting or only partially meeting its criteria.[21] This includes because AEP's target is not "aligned with the goal of limiting global warming to 1.5°C," the company has not set short term targets, and the company's targets do not include scope 3 emissions.[22] This shows the prescriptive nature of CA100+'s demands. Consumers will be required to pay for any increased costs from alternative sources of energy and suffer the consequences of any loss of reliability in their power supply.

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[14] Climate Action 100+, *Company Assessment: Berkshire Hathaway*, https://www.climateaction100.org/company/berkshire-hathaway/.

[15] Robert Gehrke and Tim Fitzpatrick, *Why is Rocky Mountain Power closing its Utah coal plants? Here's what we know*, The Salt Lake Tribune (Mar. 31, 2023), https://www.sltrib.com/news/2023/03/31/why-is-rocky-mountain-power/.

[16] Tim Fitzpatrick et al., *End of Utah coal power in sight as Rocky Mountain Power moves to renewables and nuclear*, The Salt Lake Tribune (Apr. 4, 2023), https://www.sltrib.com/renewable-energy/2023/03/31/end-utah-coal-power-sight-rocky/.

[17] American Electric Power, *Facts*, https://www.aep.com/about/facts.

[18] Climate Action 100+, *Company Assessment: American Electric Power Company*, https://www.climateaction100.org/company/american-electric-power-company-inc/.

[19] American Electric Power, *Clean Energy Future*, https://www.aep.com/about/ourstory/cleanenergy.

[20] American Electric Power, *Generation*, https://www.aep.com/about/businesses/generation.

[21] Climate Action 100+, *Company Assessment: American Electric Power Company*, https://www.climateaction100.org/company/american-electric-power-company-inc/.

[22] *Id*.

A third example is Ameren Corporation, which operates in Missouri and has several natural gas or oil-fired facilities.[23] In 2023, Ameren made a commitment to As You Sow in return for withdrawal of a shareholder proposal seeking to compel the company's board to "issue short and long-term targets aligned with the Paris Agreement's 1.5ºC goal requiring Net Zero emissions by 2050 for the full range of its Scope 3 value chain GHG emissions."[24] Ameren is a CA100+ focus company.[25] As You Sow is a CA100+ "engagement service provider," which means that it is one of the entities that coordinates with asset managers to push shareholder proposals, and it has reported that in 2021 alone it was able to extract agreements from multiple utilities.[26] In December 2023, after reaching agreement with As You Sow, Ameren Missouri released its Task Force on Climate Related Disclosure (TCFD) Report, in which it committed to "metrics and targets for reaching our 2045 net-zero carbon emissions goal."[27] It appears that this 2023 report accelerated the emissions targets for 2030, 2040, and 2045 compared to Ameren's 2022 report.[28] The shareholder proposal filed by As You Sow, which Ameren agreed to resolve in return for withdrawal, thus could increase electricity costs for consumers.

The States themselves consume energy, and decisions by utility companies directly affect the reliable and affordable supply of energy to the States. This creates another direct pecuniary interest in this matter. The States also receive taxes from economic activity, and under basic economic principles, higher energy prices reduce economic activity.

B. The States Took Action to Urge FERC to Carry Out Its Duties under the FPA and Follow Its Rules in the Context of Horizontal Agreements Among Asset Managers

This section briefly discusses two organizations of asset managers that the States identified to FERC as organized groups or associations that qualify as "holding companies" under the FPA. These two organizations are but examples, and the FPA's definition of holding companies applies to other present or future groups or associations of asset managers whose members own substantial shares in utilities and whose purpose includes influencing the operations of those utility

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[23] Ameren, *About Ameren*, https://www.ameren.com/company/about-ameren; Ameren, *Ameren Missouri Facts* (Apr. 2023), https://www.ameren.com/-/media/missouri-site/files/aboutus/amerenmissourifactsheet.ashx.

[24] *Adopt Scope 3 GHG targets (1.5C aligned) (AEE, 2023 Resolution)*, https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000Vt8DBAAZ.

[25] Climate Action 100+, *Companies*, https://www.climateaction100.org/whos-involved/companies/.

[26] Climate Action 100+, *Investor Signatories*, https://www.climateaction100.org/whos-involved/investors/?search_investors=&investor_type=engagement-service-provider; *see also* As You Sow, 2021 Shareholder Impact Review: Changing Corporations for Good, https://www.asyousow.org/2021-shareholder-impact-review.

[27] Ameren, *Powering a Reliable, Sustainable Tomorrow* at 2, *https://www.ameren.com/-/media/corporate-site/files/environment/reports/climate-report-tcfd.pdf*.

[28] *Compare id.* at page 10 (bar chart showing percentage reductions for certain years, reducing to "net-zero" in 2045), *with* Ameren, *2022 Ameren Corporate Sustainability Report* at 18 (chart showing "Projected Carbon Intensity," that does not reach 0 until 2050; moreover the rate of decrease appears to be somewhat slower when compared to the 2023 chart), https://s21.q4cdn.com/448935352/files/doc_downloads/2022/2022_Ameren_Sustainability_Report.pdf.

companies. This section also describes the procedural history of the States' motions before FERC and asset managers' responses, including Vanguard withdrawing from NZAM and BlackRock, State Street, and other large asset managers withdrawing from CA100+. Some of those withdrawals were accompanied by striking admissions about the legal risk of such organizations that FERC should consider as part of the NOI.

1. Net Zero Asset Managers Initiative (NZAM)

NZAM is an association of asset managers that encompasses $57 trillion in AUM.[29] Signatories to NZAM "commit[] to support the goal of net zero [GHG] . . . emissions by 2050, in line with global efforts to limit warming to 1.5°C."[30] They also commit to:

- "Work in partnership with asset owner clients on decarbonisation goals, *consistent with an ambition to reach net zero emissions by 2050 or sooner across all [AUM]*";
- "Set an interim target for the proportion of assets to be managed in line with the attainment of net zero emissions by 2050 or sooner";
- "Review [their] interim target at least every five years, with a view to *ratcheting up the proportion of AUM covered until 100% of assets are included*"; and
- "*Across all [AUM]* … [i]mplement a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with [the] ambition for all [AUM] to achieve net zero emissions by 2050 or sooner."[31]

"The [NZAM] commitment [also] sets out a range of actions that asset managers will take forward which are the key components required to accelerate the transition to net zero and achieve emissions reductions in the real economy: Engaging with clients, setting targets for assets managed in line with net zero pathways, corporate engagement and stewardship, [and] policy advocacy."[32] It "also ensures that several important actions – such as stewardship and policy advocacy – are comprehensively implemented."[33] All of these commitments make clear that NZAM, like CA100+, involves coordination by owners of shares in target companies in order to force such companies to reduce emissions by setting targets that are not a requirement of U.S. law.

Moreover, even just a few of the largest NZAM members collectively own more than 20% of various U.S. utilities, as shown by the following examples. This is significant because, as explained below, FERC limits share ownership in utilities to 20% when it provides a blanket authorization. *See* Part II(B), *infra*.

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[29] NZAM, *The Net Zero Asset Managers Initiative*, https://www.netzeroassetmanagers.org/.

[30] NZAM, *Commitment*, https://www.netzeroassetmanagers.org/commitment/.

[31] *Id.* (emphasis added).

[32] NZAM, *FAQ*, https://www.netzeroassetmanagers.org/faq/.

[33] *Id.*

Table 1: FirstEnergy

Company Name	**Percentage Ownership**[34]	**Membership**
Capital Group (Capital Research and Management Company)	11.9%	Member of NZAM
Vanguard	11.3%	Former member of NZAM (until 12/2022)
BlackRock	7.2%	Member of NZAM
State Street	7.2%	Member of NZAM
Total (including Vanguard)	**37.6%**	
Total (excluding Vanguard)	**26.3%**	

Table 2: Ameren

Company Name	**Percentage Ownership**[35]	**Membership**
T. Rowe Price (Price Associates Inc and T. Rowe Price Investment Management Inc.)	12.5%	Member of NZAM
Vanguard	12.1%	Former member of NZAM (until 12/2022)
BlackRock	6.9%	Member of NZAM
State Street	5.3%	Member of NZAM
Invesco	2.4%	Member of NZAM
Total (including Vanguard)	**39.2%**	
Total (excluding Vanguard)	**27.1%**	

2. Climate Action 100+ (CA100+) and "Phase 2"

CA100+ is another horizontal organization of asset managers and asset owners that at one time had approximately $68 trillion AUM.[36] In addition to its signatories, CA100+ identifies 170 "focus companies," which are "key to driving the global net zero emissions transition."[37] Several U.S.-based utility companies are among CA100+'s targeted "focus companies," including: Dominion Energy, Inc.; Duke Energy Corp.; FirstEnergy Corp.; NextEra Energy, Inc.; NRG Energy, Inc.; The Southern Company; Vistra Corp.; and Xcel Energy Inc.[38]

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[34] FirstEnergy, *Institutional Ownership*, https://investors.firstenergycorp.com/stock-information/ownership/default.aspx.

[35] Yahoo Finance, *Ameren Corporation (AEE)*, https://finance.yahoo.com/quote/AEE/holders/.

[36] *See* CA100+, Investor Signatories (Aug. 4, 2023), https://web.archive.org/web/20230804203106/https://www.climateaction100.org/whos-involved/investors/.

[37] CA100+, *Companies*, https://www.climateaction100.org/whos-involved/companies/.

[38] *Id.*

CA100+ "has established a common high-level agenda for [focus] company engagement to achieve clear commitments to cut emissions."[39] CA100+'s commitment requires signatories (*e.g.*, asset managers) to push the focus companies in which they own shares to "take action to reduce greenhouse gas [GHG] emissions"[40] and align their actions with the Paris Agreement and pathways to net zero GHG emissions.[41]

CA100+ has now moved to "Phase 2," which is a renewed call of its signatories "to action"[42] in using their AUM to pressure companies to "[t]ake action to reduce [GHG] emissions across the value chain … consistent with the Paris Agreement's goal of limiting global average temperature increase to well below 2ºC above pre-industrial levels, aiming for 1.5ºC."[43] CA100+ signatories also must press companies in which they own shares to "*implement* transition plans to deliver on robust targets" in line with the recommendations of the Task Force for Climate Related Disclosures (TCFD).[44]

Ceres, which helped found and helps coordinate CA100+, stated that CA100+ signatories "remain committed to the global effort ensuring that 170 of the largest [GHG] emitters take the necessary action on the global climate crisis."[45] Furthermore, "[i]nvestors and companies alike must do their part to cut [GHG] emissions in half this decade to avoid catastrophic levels of global temperature rise."[46] It is clear from these statements that CA100+ involves coordination in order to force companies—including utility companies—to change operations for the purpose of reducing emissions to hit certain targets that are not a requirement of U.S. law.

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[39] CA100+, *The Three Asks* (Mar. 30, 2023), https://web.archive.org/web/20230330063348/https://www.climateaction100.org/approach/the-three-asks/

[40] *Id.*

[41] *See* BlackRock, *Climate Action 100+ Sign-On Statement" & Letter from BlackRock to Climate Action 100+ Steering Committee*, at 1 (Jan. 6, 2020), https://www.blackrock.com/corporate/literature/publication/our-participation-in-climate-action-100.pdf (CA100+ sign-on statement, referencing the Paris Agreement and "well below 2 degrees Celsius" goal).

[42] Climate Action 100+, *Climate Action 100+ Announces Its Second Phase* (June 8, 2023), https://www.climateaction100.org/news/climate-action-100-announces-its-second-phase/.

[43] Climate Action 100+, *Climate Action 100+ Phase 2: Summary of Changes* at p. 7 (June 2023), https://www.climateaction100.org/wp-content/uploads/2023/06/CA100-Phase-2-Summary-of-Changes.pdf.

[44] *Id.*

[45] Ceres, *Statement on Climate Action 100+ Investor Departures* (Feb. 22, 2024), https://www.ceres.org/news-center/press-releases/ceres-statement-climate-action-100-investor-departures.

[46] *Id.*

3. The States' Motions Related to Asset Managers and FPA Section 203, and Asset Managers' Recent Withdrawals from NZAM and CA100+

a. States' Vanguard Motion and Vanguard's NZAM Departure

The States moved to intervene in Vanguard's request to renew its most recent blanket authorization in November 2022.[47] Vanguard qualifies as a "holding company" in its own right under the FPA. In addition, Vanguard was a member of NZAM, yet it did not disclose such membership in its application for blanket authorization. The States argued that "[b]y making net zero commitments, Vanguard necessarily abandoned its status as a passive investor in public utilities and adopted a motive consistent with managing the utility. These commitments … further suggest that Vanguard has already undertaken … corresponding activities that may constitute attempts to manage utilities—the precise actions Vanguard represented … that it would not take."[48] The States further argued that "in joining NZAM and Ceres, Vanguard has engaged (and promises to continue to engage) in organizations that coordinate conduct with other major financial institutions, including BlackRock and State Street, to impose net-zero requirements on publicly traded utilities. This group effort to control day-to-day operations of public utilities raises serious concerns about the continuing efficacy of the 10% and 20% ownership limits imposed by" Vanguard's prior blanket authorization.[49]

Shortly after the States' motion, Vanguard withdrew from NZAM. Vanguard's CEO commented, "*We don't believe that we should dictate company strategy*."[50] He also said, "*It would be hubris to presume that we know the right strategy for the thousands of companies that Vanguard invests with*. We just want to make sure that risks are being appropriately disclosed and that every company is playing by the rules."[51] He further stated, "We cannot state that ESG investing is better performance wise than broad index-based investing …. Our research indicates that ESG investing does not have any advantage over broad-based investing."[52]

b. States' BlackRock Motion and BlackRock's CA100+ Departure

The States also moved to intervene in the docket for BlackRock's existing blanket authorization in May 2023.[53] BlackRock, like Vanguard, qualifies as an FPA holding company in its own right. The States' motion asked the Commission to exercise its ongoing authority from granting BlackRock a blanket authorization to ensure that BlackRock is acting as a passive investor

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[47] *In re The Vanguard Group, Inc. et al*., Docket No. EC19-57-001; EC-57-002.

[48] Motion to Intervene and Protest by the States and Attorneys General of Utah et al. at 11-12, *In re The Vanguard Group, Inc. et al*., Docket No. EC19-57-001; EC-57-002 (filed, 11/28/2022).

[49] *Id.* at p. 14.

[50] Chris Flood et al., *Vanguard chief defends decision to pull asset manager out of climate alliance*, Financial Times (Feb. 20, 2023) (emphasis added), https://www.ft.com/content/9dab65dd-64c8-40c0-ae6e-fac4689dcc77.

[51] *Id.* (emphasis added).

[52] *Id.*

[53] Motion to Intervene and Motion for Relief Regarding BlackRock's Blanket Authorizations, In re BlackRock, Inc., Docket No. EC16-77-002 (filed, May 10, 2023).

as it promised.[54] The States' motion also asked the Commission to inquire into whether CA100+ and NZAM, including their members such as BlackRock, are "holding companies" under the FPA that have not received Commission authorization to own shares in utilities over the amount specified in Section 203(a)(2).[55] That motion remains pending. For purposes of completing the administrative record in this NOI, the States' motion is attached as Exhibit A and the Reply is attached as Exhibit B to this Comment.

In February 2024, BlackRock announced it is limiting involvement with CA100+ to only its international arm and now will pursue net-zero goals in engagements and proxy votes only for clients who have expressly asked it to do so.[56] BlackRock also noted that it "owes contractual and fiduciary duties to [its] clients and is subject to various antitrust and competition laws across various jurisdictions."[57] BlackRock nonetheless remains a member of NZAM, for which it has never received approval from FERC.

c. CA100+ Departures by Other Asset Managers

J.P. Morgan Asset Management, State Street Global Advisors, PIMCO, and Invesco all recently announced their withdrawals from CA100+.[58] Close to 40 asset managers appear to have left CA100+ over the past six months.[59] Notably, State Street recognized "*potential legal risks*" when leaving CA100+ and stated that Phase 2 is "*not consistent with [State Street's] independent approach to proxy voting and portfolio company engagement*."[60]

While these departures indicate that asset managers are recognizing the legal risks associated with membership in these organizations, over 700 asset managers remain members of CA100+ and approximately 325 remain members of NZAM (some asset managers are members of both). There are also other similar organizations (and new ones may be formed). Therefore, the issues related to commitments in horizontal organizations to require portfolio companies to set net

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[54] *Id.* at 5.

[55] *Id.* at 3.

[56] BlackRock, *Letter to Climate Action 100+ Steering Committee* (Feb. 2, 2024), https://www.blackrock.com/corporate/literature/publication/2024-our-participation-in-climate-action-100.pdf.

[57] *Id.*

[58] Simon Jessop, *Invesco Joins List of US Asset Managers to Exit CA100+ Climate Group*, Reuters (Mar. 1, 2024), https://www.reuters.com/sustainability/invesco-joins-list-us-asset-managers-exit-ca100-climate-group-2024-03-01/.

[59] *Compare* Climate Action 100+, *Investors* (Sep. 27, 2023), https://web.archive.org/web/20230927043308/https://www.climateaction100.org/whos-involved/investors/page/19/ (archived copy showing approx. 780 members) *with* Climate Action 100+, *Investors*, https://www.climateaction100.org/whos-involved/investors/page/18/ (approx. 741 members).

[60] David Gelles, *More Wall Street Firms Are Flip-Flopping on Climate*, N.Y. Times (Feb. 19, 2024) (emphasis added), https://www.nytimes.com/2024/02/19/business/climate-blackrock-state-street-jpmorgan-pimco.html; Patrick Temple-West and Brooke Masters, *JPMorgan and State Street Quit Climate Group as BlackRock Scales Back*, Financial Times, Feb. 15, 2024, https://www.ft.com/content/3ce06a6f-f0e3-4f70-a078-82a6c265ddc2.

zero emissions targets—and the fundamental contradiction between those commitments and FERC's requirement for blanket authorization of being a passive investor that does not seek to influence control of utilities and limiting ownership to 20%—remain highly relevant to this NOI.

II. The Commission's Policies Related to Blanket Authorizations Under FPA Section 203(a)(2) Must Fully Cover "Holding Companies" under the FPA, Which Includes "Associations" or "Organized Groups" that Seek to Influence Utility Operations

This section responds to NOI Questions 1 through 7, including whether the current blanket authorization policy is sufficient to ensure that holding companies lack an ability to control public utilities and how, if at all, that policy should be revised (Q1 and Q2) and what commitments or conditions could give the Commission assurance that blanket authorizations are consistent with the public interest (Q5).

A. FERC's Blanket Authorization Analysis Must Take Horizontal Agreements and Associations By Asset Managers Into Account

The Commission's policy is sufficient, but it needs to be enforced for a key category of "holding company," which so far has operated in violation of the FPA—"associations" or "organized groups" that seek to influence utility company operations. For example, the association or organized group consisting of 1) NZAM and 2) its signatories falls within the plain-language definition of a "holding company" in the FPA, but that association or organized group has not sought or received FERC approval. CA100+ and its signatories similarly never sought or received FERC approval. Asset managers that seek blanket authorizations from FERC are not addressing in their applications that they are part of such holding companies. Many other asset managers are failing to seek blanket authorizations entirely, even though they are part of such associations or organized groups. Therefore, although the FPA is sufficiently broad that it covers this collective activity by asset managers, FERC is failing to enforce the law for an important aspect of the problem of improper control of utilities. FERC must consider and address this problem in the NOI.[61] It must require the hubs of such "holding companies" (*e.g.*, NZAM and CA100+) to receive FERC approval, and it must require each asset manager that is a member of any such association or organized group to also receive FERC approval. As discussed in Part III, *infra*, that approval must ensure that the associations are not improperly controlling utilities.

FPA Section 203(a)(2) prohibits a "holding company in a holding company system that includes a transmitting utility or an electric utility" from "purchas[ing], acquir[ing], or tak[ing] any security with a value in excess of $10,000,000 … without first having secured an order of the Commission authorizing it to do so."[62] Companies may request "blanket authorizations" from the Commission.[63] The Commission will approve such an application only if it finds that doing so is consistent with the public interest in light of competition, rates, and regulation.[64] The Commission

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[61] *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

[62] *See* 16 U.S.C. § 824b(a)(2); 18 C.F.R. § 33.1(c)(2)(ii); *see also* 42 U.S.C. § 16451(8)(A).

[63] *See, e.g., Cap. Rsch. & Mgmt. Co.*, 116 F.E.R.C. ¶ 61,267 at P 28 (2006).

[64] 18 C.F.R. § 2.26(b); *see also* 16 U.S.C. § 824b(a)(4) (setting forth general "consistent with the

historically issues blanket authorizations for three-year terms, requiring investment companies to re-apply for reauthorization periodically.[65] The Commission also retains ongoing authority when it issues a blanket authorization.[66] These requirements are all appropriate.

The definition of "holding company" is broad and covers an "association" or unincorporated "organized group" consisting of a horizontal association *and* its investor signatories acquiring shares in utilities. FPA Section 203(a)(6) provides that the term "'holding company' … [has] the meaning given [it] in the Public Utility Holding Company Act of 2005" ("PUHCA").[67] PUHCA provides that the definition of "holding company" is met by either of the following:

> (i) any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company; and
>
> (ii) any person, determined by the Commission, after notice and opportunity for hearing, to exercise directly or indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a controlling influence over the management or policies of any public-utility company or holding company as to make it necessary or appropriate for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this part upon holding companies.[68]

PUHCA further defines "company" as "a corporation, partnership, association, joint stock company, business trust, or any organized group of persons, whether incorporated or not, or a receiver, trustee, or other liquidating agent of any of the foregoing."[69] And it defines a "person" as "an individual or company."[70]

Groups of asset managers that have joined organizations whose purpose is to push utilities to change their operations (for environmental goals or otherwise) fall within the plain language of the first definition of "holding company." This is because they constitute an "association" or "any organized group of persons, whether incorporated or not." For example, NZAM has official signatories who commit, among other things to "[w]ork in partnership with asset owner clients on decarbonisation goals, consistent with an ambition to reach *net zero emissions by 2050 or sooner across all [AUM]*"; to "*ratcheting up the proportion of AUM covered until 100% of assets are included.*"; and "[a]cross all [AUM] … [to i]mplement a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with [the] ambition for all [AUM] to

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public interest" standard).

[65] *See, e.g., T. Rowe Price Grp., Inc.*, 179 F.E.R.C. ¶ 62,124 at Ordering Paragraph (4) (2022).

[66] 16 U.S.C. § 824b(b); *see also New PJM Companies*, 107 FERC ¶ 61,271, 62,210 (2004).

[67] 16 U.S.C. § 824b(a)(6).

[68] 42 U.S.C. § 16451(8)(A).

[69] 42 U.S.C. § 16451(4) (emphasis added).

[70] *Id.* § 16451(12).

achieve net zero emissions by 2050 or sooner."[71] These commitments necessarily entail specific and dramatic changes in utility operations. The International Energy Agency's *Net Zero Roadmap*, shows Electricity Generation Shares for all fossil fuels being cut from 61% in 2020 to 26% by 2030 and to 2% by 2050.[72] It is hard to imagine a more direct and substantial change in operations than switching over 60% of the sources of generation.

The interpretation of "holding company" discussed above is consistent with Commission precedent. First, the Commission has already described the definition of "corporation" in Section 3(3) of the FPA as "very broad."[73] Therefore the "very broad" term should be given its full scope when applied to horizontal associations or organizations of asset managers, just as it should for any other application. Second, in the analogous context of interpreting the Natural Gas Act, the Commission's held that a committee of operators, the "Cotton Valley Operators Committee," "[c]ertainly … comes within the definition of the term 'person', … since it is at the very least, an organized group of persons"; it was thus a "Natural-gas company" under that act.[74] Just as the operators committee fell within the definition of a "Natural-gas company," an association of asset managers that influences control over utilities falls within the definition of "company" for purposes of the analogous definition in the FPA.

Horizontal associations also meet the second definition of "holding company," given the massive AUM and express commitment to influence utility company operations.[75] The Commission has explained that the second definition "pertains to situations where the entity does not fall within the formal definition of a holding company set forth in [42 U.S.C. § 16451(8)(A)(i)], but there is nevertheless a reason to treat that entity as a holding company."[76]

The critical point is that organized groups, which must obtain FERC approval, are not seeking or receiving it through blanket authorizations or otherwise. As a result, each such group is not committing to FERC to operate as passive investors that do not seek to influence control of utilities, to comply with the fiduciary duty to act solely for the financial interest of investors, and to keep its collective ownership under 20%. In sum, the existing statutory scheme and FERC requirements designed to promote competition and protect utility consumers are not being applied.

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[71] NZAM, *Commitment*, https://www.netzeroassetmanagers.org/commitment/.

[72] IEA, *Net Zero by 2050: A Roadmap for the Global Energy Sector* at 31, 199 (Table A.3: Electricity), https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf.

[73] 16 U.S.C. § 796(3); *New Reporting Requirement Implementing Section 213(b) of the Fed. Power Act & Supporting Expanded Regul. Resps. Under the Energy Pol'y Act of 1992 & Conforming & Other Changes to Form No. FERC-714*, 65 FERC ¶ 61,324, 62,452 (1993).

[74] *Midstates Oil Corp.*, 20 F.P.C. 70, 88 (1958).

[75] 42 U.S.C. § 16451(8)(A)(ii).

[76] *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,209, 62,087 (2008).

B. FERC Should Require the Same Commitments from Associations or Organized Groups of Asset Managers that It Normally Requires in Blanket Authorizations, and Also Require They Adhere to their Fiduciary Duties

For each such association or organized group, and its asset managers, FERC must require a commitment to function as passive investors that do not seek to influence control over the utility, must require a commitment to operate solely for the financial benefit of investors consistent with fiduciary duties, and must limit overall ownership across all group members to 20%. When evaluating an application for blanket authorization in accordance with these requirements, the Commission has made clear that it "relies on the terms and conditions committed to by a blanket authorization applicant."[77]

The first requirement that FERC should require for blanket authorizations is that the association and its members operate as passive investors and not seek to control or influence control of utilities in which they own shares. What FERC should specifically require and how FERC policies and practices should ensure compliance with this commitment to passive investing is discussed in the next section, *see* Part III, *infra*.

Second, FERC should require a commitment to operate consistent with the traditional fiduciary duties applicable to asset managers. As Commissioner Christie recognized, there is a clear—and unacceptable—potential for conflicts when asset managers "appear to be acting not as passive investors simply seeking the best risk-based returns for their clients but instead appear to be *actively* using their investment power to affect how the utility meets its own public service obligations."[78] The duty to invest "solely in the interests" of a client incorporates trust law principles,[79] which prohibit a fiduciary having motives other than the beneficiary's financial interests. "The trustee, in other words, is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Acting with mixed motives triggers an irrebuttable presumption of wrongdoing, full stop."[80] Thus, in managing the investments of a trust, "the trustee's decisions ordinarily must not be motivated by a purpose of advancing or expressing the trustee's personal views concerning social or political issues or causes," except as expressly authorized by the terms of the trust or consent of the beneficiaries, or in some charitable contexts.[81]

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[77] *Mario J. Gabelli*, 175 FERC ¶ 61,004 at ¶ 32 (2021) (emphasis added).

[78] 88 Fed. Reg. 88904.

[79] *See, e.g.*, 29 U.S.C. § 1104 (sole-interest ERISA standard); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (noting that "the law of trusts will often inform . . . an effort to interpret ERISA's fiduciary duties," though it may not always be determinative).

[80] Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 381, 400-401 (2020) (citations and quotations omitted).

[81] Restatement (Third) of Trusts, § 90, cmt. c; *see also* Uniform Prudent Investor Act § 5 cmt. (1994) ("No form of so-called 'social investing' is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries—for example, by accepting below-market returns—in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause."); Richard A. Posner & John H. Langbein, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 96

Third, FERC must limit overall ownership across all group or association members to 20%. The 20% maximum ownership requirement is critical to ensure that horizontal associations and organized groups do not exercise control over utilities.[82] If members of an association work to achieve a common goal related to influencing one or more utilities to adopt net zero in their operations, it follows under general agency principles that the acquisition of stock by any one of their members is attributable to each of the other members for purposes of the definition of "association" and "organized group of persons, whether incorporated or not" under the FPA.[83]

Finally, as discussed in the next section of this comment, FERC must vigorously police post-approval compliance with these requirements. These conditions for blanket authorization are critical to ensuring that recipients of such blanket authorizations do not use their power to harm competition or otherwise contravene the utility's public service obligations.

III. Comments Related to What Constitutes Control of a Public Utility for Purposes of Requests for Blanket Authorizations and What Factors the Commission Should Consider in Evaluating Control

This section responds to NOI Questions 8 through 12, including how the Commission can effectively evaluate the influence and control exerted by holding companies, including investment companies (Q8). It also responds to NOI Questions 13-17, including in what ways a holding company can exert control over public utilities that is not currently captured by the Commission's policies (Q13).

First, the Commission's policies for blanket authorizations should require commitments not just to refrain from controlling utilities in the sense of owning a certain percentage of the utility's shares, but also to refrain from using lower percentages of share ownership to influence control or day-to-day operations of such utilities. This includes seeking to push utilities to shut down generating capacity earlier than at the end of the generating capacity's useful life for non-financial reasons.

The States provided extensive examples of exercise of influence and control over utilities in their Motion related to BlackRock.[84] This includes that BlackRock held over 2,300 company

(1980) ("It remains to consider whether social investing is contrary to trust law and its statutory counterparts. We conclude that it is . . . .").

[82] See, e.g., *Franklin Res., Inc.,* 126 FERC ¶ 61,250 at P 39–40 (2009), *order on reh'g*, 127 FERC ¶ 61,224.

[83] *See Brady v. Comm'r*, 25 T.C. 682, 689 (1955) (holding that, in a joint venture, "the acts of each are attributable to all"); *BP Exploration & Prod. Inc. v. Cashman Equip. Corp.*, 132 F. Supp. 3d 876, 894 (S.D. Tex. 2015) ("By the general law of partnership, the act of each partner, during the continuance of the partnership and within the scope of its objects, binds all the others." (quoting Bell v. Morrison, 26 U.S. 351, 370 (1828))); *Seybolt v. Bio-Energy of Lincoln, Inc.*, 38 B.R. 123, 127 (Bankr. D. Mass. 1984) (noting that a "partner's action binds the partnership whether the . . . partner acts in his own name or in the partnership name").

[84] States BlackRock Motion (Exhibit A to this Comment) at pages 26-30 and 61-62.

engagements on environmental issues with its portfolio companies, and the Ceres Network, which BlackRock is a member of, stated that its members (of which BlackRock is the largest) had reached a record number of negotiated agreements in return for withdrawals of shareholder proposals, including to set GHG emissions targets.[85] Other specific actions include:

- BlackRock voted against the Chairman of the Board of First Energy because the company "does not have a rigorous net zero strategy."

- BlackRock voted against a director for Dominion Energy because the company did not meet BlackRock's "expectations of having adequate climate risk disclosures against all 4 pillars of TCFD … including Scope 3 disclosures."

- BlackRock stated that it would be "increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability related disclosures and the business practices and plans underlying them."

- BlackRock stated that it was "making sustainability its new standard for investing."

- In the second half of 2020, after joining CA100+, BlackRock supported 54% of all environmental and social proposals, up from about 10% of such proposals prior to the 2020 proxy season.[86]

In *Franklin Resources*, the applicants were required to commit "not to engage in certain specified activities that could lead to the exercise of control over the management or affairs of a U.S. Traded Utility."[87] In *Entegra Power Group*, the Commission rejected the argument that a "21 percent" ownership was insufficient to influence control of a utility.[88] "The Commission has rejected the notion that mere minority ownership is insufficient to exert a degree of control sufficient to require authorization under section 203."[89] The Commission thus placed limits on the applicants, including that they may "not cast any votes or take any action that directly or indirectly dictates the price at which power is sold from Entegra's generating facilities, or directly or indirectly specifies how and when power generated by the facilities will be sold."[90] These types of commitments are critical to carrying out the FPA's competition and consumer-protection purposes.

The example of BlackRock's commitments to FERC over the course of its blanket authorization applications also shows the importance of including influence over day-to-day

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[85] *Id.* at 26-27.

[86] *Id.* at 61-62.

[87] *Franklin Res., Inc.*, 127 FERC ¶ 61,224 at P 8.

[88] *See Entegra Power Grp. LLC*, 125 FERC ¶ 61,143, 61,718 ¶33 (2008).

[89] *Id.*

[90] *Id.* at 61,722 ¶40 (F).

operations and decisions of which generating assets to use in the commitment to refrain from seeking to control a utility. The Commission's orders prohibited BlackRock from engaging in "any activity designed to … influence the day-to-day commercial conduct of [an FPA-covered utility's] business,"[91] or "[seeking] to determine or influence whether generation, transmission, distribution or other physical assets of the Utility are made available or withheld from the marketplace; … or·[seeking] to participate in or influence any other operational decision of the Utility."[92] In fact, in 2022, the Commission specifically relied on the fact that BlackRock "provided assurances sufficient to demonstrate that they will not be able to influence control over U.S. Traded Utilities."[93] The Commission should require commitments such as those by Entegra and BlackRock in orders granting blanket authorizations.

Second, the Commission should require a clear commitment by asset managers not to coordinate their engagement, votes, or investment decisions with any external groups or organizations, unless 1) the asset manager and the organization's actions are fully consistent with the passive ownership commitment that the asset manager made to FERC, 2) the collective the ownership of the members of the association in the utility does not exceed 20%, *and* 3) the Commission has approved involvement in such groups or organizations as part of the blanket authorization for the asset manager. The key point here is that if an asset manager is coordinating to influence utility behavior using the weight of the shares it has been permitted to acquire in the utility, it must do so consistent with the same requirements that apply to it directly as part of its blanket authorization. The asset manager must otherwise commit to make its decisions independently and consistent with its representation not to coordinate. The asset manager must also commit not to communicate or reveal how it plans to vote to others, other than through public voting guidelines or publicly posted materials. In addition, the asset manager must commit to establish procedures to prevent anyone involved in voting shares or engaging with portfolio companies from receiving communications or speaking with other asset managers, non-profits, and NGOs regarding voting and engagement unless such third parties have been approved as part of the blanket authorization.

Third, to understand and monitor how asset managers can exercise control, the Commission's blanket approval orders must include reports from asset managers beyond just SEC Schedule 13G and 13D filings. The Commission has historically required such filings by recipients of blanket authorizations regarding securities they hold in utilities. However, these filings do not necessarily address all of the concerns that the Commission has regarding utility control. In addition to such filings, the Commission should require specific reports by asset managers of every instance when such asset managers voted contrary to the recommendation of management on a shareholder proposal or board of director nomination, as well as an explanation of how such votes were consistent with the asset manager's commitments to FERC in obtaining blanket authorization, particularly related to act as passive investors and to comply with fiduciary duties. Asset managers should also be required to report on all engagements with utilities, including by

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[91] *BlackRock, Inc.*, 131 FERC ¶ 61,063, 61307 at P 21 (2010) (discussing BlackRock's representations of its actions when filing SEC Schedule 13G forms with the Commission).

[92] *BlackRock, Inc.*, 155 FERC ¶ 62,051, at *2 (2016) (discussing BlackRock's representations of its actions when filing SEC Schedule 13D forms with the Commission).

[93] *See BlackRock, Inc.,* 179 FERC ¶ 61,049 at P 19 (2022).

providing a summary of the topics and any "asks" in engagements with utilities within 14 days after such engagement. This will similarly allow FERC to monitor whether an asset manager is acting contrary to its FERC commitments. The foregoing are appropriate safeguards because the plain language of the FPA limits acquiring more than $10 million in securities of a utility without Commission approval. Because asset managers acquire far more than that, FERC can impose safeguards designed to monitor conduct.

These requirements will greatly assist FERC in ensuring that asset managers that receive blanket authorizations are not improperly influencing or controlling utilities in a manner that is not consistent with the public interest and the FPA.

Conclusion

FERC's statutory duty is to take all practicable steps within its jurisdiction to ensure robust competition among electricity providers and a reliable and affordable electricity supply for consumers and businesses. The anti-competitive actions of large investment companies risk serious harm to our States. We thank FERC for providing the opportunity to comment on this important issue that affects our States' access to affordable and reliable power. This issue directly affects not just our States' economic security but also the health, safety, and welfare of our citizens.

Respectfully submitted,

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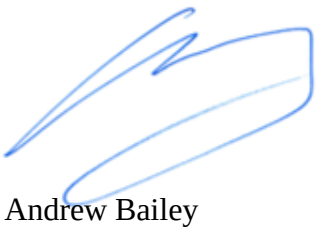

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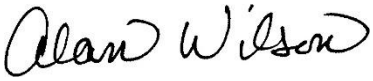

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

BlackRock, Inc. its affiliated Investment Management Subsidiaries and Applicant Funds	)))	Docket No. EC16-77-002

MOTION TO INTERVENE AND MOTION FOR RELIEF REGARDING BLACKROCK'S BLANKET AUTHORIZATIONS; HEARING REQUESTED BY THE STATES AND ATTORNEYS GENERAL OF UTAH, INDIANA, ALABAMA, ALASKA, ARKANSAS, IOWA, KENTUCKY, LOUSIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND WEST VIRGINIA

Pursuant to 16 U.S.C. § 824b and Rule 214 of the Federal Energy Regulatory Commission ("FERC" or the "Commission") Rules of Practice and Procedure ("Rules"),[1] the States of Utah, Indiana, Alabama, Alaska, Arkansas, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Texas, and West Virginia, by and through their Attorneys General (collectively, the "Attorneys General" or the "States"), move to intervene in the above-captioned docket number, wherein the Commission granted Applicants[2] a three-year reauthorization of "blanket authorizations" (the "reauthorization") to purchase, acquire, or take over $10 million in voting securities of any "public utility," "electric utility company," "transmitting utility," or "holding company in a holding company system that includes an electric utility company or transmitting utility" as those terms are used in Section 203 of the Federal Power Act ("FPA") (collectively, "FPA-covered utility").[3]

[1] 18 C.F.R. § 385.101 *et seq.*

[2] "Applicants" refers to BlackRock, Inc., the Investment Management Subsidiaries, and the Applicant Funds, collectively. Unless context otherwise requires, "BlackRock" refers to BlackRock, Inc., and its subsidiaries.

[3] *See BlackRock, Inc*. 179 FERC ¶ 61,049 (2022) ("2022 BlackRock Order"); 16 U.S.C. § 824b(a)(2); Request for Reauthorization and Extension of Blanket Authorizations Under Section

The States also respectfully move pursuant to Rule 212 for the Commission to exercise its ongoing authority under the 2022 BlackRock Order (1) to audit whether Applicants are in compliance with their representations and commitments in their application for reauthorization and the terms of the 2022 BlackRock Order, and (2) to issue supplemental orders and other appropriate relief, including ordering Applicants to function as passive, non-controlling investors and to cease all coordination with other asset managers and asset owners to influence control of utility operations before "purchas[ing], acquir[ing], or tak[ing] any" further securities in any FPA-covered utility. *See* 16 U.S.C. §§ 824b(a)(2), (b), 825h. The States further request the Commission order an evidentiary hearing on this motion. If the Commission denies intervention or concludes that relief requested is not properly sought under Rules 212 and 214, then the States request in the alternative that the Commission issue an order treating this filing as a complaint under Rule 206 for violation of 16 U.S.C. § 824b(a)(2) and proceed accordingly.

INTRODUCTION

Under the FPA, any public utility holding company seeking to acquire more than $10 million in voting securities in another utility must secure an order from the Commission authorizing it to do so.[4] Large investment management companies like BlackRock may request advance "blanket authorizations" from the Commission to acquire prospectively such equity in FPA-covered utilities.[5] Only if the Commission finds the transaction is consistent with the public interest in light of competition, rates, and regulation will it then approve an application for blanket authorization.[6] The Commission historically issues blanket authorizations for three-year terms,

203 of the Federal Power Act and Request for Expedited Consideration, *BlackRock, Inc.*, Docket No. EC16-77-002 (Feb. 18, 2022) ("2022 BlackRock Application").

[4] 16 U.S.C. § 824b(a)(2); 18 C.F.R. § 33.1(c)(2)(ii); *see also* 42 U.S.C. § 16451(8)(A).

[5] *See, e.g.*, *Cap. Rsch. & Mgmt. Co.*, 116 F.E.R.C. ¶ 61,267 at P 28 (2006).

[6] 16 U.S.C. § 824b(a)(4).

requiring investment companies to re-apply for reauthorization periodically.[7]

For over a decade, BlackRock has applied for and received blanket authorizations and reauthorizations from the Commission. In its applications, BlackRock repeatedly assures the Commission that reauthorizations are warranted because BlackRock is merely a "passive" and "non-controlling investor[]"[8]—one that has never intended to "chang[e] or influenc[e] the control of the issuer" or "exercise any control over the day-to-day management or operations" of utility companies.[9]

That's not true. Maybe BlackRock was a passive investor ten years ago, but today it's an environmental activist. Indeed, BlackRock's own public commitments belie its representations to the Commission. Pursuant to its membership in several horizontal associations, BlackRock aims to pressure or force utility companies to phase out traditional energy investment. The States now submit that in taking such action, BlackRock has violated § 824b(a)(2) of the FPA and the Commission's reauthorization for two independent reasons, each of which is sufficient to warrant relief.

First, BlackRock is part of "holding companies" that have not received Commission authorization. BlackRock is a signatory to horizontal associations—including Climate Action 100+ ("CA100+") and the Net Zero Asset Managers initiative ("NZAM")—that have an express purpose of coordinating shareholder voting power across their members to influence the operations of FPA-covered utilities. These groups embrace targets that would force utilities to reduce their fossil fuel usage from 61% in 2020 to 25% by 2030, and to 2% by 2050. Another scenario calls

[7] *See, e.g.*, *T. Rowe Price Grp., Inc.*, 179 F.E.R.C. ¶ 62,124 at Ordering Paragraph (4) (2022).
[8] 2022 BlackRock Application at 10-12.
[9] Request for Authorizations to Acquire Securities Under Section 203(a)(2) of the Federal Power Act, *BlackRock, Inc.*, Docket No. EC10-40-000, at 21, 24–25 (filed Jan. 20, 2010) ("2010 Application").

for U.S. power-sector emissions to reach net zero by 2035. BlackRock and others have formally and publicly joined these associations, whose members then engage with, introduce shareholder proposals at, and vote on such proposals and directors at FPA-covered utilities to influence changes in their operations.

CA100+ and NZAM, including their signatories such as BlackRock, are "holding companies" under 16 U.S.C. § 824b(a)(2) and (6), but the Commission has never authorized the purchase, acquisition, or taking of securities in FPA-covered utilities in relation to them. In fact, on information and belief, BlackRock has never formally disclosed its participation in these holding companies to the Commission. An "association" and "any organized group of persons, whether incorporated or not," can meet the definitions of "holding company." 42 U.S.C. § 16451(4). CA100+ and NZAM, including their members, fit within that broad statutory language. Moreover, the Commission's precedent rejects blanket authorization under § 824b(a)(2) for a holding company comprised of asset managers to exceed 20% ownership in FPA-covered utilities,[10] yet the holding companies of CA100+ and NZAM, including their members, exceed that. Applicants' reauthorization as part of a smaller holding company (BlackRock) cannot insulate them from compliance with § 824b(a)(2) as part of undisclosed larger holding companies that coordinate activities (*e.g.*, CA100+ and NZAM)—otherwise, the percentage limits in the reauthorization would be meaningless.

In contrast to BlackRock, the Vanguard Group, Inc. ("Vanguard") did not join CA100+, and it withdrew from NZAM in December 2022. Vanguard's CEO recently commented, "We don't

[10] *See, e.g.*, *Franklin Res., Inc.*, 126 FERC ¶ 61,250 at P 39–40 (2009), *order on reh'g*, 127 FERC ¶ 61,224 (2009).

believe that we should dictate company strategy."[11] He also said, "It would be hubris to presume that we know the right strategy for the thousands of companies that Vanguard invests with. We just want to make sure that risks are being appropriately disclosed and that every company is playing by the rules."[12] He further stated, "We cannot state that [environmental, social and governance ("ESG")] investing is better performance wise than broad index-based investing …. Our research indicates that ESG investing does not have any advantage over broad-based investing."[13]

Second, Applicants are not functioning as "passive, non-controlling investors," as they represented in seeking authorization and reauthorization.[14] The Commission's orders have never authorized BlackRock to engage in "any activity designed to … influence the day-to-day commercial conduct of [an FPA-covered utility's] business,"[15] or to "[s]eek to determine or influence whether generation, transmission, distribution or other physical assets of the Utility are made available or withheld from the marketplace; … or·[s]eek to participate in or influence any other operational decision of the Utility."[16] Those representations continue to bind BlackRock through its subsequent requests for reauthorization. In fact, in 2022, the Commission specifically relied on the fact that BlackRock "provided assurances sufficient to demonstrate that they will not

[11] Chris Flood et al., *Vanguard chief defends decision to pull asset manager out of climate alliance*, FINANCIAL TIMES (Feb. 20, 2023), *available at* https://www.ft.com/content/9dab65dd-64c8-40c0-ae6e-fac4689dcc77.
[12] *Id.*
[13] *Id.*
[14] *See* 2022 BlackRock Application at 10; *see also id.* at 11 (stating that "the interests acquired by the Applicants would be passive").
[15] *BlackRock, Inc.*, 131 FERC ¶ 61,063, 61307 at P 21 (2010) ("2010 BlackRock Order") (discussing BlackRock's representations of its actions when filing S.E.C. Schedule 13G forms with the Commission)
[16] *BlackRock, Inc.*, 155 FERC ¶ 62,051, at *2 (2016) ("2016 BlackRock Order") (discussing BlackRock's representations of its actions when filing SEC Schedule 13D forms with the Commission).

be able to influence control over U.S. Traded Utilities."[17]

The Commission should ensure that BlackRock is adhering to these limitations on "influence" regardless of whether BlackRock is filing a Schedule 13G or 13D disclosure for a particular U.S. Traded Utility.[18] The Commission should do so as a proper exercise of its audit and supplemental order powers under the 2022 BlackRock Order. If BlackRock returns to functioning as a passive owner and withdraws from CA100+, NZAM, and other associations seeking to influence control of FPA-covered utilities, it may properly continue acquiring shares to the limits established by the Commission. Absent those corrective actions, it must not be permitted to acquire more shares in violation of § 824b(a)(2).

The relief requested in this Motion is appropriate. When issuing the reauthorization, the Commission expressly reserved its audit and supplemental order powers over BlackRock during the term of the reauthorization. The order provides: "(E) Applicants are subject to audit to determine whether they are in compliance with the representations, conditions, and requirements that the authorizations granted in this order are based on," and "(L) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate."[19] Given the aggregation of shareholder voting power beyond the 20% limit set by the Commission

[17] 2022 BlackRock Order at P 19.

[18] Federal securities laws require investors to file a Schedule 13D or 13G disclosure report with the Securities and Exchange Commission ("SEC") whenever any person acquires, directly or indirectly, beneficial ownership of five percent or more of any class of securities of a publicly traded company. *See* 15 U.S.C. § 78a *et seq.*; 17 C.F.R. § 240.13d-1 *et seq*. A 5% investor must file a Schedule 13D with the SEC that describes its efforts or motivation to influence control of the company. *See* 15 U.S.C. § 78m(g); 17 C.F.R. § 240.13d-1. However, a 5% investor may file an abbreviated Schedule 13G disclosure where the "securities . . . were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer." *Id.* BlackRock almost exclusively files short-form disclosures on Schedule 13G. *See* Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2099 (2019).

[19] 2022 BlackRock Order, at Ordering Paragraph (E), (L).

and BlackRock's actions to influence control of companies, the Commission must exercise its ongoing authority. The States therefore respectfully move for intervention and for the Commission to exercise its audit and supplemental order authorities and to set an evidentiary hearing on this matter. In the alternative, the States respectfully move the Commission to treat this filing as a complaint and proceed accordingly.

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ARGUMENT

I. Factual and Procedural Background Relevant to the States' Motions

A. BlackRock and Affiliates Have Consistently Represented Themselves When Seeking Blanket Authorization and Reauthorizations as "Passive" Investors That Would Not "Influence" Utility Operations.

The Commission originally granted BlackRock's "blanket authorization" in 2010 for certain acquisitions of utility voting securities that would otherwise be prohibited by Section 203(a)(2) of the FPA.[20] By regulation, upon receipt of an application, the Commission determines whether the proposed transaction is "consistent with the public interest" in light of its possible effects on competition, rates, and regulation.[21] Section 203(b) of the FPA authorizes the Commission to grant applications "in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest."[22]

The 2010 BlackRock Order allowed BlackRock to acquire the voting securities of any FPA-covered utility, up to 20% ownership in aggregate by BlackRock and its affiliates or subsidiaries or up to 10% ownership by any individual BlackRock fund.[23] In practice, BlackRock owns billions of dollars of stock in multiple utility companies, far in excess of the limit of $10 million that is available to a holding company without some form of Commission authorization.[24]

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[20] *See* 16 U.S.C. § 824b(a)(2); 2010 BlackRock Order.
[21] 18 C.F.R. § 2.26(b); *see also* 16 U.S.C. § 824b(a)(4) (setting forth general "consistent with the public interest" standard). In determining whether the proposed transaction is in the public interest, the Commission considers the possible effect on competition, rates, and regulation. 18 C.F.R. § 2.26(b); *see also Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act; Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996).
[22] 16 U.S.C. § 824b(b).
[23] 2010 BlackRock Order at 61, 309 P 33.
[24] *See* 16 U.S.C. § 824b(a)(2). For example, BlackRock owns 7.9% (or 156,522,420 shares) of NextEra Energy, Inc.—a 154-billion-dollar company. *See* "BlackRock Inc. Ownership in NEE/NextEra Energy Inc," FINTEL (Jan. 31, 2023).

The Commission granted the blanket authorizations based on Applicants' "commit[ment] … not [to] exercise control over the day-to-day management or operations" of utilities.[25] Applicants assured the Commission that their investments were merely "passive" and that they acquired voting securities in FPA-covered utility companies "in the ordinary course of . . . [their] business and not with the purpose nor with the effect of changing or influencing the control of the issuer."[26] Applicants stated they would act in a manner that would limit them to filing Schedule 13G forms and "maintain[ed] that … ***any activity designed to*** replace the issuing company's management or ***influence the day-to-day commercial conduct of its business*** constitutes an attempt at control and therefore renders an acquiring person ineligible to file a Schedule 13G."[27] This was a key representation by Applicants to the Commission when obtaining initial blanket authorization in 2010.

The Commission reauthorized the blanket authorizations in 2013 based on the similar representation that "Applicants will be non-controlling, passive investors," and Applicants were again limited to activities that would qualify for filing a Schedule 13G.[28] The 2013 order makes clear that Applicants did not seek any broader authority to exercise control than what they sought and represented in 2010.

In 2016, Applicants again represented that they would be "non-controlling, passive investors."[29] They did seek broader authority to exercise control in a way that would require them to file Schedule 13D forms, but Applicants were clear that even in that scenario they would not

[25] 2010 BlackRock Order at 61,306, 61,309 PP 15, 33.
[26] Request for Authorizations to Acquire Securities Under Section 203(a)(2) of the Federal Power Act, *BlackRock, Inc.*, Docket No. EC10-40-000, at 21, 24–25 (Jan. 20, 2010) ("2010 Blackrock Application") (quoting 17 C.F.R. § 240.13d-1(b)(1)(i)).
[27] 2010 BlackRock Order at 61,307 P 21 (emphasis added).
[28] *BlackRock, Inc.*, 143 FERC ¶ 62,046, 64,138 (2013) ("2013 BlackRock Order").
[29] 2016 BlackRock Order at *3.

"[s]eek to determine or influence whether generation, transmission, distribution or other physical assets of the Utility are made available or withheld from the marketplace; … or [s]eek to participate in or influence any other operational decision of the Utility."[30]

In 2019, Applicants told the Commission that "there have been no changes in material facts and circumstances that would alter or affect the Commission's consideration in the prior authorization orders."[31]

In 2022, Applicants continued their representation to the Commission that they would function as "passive, non-controlling investors" and "the interests acquired by the Applicants would be passive."[32] The Commission did not hold a hearing or receive any economic evidence related to BlackRock's application. Instead, "[b]ased on Applicants' representations, [the Commission found] that the Reauthorization will not have an adverse effect on competition, rates, or regulation."[33] The Commission further rejected Public Citizen's protest because "Applicants have provided assurances sufficient to demonstrate that they will not be able to influence control over U.S. Traded Utilities."[34] As with the prior orders, the 2022 BlackRock Order limited equity ownership in aggregate by BlackRock and its affiliates or subsidiaries in any utility to 20%, or up to 10% ownership by any individual BlackRock fund.[35]

B. BlackRock Is Participating in Horizontal Associations or Organized Groups that Leverage Shares to Influence Utility Companies to Change Operations.

BlackRock's representations in its applications that it would merely be a passive investor and not seek to "influence" control of FPA-covered utilities warrant ongoing review and action by

[30] *Id.* at *2.
[31] *BlackRock, Inc.*, 167 FERC ¶ 62,049, 64,126 (2019) ("2019 BlackRock Order").
[32] 2022 BlackRock Application at 10-11.
[33] 2022 BlackRock Order at P 15.
[34] *Id.* at P 19.
[35] *Id.* at Ordering Paragraph (B).

the Commission. On information and belief, BlackRock did not inform the Commission in its 2022 application that in 2020 and 2021 it formally joined with other asset managers in associations or organized groups whose mission is to leverage shareholder voting power to influence companies to adopt "net zero by 2050."[36] This agenda includes major changes in utility operations—reducing fossil fuel usage from 61% in 2020 to 25% by 2030, and to 2% by 2050. A more recent scenario endorsed by CA100+ and other horizontal organizations calls for power-sector emissions in advanced economies (including the United States) to reach net zero by 2035.[37] These associations, which collectively hold more than 20% of the equity in FPA-covered utilities, are thus coordinating to influence control over utility company operations.

1. Climate Action 100+

BlackRock joined CA100+ in January 2020. CA100+ is a horizontal organization of asset managers and asset owners that has approximately **$68 trillion** in assets under management.[38] CA100+ "has established a common high-level agenda for company engagement to achieve clear commitments to cut emissions, improve governance and strengthen climate-related financial disclosures."[39] The second prong of CA100+'s "three asks" agenda is to push target company

[36] Whether BlackRock reserved the right to act independently, its membership is still part of an "association" or "any organized group or persons, whether incorporated or not," which is the language of the statute. *See* 16 U.S.C. § 824b(a)(6); 42 U.S.C. § 16451(4). And BlackRock cannot claim it was unaware that its membership had significance. It put out a statement acknowledging that "[c]ertain types of collective action can have regulatory ramifications." BlackRock, *Climate Action 100+ Sign-on Statement* (Jan. 6, 2020) ("BlackRock CA100+ Sign-on Statement"), *available at* https://www.blackrock.com/corporate/literature/publication/our-participation-in-climate-action-100.pdf.

[37] CA100+, *Global Sector Strategies: Investor Interventions to Accelerate Net Zero Electric Utilities* 2 (Oct. 2021) ("CA100+ Global Sector Strategies Report"), *available at* https://www.climateaction100.org/wp-content/uploads/2021/10/Global-Sector-Strategy-Electric-Utilities-IIGCC-Oct-21.pdf.

[38] CA100+, *Investor Signatories*, https://www.climateaction100.org/whos-involved/investors/.

[39] CA100+, *The Three Asks*, https://www.climateaction100.org/approach/the-three-asks/.

boards and senior management to "[t]ake action to reduce greenhouse gas emissions across the value chain, consistent with the Paris Agreement's goal of limiting global average temperature increase to well below two degrees Celsius above pre-industrial levels, aiming for 1.5 degrees. Notably, this implies the need to move towards net-zero emissions by 2050 or sooner."[40] CA100+ also mandates that investors require their portfolio companies to provide enhanced corporate disclosures in line with the recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD").[41]

CA100+ identifies on its website 166 "focus companies," which are "key to driving the global net zero emissions transition."[42] Signatories to CA100+ promise to evaluate whether the focus companies are "working to decarbonize [their] capital expenditures," which requires making "a commitment to 'green revenues' from low carbon products and services" and planning to cut future investment and production of traditional energy sources.[43] Several U.S.-based utility companies are among CA100+'s targeted "focus companies," including: Dominion Energy, Inc.; Duke Energy Corp.; FirstEnergy Corp.; NextEra Energy, Inc.; NRG Energy, Inc.; The Southern Company; Vistra Corp.; and Xcel Energy Inc.[44] The "focus companies have been selected for engagement" because according to CA100+, they represent a significant portion of industrial greenhouse gas ("GHG") emissions.[45]

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[40] *Id*.
[41] *Id.*
[42] CA100+, *Companies*, https://www.climateaction100.org/whos-involved/companies/.
[43] CA100+, *Climate Action 100+ Net-Zero Company Benchmark* 2-3 (Mar. 2021) ("CA100+ Net-Zero Company Benchmark"), *available at* https://www.climateaction100.org/wp-content/uploads/2021/03/Climate-Action-100-Benchmark-Indicators-FINAL-3.12.pdf.
[44] *See* CA100+, *Companies,* https://www.climateaction100.org/whos-involved/companies.
[45] *Id.*

To satisfy CA100+'s goal, focus companies must be forced to "explicitly commit[] to align future capital expenditures with the Paris Agreement's objective of limiting global warming to 1.5 Celsius."[46] As to utility companies specifically, CA100+ asset managers urge that "[b]oth coal and gas fired generation *must be phased out* to achieve global net-zero emissions by mid-century."[47] Accordingly, these asset managers have agreed to collectively compel utilities to publish a "coal and natural gas-generation retirement schedule consistent with a credible climate scenario" and a "retirement date assigned to each coal or gas unit."[48]

BlackRock's CEO Larry Fink stated in his 2020 Letter to CEOs—including CEOs of publicly traded utility companies—that he "believe[s] we are on the edge of a fundamental reshaping of finance."[49] Mr. Fink said BlackRock will be "increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures **and** the business practices and plans underlying them."[50] Mr. Fink's 2020 letter to BlackRock clients provides, "We are asking companies to publish [Sustainability Accounting Standards Board ("SASB")]- and [Task Force on Climate-related Financial Disclosures ("TCFD")]-aligned disclosures, and as expressed by the TCFD guidelines, this should include the company's plan for operating under a scenario where the Paris Agreement's goal of limiting warming to less than two degrees is fully realized."[51]

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[46] CA100+ Net-Zero Company Benchmark at 3.
[47] CA100+, *2020 Progress Report* 44 (2020) (emphasis added), *available at* https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf.
[48] *Id.*
[49] Larry Fink, *Annual Letter to CEOs* (2020) ("Fink 2020 CEO Letter"), available at https://corpgov.law.harvard.edu/2020/01/16/a-fundamental-reshaping-of-finance/.
[50] *Id.* (emphasis added).
[51] Larry Fink, *Letter to Clients* (2020), *available at* https://corpgov.law.harvard.edu/2020/01/17/sustainability-as-new-standard-for-investing/.

2. Net Zero Asset Managers Initiative

BlackRock joined NZAM in 2021. NZAM is another horizontal association of asset managers that encompasses **$59 trillion** in assets under management.[52] BlackRock pledged, as a member of NZAM, to "[i]mplement a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with [its] ambition for all assets under management to achieve net zero emissions by 2050 or sooner."[53] This commitment, by its terms, applies to "all assets under management."

The NZAM FAQ says, "What is the reach of the Net Zero Asset Managers initiative?"[54] The response is: "Our 273 signatories to date [*i.e.*, at the time of the FAQ] manage over USD 61.3 trillion of assets. The transition to net zero will be the biggest transformation in economic history. The opportunities to allocate capital to this transition over the coming years cannot be underestimated. Our industry's ability to drive the transition to net zero is extremely powerful. Without our industry on board, the goals set out in the Paris Agreement will be difficult to meet."[55]

As a member of NZAM, BlackRock is also part of the Glasgow Financial Alliance for Net Zero ("GFANZ") because NZAM is one of the "sector-specific alliances" that comprise GFANZ.[56] Mr. Fink, in his capacity as Chairman and CEO of BlackRock, in fact, is a member of the "GFANZ Principals Group," which sets "strategic direction and priorities for GFANZ and monitors progress."[57] The United Nations described GFANZ as follows: "Over 160 firms with $70 trillion in assets have joined forces behind a common goal: steer the global economy towards net-zero

[52] NZAM, *The Net Zero Asset Managers initiative*, https://www.netzeroassetmanagers.org/.
[53] NZAM, *Commitment*, https://www.netzeroassetmanagers.org/commitment/.
[54] NZAM, *FAQ*, https://www.netzeroassetmanagers.org/faq/.
[55] *Id.* (footnote omitted).
[56] GFANZ, *About us*, https://www.gfanzero.com/about/.
[57] *Id.*

emissions and deliver the Paris Agreement goals."[58] This group is committed to "accelerat[ing] the decarbonisation of the global economy,"[59]

Mr. Fink's 2021 Letter to Clients stated, "Last year we wrote to you that BlackRock was making sustainability our new standard for investing."[60] He also stated that BlackRock is "explicitly asking that all companies disclose a business plan aligned with the goal of limiting global warming to well below 2ºC, consistent with achieving net zero global greenhouse gas emissions by 2050."[61]

* * *

An asset manager with trillions in assets under management[62] who joins with other asset managers to use tens of trillions of assets under management to influence fundamental changes in utility company operations bears no resemblance to the "passive" investor BlackRock promised to be. BlackRock recognized the regulatory concerns in joining CA100+. It specifically acknowledged that "[c]ertain types of collective action can have regulatory ramifications."[63] And, as will be shown below, the percentage of utility stock owned by the asset managers that have joined CA100+ and NZAM exceeds the 20% maximum that the Commission permits asset managers.

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[58] United Nations, *Biggest financial players back net zero*, https://www.un.org/en/climatechange/biggest-financial-players-back-net-zero

[59] GFANZ, *Our progress and plan towards a net-zero global economy* 6 (Nov. 2021), *available at* https://assets.bbhub.io/company/sites/63/2021/11/GFANZ-Progress-Report.pdf.

[60] BlackRock, *Net zero: a fiduciary approach* ("Fink 2021 Client Letter"), https://www.blackrock.com/corporate/investor-relations/2021-blackrock-client-letter.

[61] *Id.*

[62] BlackRock reported $8.59 trillion in assets under management at the end of Q4 2022. Christine Williamson, *BlackRock posts 14% decline in 4th quarter AUM amid volatile markets*, PENSIONS & INVESTMENTS (Jan. 13 2013), *available at* https://www.pionline.com/money-management/blackrock-posts-14-decline-4th-quarter-aum-amid-volatile-markets.

[63] BlackRock CA100+ Sign-on Statement. It is unclear if BlackRock issued a similar statement when joining NZAM.

C. The Horizonal Organizations Influence Company Operations

1. CA100+'s Mission Is to Influence Utilities to Change their Operations to Reduce Fossil Fuel Usage In Alignment with Net Zero by 2050.

Simply put, CA100+ seeks to control the operations of utilities to change fossil fuel usage from 61% in 2020 to 25% by 2030, with an ultimate limit of only 2% fossil fuel usage by 2050. The change in operations CA100+ pushes relates to whether a company's short, medium, and long-term targets are aligned with the goal of "limiting global warming to 1.5°C," as provided for and quantified in the International Energy Agency's ("IEA") Net Zero Emissions by 2050 scenario ("NZE"), which was released in May 2021.[64] This change in operations is not required to comply with applicable U.S. or state law but rather uses the power of horizontal agreements among asset managers with substantial stock holdings to coerce companies to adopt changes sought by activists.

BlackRock—consistent with joining CA100+ and NZAM—also adopted a policy seeking disclosure and targets aligned with less than 2°C of global warming. BlackRock cites the TCFD and has cited the Science Based Targets Initiative ("SBTi"). TCFD recommends that organizations "[d]escribe the resilience of their strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario, where such information is material."[65] And

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[64] CA100+, *Net Zero Company Benchmark: Frequently Asked Questions*, https://www.climateaction100.org/net-zero-company-benchmark/questions/. See "How does the Benchmark incorporate the goal of the Paris Agreement to limit global warming to 1.5°C?" The answer identifies metrics 2.3, 3.3, and 4.3 of the disclosure framework. For an example of metrics 2.3, 3.3, and 4.3, see CA100+, *Company Assessment: The Southern Company*, https://www.climateaction100.org/company/the-southern-company/. The IEA is an intergovernmental organization. *See* IEA, *Structure*, https://www.iea.org/about/structure. It issued a report titled *Net Zero by 2050: A Roadmap for the Global Energy Sector* ("*Net-Zero Roadmap*"). *See* IEA, *Net-Zero Roadmap* (Oct. 2021), available at https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf.

[65] TCFD, *TCFD Recommendations*, https://www.fsb-tcfd.org/recommendations/; *see also* TCFD, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures*

BlackRock specifically encourages portfolio companies to disclose targets that are "[c]onsistent with the TCFD, … including a scenario in which global warming is limited to well below 2°C, and considering global ambitions to achieve a limit of 1.5°C."[66]

BlackRock previously published its Commentary specific to "Climate risk and the transition to a low-carbon economy" in February 2021 (the "2021 BIS Commentary"), which elaborated on its Global Principles for Investment Stewardship.[67] It spelled out that BlackRock "expect[s] companies to disclose scope 1 and scope 2 emissions and accompanying GHG reduction targets," instructed that "[c]ompanies in carbon-intensive industries should also disclose scope 3 emissions," and stated that "[a] significant portion of the transition to a low-carbon economy hinges on the eventual retirement of fossil fuels."[68] The 2021 BIS Commentary further stated,

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28 (Oct. 2021), *available at* https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf.

[66] BlackRock, *Climate-related risk and the energy transition* 2 (Mar. 2023) ("Climate-Related Risk and the Energy Transition"), *available at* https://www.blackrock.com/corporate/literature/publication/blk-commentary-climate-risk-and-energy-transition.pdf.

[67] *See* Blackrock, *Climate risk and the transition to a low-carbon economy* (Feb. 2021) ("2021 BIS Commentary"), *available at* https://web.archive.org/web/20220114050839/https://www.blackrock.com/corporate/literature/publication/blk-commentary-climate-risk-and-energy-transition.pdf. The January 2023 BlackRock Investment Stewardship "Proxy voting guidelines for U.S. securities" cites to the commentaries. *See* Blackrock, *Blackrock Investment Stewardship: Proxy voting guidelines for U.S. securities* 20 (Jan. 2023), *available at* https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf. The January 2023 Blackrock Investment Stewardship "Global Principles" also cites to the commentaries. *See* Blackrock, *BlackRock Investment Stewardship: Global Principles* 14 (Jan. 2023), *available at* https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf.

[68] 2021 BIS Commentary at 3. According to the Environmental Protection Agency, Scope 1 greenhouse gas emissions "occur from the sources that are controlled or owned by an organization," and Scope 2 emissions are indirect emissions associated with electricity, steam, heat, or cooling. https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance. Scope 3 emissions are even more attenuated—they are emissions resulting from "assets not owned or controlled by the reporting organization, but that the organization indirectly affects in its value chain." https://www.epa.gov/climateleadership/scope-3-inventory-guidance.

"Industry bodies, such as the [SBTi] provide guidance and assurance processes for companies to set targets aligned with less than 2° C of warming and to track milestones."[69] The 2022 BlackRock Commentary also points portfolio companies to STBi.[70] BlackRock's engagement and voting arm has thus pointed companies to TCFD and SBTi guidance to describe what carbon reduction goals it expects.

The SBTi publication *Pathways to Net-Zero: SBTi Technical Summary* explains that "[m]itigation pathways play a key role in setting science-based targets (SBTs)."[71] Under the heading "How does the SBTi determine 1.5ºC-aligned pathways?," SBTi—like CA100+—cites the IEA "*Net-Zero Roadmap*" as one of two key studies that "define the upper bound of sectoral carbon budgets that must not be exceeded by target-setting pathways."[72]

SBTi desribes the *Net-Zero Roadmap* as one of the "studies [that] have undergone rigorous peer review, incorporate detailed sectoral considerations, and utilize recent historical data."[73] SBTi further provides: "Companies in the power generation sector . . . are required to set SBTs using sector-specific pathways."[74] To establish "emissions corridors for energy and industrial process CO2 emissions," SBTi again relies on studies, including "NZE, which is the main scenario from the IEA (2021), Net-Zero Roadmap."[75] SBTi—like CA100+—thus uses the IEA *Net-Zero*

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[69] 2021 BIS Commentary at 3.
[70] See BlackRock, *Climate risk and the global energy transition* 11 n.33 (Feb. 2022) ("2022 BIS Commentary"), *available at* https://web.archive.org/web/20221107054333/https://www.blackrock.com/corporate/literature/publication/blk-commentary-climate-risk-and-energy-transition.pdf.
[71] SBTi, *Pathways to Net-Zero: SBTi Technical Summary* 3 (Oct. 2021), *available at* https://sciencebasedtargets.org/resources/files/Pathway-to-Net-Zero.pdf.
[72] *Id.* at 4-5.
[73] *Id*. at 5.
[74] *Id.* at 6.
[75] *Id.* at 7.

Roadmap, and specifically NZE, as a reliable indicator of what changes they demand from the power-generation sector.

The *Net-Zero Roadmap* in turn explains that NZE refers to the Net Zero Emissions by 2050 Scenario.[76] Annex A of the report then provides "projected data for the [NZE] scenario," and "Table A.3: Electricity" shows Electricity Generation Shares (%) for all fossil fuels **being cut from 61% in 2020 to 26% by 2030 and to 2% by 2050**.[77]

Table A.3: Electricity

	Electricity Generation (TWh)					Shares (%)			CAAGR (%)	
	2019	2020	2030	2040	2050	2020	2030	2050	2020-2030	2020-2050
Total generation	**26 922**	**26 778**	**37 316**	**56 553**	**71 164**	**100**	**100**	**100**	**3.4**	**3.3**
Renewables	7 153	7 660	22 817	47 521	62 333	29	61	88	12	7.2
Solar PV	665	821	6 970	17 031	23 469	3	19	33	24	12
Wind	1 423	1 592	8 008	18 787	24 785	6	21	35	18	9.6
Hydro	4 294	4 418	5 870	7 445	8 461	17	16	12	2.9	2.2
Bioenergy	665	718	1 407	2 676	3 279	3	4	5	7.0	5.2
of which BECCS	-	-	*129*	*673*	*842*	-	*0*	*1*	*n.a.*	*n.a.*
CSP	14	14	204	880	1 386	0	1	2	31	17
Geothermal	92	94	330	625	821	0	1	1	13	7.5
Marine	1	2	27	77	132	0	0	0	28	14
Nuclear	2 792	2 698	3 777	4 855	5 497	10	10	8	3.4	2.4
Hydrogen-based	-	-	875	1 857	1 713	-	2	2	n.a.	n.a.
Fossil fuels with CCUS	1	4	459	1 659	1 332				61	21
Coal with CCUS	1	4	289	966	663	0	1	1	54	19
Natural gas with CCUS	-	-	170	694	669	-	0	1	n.a.	n.a.
Unabated fossil fuels	16 941	16 382	9 358	632	259				-5.4	-13
Coal	9 832	9 426	2 947	0	0	35	8	0	-11	-40
Natural gas	6 314	6 200	6 222	626	253	23	17	0	0.0	-10
Oil	795	756	189	6	6	3	1	0	-13	-15

[76] Net-Zero Roadmap at 31.

[77] *Id.* at 193, 198. These figures are obtained by adding and comparing the columns for "Fossil fuels with CCUS" and "Unabated fossil fuels" for 2020, 2030, and 2050 under "Shares (%)." "CCUS" refers to carbon capture, utilization, and storage.

CA100+ itself indicated last year that it wants to see "coal-fired power … phased out in advanced economies by 2030," citing specifically to "the IEA's Net Zero by 2050 roadmap."[78] CA100+ also indicated that it wants "utility companies" to "add[] renewables and other low-carbon technologies fast enough to limit global warming to 1.5°C."[79]

Another report from last year that was endorsed by CA100+ and other horizontal organizations "brings forward the date by which power sector emissions need to reach net zero in advanced economies from 2040 to 2035."[80] It then states, "[t]he report will now be used by investors that are engaging with power companies on the [CA100+] focus list, through sector-wide dialogue that encourages collaborative action and as part of individual engagements."[81] Showing how central these goals are to CA100+'s members, the report states that "[p]ower is arguably the most important sector to decarbonise over the next decade."[82] The report states, "[t]hese actions should include an immediate halt to the construction of coal-fired power plants, the phase out of coal in line with the timelines proposed by [the Powering Past Coal Alliance] and IEA NZE, and the scaling up of investments in clean energy sources and infrastructure. It is also vital to ensure full accountability of boards of directors to ensure that governance, targets, and disclosures are

[78] CA100+, Press Release, *Climate Action 100+ Net Zero Company Benchmark Shows an Increase in Company Net Zero Commitments, but Much More Urgent Action Is Needed to Align with a 1.5°C Future* (Mar. 30, 2022) ("CA100+ 2022 Benchmark Increase Statement"), *available at* https://www.climateaction100.org/news/climate-action-100-net-zero-company-benchmark-shows-an-increase-in-company-net-zero-commitments-but-much-more-urgent-action-is-needed-to-align-with-a-1-5c-future/.
[79] *Id.*
[80] CA100+ Global Sector Strategies Report at 2. Advanced economies are OECD countries, which includes the United States.
[81] *Id.*
[82] *Id.* at 6.

provided, in line with the Climate Action 100+ Benchmark, to allow shareholders and stakeholders to track progress."[83]

With respect to influencing utility operations, the report specifically outlines that "Power companies should align their capital investment (capex) plans to a 1.5ºC pathway by: Not investing in any new coal generation" and "Committing to ensure that any new natural gas generation will be net zero by 2040 (2035 in advanced economies)."[84] It provides a case study of American Electric Power, for which the report states: "AEP's current net zero goal by 2050 is not yet consistent with the 2035 timeline for advanced economies set by the IEA in its NZE scenario" and further that "[t]ens of billions of dollars in capital investments will be needed for new, clean energy infrastructure."[85]

These reports show the fundamental changes that asset managers like BlackRock are seeking as part of their horizontal agreements to use their shares to influence control of utilities. Participation in horizontal agreements involving tens of trillions in assets under management to force such change in utility operations on a timeframe that is not required by applicable federal and state law is not consistent with being a "passive" investor that does not seek to "influence" operations.

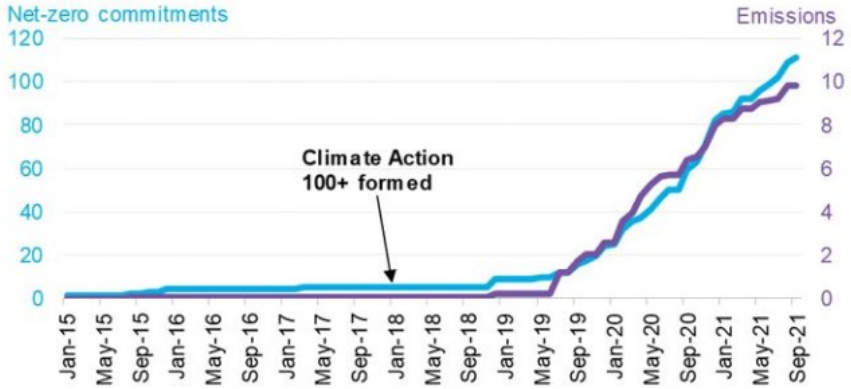
2. Engagement and Voting by CA100+ Members Has Led to Utility Pledges to Change Operations.

CA100+ states that when it "launched at the end of 2017, only five focus companies had set net zero commitments. Investor engagement through the initiative has played a significant role in accelerating the net zero journey of focus companies, particularly around its three engagement goals of cutting greenhouse gas emissions, improving climate governance, and strengthening

[83] *Id.*
[84] *Id.* at 13.
[85] *Id.* at 30.

climate-related financial disclosures."[86] CA100+ cites to research from BloombergNEF in September 2021, which showed the increase in net-zero commitments from CA100+ "focus companies."[87]

Figure 1: Net-zero commitments and emissions addressed under targets for Climate Action 100+ focus companies



Source: BloombergNEF, Climate Action 100+, Bloomberg Terminal. Note: Emissions are based on the portion of a company's carbon footprint that is included in the net-zero target.

Of particular note here, BlackRock's participation in CA100+ overlapped with a steep increase in emissions commitments for net zero. The BloombergNEF article continues by reporting that "[a]longside investor pressure, these targets have also been influenced by decarbonization targets set by the oil majors' major customers. … Utilities (2.3GtCO2e), materials companies (2.2GtCO2e) and manufacturing (1.4GtCO2e) are the next largest sectors set to reduce their emissions. Utilities in particular have cut their emissions in recent years as they've integrated more

[86] CA100+, Press Release, *Climate Action 100+ Net Zero Company Benchmark Shows Continued Progress on Net Zero Commitments Is Not Matched by Development and Implementation of Credible Decarbonisation Strategies*, (Oct. 13, 2022) ("CA100+ Net Zero Benchmark Shows Continued Progress"), *available at* https://www.climateaction100.org/news/climate-action-100-net-zero-company-benchmark-shows-continued-progress-on-net-zero-commitments-is-not-matched-by-development-and-implementation-of-credible-decarbonisation-strategies/.

[87] BloombergNEF, *Two Thirds of the World's Heaviest Emitters Have Set a Net-Zero Target* (Sep. 24, 2021), *available at* https://about.bnef.com/blog/two-thirds-of-the-worlds-heaviest-emitters-have-set-a-net-zero-target/.

clean energy into their generation portfolios."[88] The article concludes: "Investor pressure is a huge driver in the corporate race to net zero. … [CA100+] consists of over 600 investors that are working with their portfolio companies to cut emissions and improve climate reporting. They are specifically taking aim at the 167 focus companies."[89]

Senior leadership of CA100+ has stated outright that the purpose of CA100+ is coordinated, horizontal action by shareholders across companies to force operational changes. The vice-chair of CA100+'s "global Steering Committee," Stephanie Pfeifer, stated that "[t]he Climate Action 100+ initiative has shown that investors can influence companies through meaningful engagement and good stewardship."[90] And Simiso Nzima, who is a member of the Steering Committee, said, "We will continue to use the power of collaborative engagements and proxy voting to drive action at our portfolio companies to align their climate ambitions with their long-term strategies and capital allocation decisions."[91] Ceres Investor Network CEO Mindy Lubber, who is also a member of the CA100+ global Steering Committee, stated, "Companies must ratchet up their climate ambition and action, and as we head into this year's U.S. proxy season, investors will continue to use the results of the Climate Action 100+ Net Zero Company Benchmark to strengthen their own engagement and voting strategies."[92]

3. BlackRock's Own Actions Are Consistent with the CA100+ and NZAM Mission to Influence Companies to Adopt Net Zero Targets.

In the second half of 2020, after joining CA100+, BlackRock supported 54% of all environmental and social proposals, up from about 10% of such proposals prior to the 2020 proxy

[88] *Id.*
[89] *Id.*
[90] CA100+ 2022 Benchmark Increase Statement.
[91] *Id.*
[92] *Id.*

season.[93] This represents a five-fold increase in support of activist proposals by BlackRock since joining CA100+. BlackRock touted that it not only took voting action against 69 companies but also put 191 companies "on watch," warning that such "on watch" companies face risk of ongoing voting action unless they make progress on their "transition plans to a net zero economy."[94]

BlackRock appears to have made good on CA100+'s "asks" and NZAM's requisite commitments by integrating environmental ideology into its investment decisions, voting strategies, and engagement priorities. During the 2020–2021 proxy season, BlackRock held over 2,300 company "engagements" on environmental issues with its portfolio companies.[95] BlackRock's corporate materials do not specify the precise nature or results of such engagements, which include off-the-record conversations and closed-door meetings in which BlackRock communicates its environmental prerogatives. The Ceres Investor Network recently boasted that its investors (of which BlackRock is the largest) had reached a "[r]ecord number of negotiated agreements" in exchange for resolution withdrawals, including agreements by electric utilities "to set targets for reducing Scope 3 greenhouse gas emissions."[96] In sum, it appears that BlackRock is using corporate-engagement strategies to pressure utilities to conform their business operations to align with BlackRock's net-zero goals.

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[93] Fink 2021 Client Letter; *see also* Sinead Cruise et al., *BlackRock vows tougher stance on climate after activist heat*, Reuters (Jan. 14, 2020), *available at* https://www.reuters.com/article/us-blackrock-fink/blackrock-vows-tougher-stance-on-climate-after-activist-heat-idUSKBN1ZD12B

[94] Fink 2021 Client Letter.

[95] BlackRock, *Pursuing long-term value for our clients* 8 (2021) ("Pursuing Long-Term Value for Our Clients"), *available at* https://www.blackrock.com/corporate/literature/publication/2021-voting-spotlight-full-report.pdf.

[96] Ceres, *Record number of negotiated agreements between investors and companies in 2022 proxy season* (Aug. 1, 2022), *available at* https://www.ceres.org/news-center/press-releases/record-number-negotiated-agreements-between-investors-and-companies-2022.

BlackRock's engagement strategies are likely successful because companies know that BlackRock has and will vote its massive shareholdings against companies for failure to align with certain environmental objectives. In the 2020–2021 proxy season, BlackRock took voting action against seven utility companies "for lack of progress on climate."[97] Some of these voting actions were directed at American utility companies including Allete, Inc., the Atlantic Power Corporation, and the National Fuel Gas Company.[98] Although BlackRock does not always divulge the reasons behind its votes with respect to American companies, it loudly broadcasts the use of its voting power to punish utilities generally. For example, BlackRock voted against the board of a Korean utility to "hold[] them accountable for the decision to proceed with investing in a coal-fired power plant project in Indonesia."[99]

Moreover, in 2021, BlackRock voted against the Chairman of the Board of FirstEnergy, an Ohio-based electric utility that is a CA100+ focus company because the company "does not have a rigorous net zero strategy."[100] BlackRock also voted in 2021 against a director for Dominion Energy—another CA100+ focus company—because the company did not meet BlackRock's "expectations of having adequate climate risk disclosures against all 4 pillars of TCFD at this time, including Scope 3 disclosures."[101] The CA100+ "case study" of Dominion below shows how a

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[97] *See* BlackRock, *Our approach to sustainability* 27-29 (2020), *available at* https://www.blackrock.com/corporate/literature/publication/our-commitment-to-sustainability-full-report.pdf?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosgenerate&stream=top.

[98] *Id.*

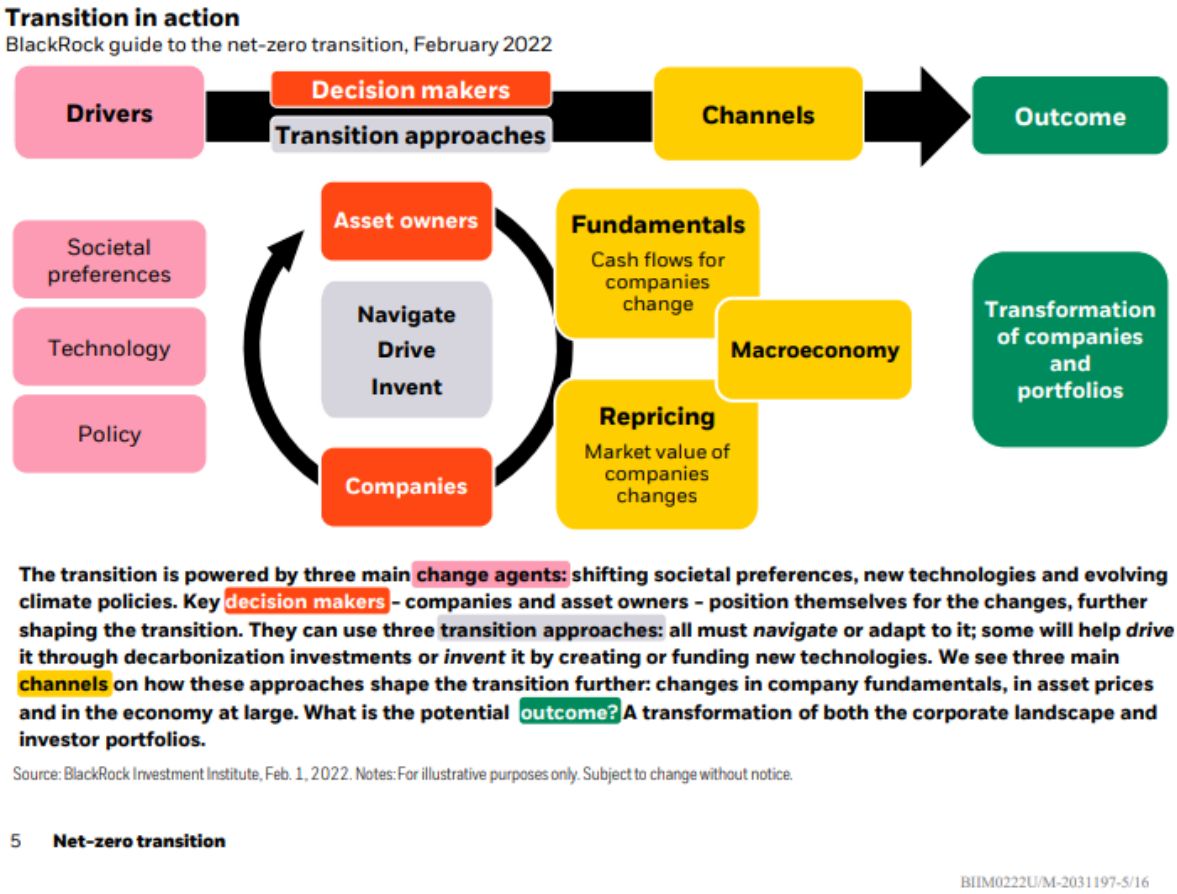
[99] BlackRock, *Our 2021 Stewardship Expectations* 19 (2020), *available at* https://www.blackrock.com/corporate/literature/publication/our-2021-stewardship-expectations.pdf.

[100] *See* BlackRock, *Proxy Voting Search*, http://vds.issproxy.com/SearchPage.php?CustomerID=10228 (search for "FirstEnergy").

[101] *See id.* (search for "Dominion Energy").

single director vote like this can then force the company to take further actions to avoid the pain of other adverse votes.

In February 2022, another arm of BlackRock produced a white paper, titled *Managing the Net-Zero Transition*, that illustrates exactly how asset owners "drive" the "net-zero transition."[102]



BlackRock, as an asset manager and the proxy for those who invest their money through it, falls within the "Asset owners" box. By BlackRock's own analysis "some [asset owners] will help *drive*" the net-zero transition "through decarbonization investments or invent it by creating or funding new technologies."[103] The actions by BlackRock discussed above fit within this definition

[102] *See* BlackRock, *Managing the net-zero transition* 5 (Feb. 2022) ("Managing the Net-Zero Transition"), *available at* https://www.blackrock.com/corporate/literature/whitepaper/bii-managing-the-net-zero-transition-february-2022.pdf.
[103] *Id.*

of "driv[ing]" the net zero transition by forcing decarbonization capital allocation decisions by utilities.

D. The Horizonal Organizations BlackRock Joined Plan to Continue Influencing Company Operations

1. CA100+ Has A Specific Goal In "Phase 2" to Influence Companies to Make Good on the Pledges Secured in "Phase 1".

CA100+ has explained that under "Phase 1" of its initiative, which is ongoing until mid-2023, it has produced "Global Sector Strategy reports" for industries including electric utilities.[104] "These have contributed to the establishment of investor-led working groups focused on implementing key actions required for these sectors to transition to net zero."[105] With respect to the electric utility sector strategy, CA100+ states that "[t]he electricity sector is responsible for 40% of global emissions, more than any other sector, and demand is predicted to grow by over 166% by 2050. In order to align with the IEA's Net Zero by 2050 scenario, emissions from electricity generation need to reach net zero by 2040 globally and by 2035 in advanced economies."[106]

CA100+ included a case study of Dominion Energy, which as discussed above is a CA100+ focus company that BlackRock took voting action against in 2021.[107] CA100+ states: "Following years of sustained dialogue and in response to multiple shareholder proposals, Dominion Energy made important progress in 2022: … ***Capital Expenditure Plan: Dominion has explicitly linked its capital investment plan and net zero goal***. In addition, the company identified a $73 billion

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[104] CA100+, *Progress Update 2022: Five years of Climate Action 100+* 9 (2022) ("CA100+ Progress Update"), *available at* https://www.climateaction100.org/wp-content/uploads/2023/01/CA-100-Progress-Update-2022-FINAL-2.pdf.
[105] *Id.*
[106] CA100+, *Investor Interventions to Accelerate Net Zero Electric Utilities*, *available at* https://www.climateaction100.org/approach/global-sector-strategies/electric-utilities/.
[107] CA100+ Progress Update at 22.

investment opportunity by 2035, focused on building zero-carbon generation, energy storage and upgrading the electric grid."[108]

CA100+ also included a case study of Duke Energy, another CA100+ focus company, and specifically took credit for operational changes pushed by CA100+ engagement. CA100+ noted that in February 2022, Duke "expanded its net zero by 2050 target to include indirect emissions from the procurement of fossil fuels used for generation, the electricity purchased for its own use, the methane and carbon from production of natural gas, and the carbon emissions from customers' consumption," and that Duke "***committed to exiting coal by 2035 and reducing the amount of power the company produces from coal to just 5% of generation by 2030***."[109] Dan Bakal, who works at Ceres, explained that "[t]hrough [CA100+], investors have engaged with Duke to increase the ambition and scope of their climate commitments."[110]

CA100+ has also explained its future plans, which show its members will continue to function as "active" rather than "passive" investors. CA100+'s focus appears to be to coerce all electric utilities into shifting at a rapid pace to non-fossil fuel generation assets. CA100+ stated that "the encouraging uptake of net zero commitments is not matched by the development and implementation of credible decarbonisation strategies. As a priority, investors need to see corporates outlining the practical actions on how they will begin to meet their net zero commitments."[111] CA100+ has also explained that in "Phase 2" of its initiative, which is scheduled to begin this year, "[t]he initiative will double down on the requirement for robust transition plans

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[108] *Id.* (emphasis added).
[109] CA100+, Press Release, *New Duke Climate Commitments Represent an "Encouraging" Step* (Feb. 10, 2022) (emphasis added), *available at* https://www.climateaction100.org/news/new-duke-climate-commitments-represent-an-encouraging-step/.
[110] *Id.*
[111] CA100+ Net Zero Benchmark Shows Continued Progress.

aligned with the Paris Agreement. It will also focus on deeper engagement by investor signatories to dismantle the barriers, and maximise the opportunities, that each sector encounters."[112] CA100+ has also stated that "[a] step change is still needed in the build out of low carbon technologies by electric utility as well as automotive focus companies. Analysis by the Rocky Mountain Institute using the [Paris Agreement Capital Transition Assessment] methodology shows that 94% of electric utility focus companies do not plan to build out sufficient renewable energy capacity and are on a >2.7°C global warming pathway for the next 5 years."[113]

In other words, CA100+ has been clear that it is targeting utilities to change and accelerate their capital expenditures toward non-fossil-fuel-based generation, and that it intends to ratchet up the pressure further through "engagements" by its members. This clearly has an impact on utility operations and rates. And when it is coordinated by shareholders who own shares in many different utilities—such as CA100+ and NZAM—it also has the clear potential to impact competition.

2. Coordinated Engagements Have Also Influenced Changes in Operations and the Ongoing 2023 Proxy Season Shows Shareholder Proposals Targeted at Natural Gas and Scope 3 Emissions.

The company commitments secured by CA100+ and overarching Phase 2 goals are not the only indicator of a very heavy collective thumb on the scale to influence utility operations; there is also evidence of coordinated engagement by lead investors as well as "engagement service providers."

One noteworthy CA100+ "engagement service provider" is As You Sow.[114] As You Sow reports that in 2021 it was able to extract agreements from multiple utility companies, some of

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[112] CA100+, Press Release, *Climate Action 100+'s 2030 Vision, PRI in Person* (Dec. 9, 2022), *available at https://www.climateaction100.org/news/climate-action-100s-2030-vision-pri-in-person.*

[113] CA100+ Net Zero Benchmark Shows Continued Progress.

[114] *See* CA100+, Investor Signatories, https://www.climateaction100.org/whos-involved/investors/?investor_type=engagement-service-provider.

which are CA100+ focus companies. It reported that Southern Company "agreed to work with *As You Sow* over the coming year to evaluate methodologies for estimating upstream emissions from natural gas with the aim of enhancing its disclosures."[115] Duke Energy similarly reached agreement with As You Sow in return for withdrawal of a shareholder proposal to "[m]easure and disclosure upstream GHG emissions associated with its natural gas supplies."[116] Finally, DTE Energy "agreed to work with *As You Sow* to address concerns regarding natural gas use and the possibility of supporting electrification."[117]

In 2022, As You Sow also was able to obtain commitments from CA100+ focus companies Dominion Energy, Duke Energy, and Southern Company.[118] These commitments were in exchange for withdrawal of shareholder proposals. For example, one proposal sought to compel Dominion to "revise its net zero by 2050 target, and any relevant interim targets, to integrate Scope 3 value chain emissions consistent with guidelines such as the CA100+ and SBTi, or publish an explanation of why the Company does not view inclusion of those emissions as appropriate."[119]

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[115] As You Sow, *2021 Shareholder Impact Review: Changing Corporations for Good*, https://www.asyousow.org/2021-shareholder-impact-review.

[116] *Id.*; *see also* As You Sow, *Duke Energy: Climate Change Risks,* https://www.asyousow.org/resolutions/2020/11/25/duke-energy-climate-change-risks.

[117] As You Sow, Press Release, *Utilities Respond to Electrification Risks—Shareholders Withdraw Proposals at Dominion and DTE Energy* (Mar. 19, 2021), *available at* https://www.asyousow.org/press-releases/2021/3/18/utelectrification-shareholders-proposals-dominion-dte-energy.

[118] Ceres, *Adopt GHG reduction targets (D, 2022 Resolution)* (2022) (Dominion Energy) ("As You Sow Dominion Energy Resolution"), https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000IXTuZAAX; Ceres, *Adopt GHG reduction targets (DUK, 2022 Resolution)* (2022) (Duke Energy), https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000Mjff9AAB; Ceres, *Adopt GHG reduction targets (SO, 2022 Resolution)* (2022) (Southern Company), https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000Mjff8AAB.

[119] As You Sow Dominion Energy Resolution.

The Duke and Southern Company proposals—both of which were also withdrawn based on commitments from the companies—are in accord.

With respect to Southern Company, As You Sow explained the 2022 agreement: "Southern Company has committed to improve GHG disclosures through disclosing its upstream Scope 3 natural gas emissions . . . in 2022, discussing ways to improve methane calculation and disclosure frameworks for the natural gas value chain with the UN Oil & Gas Methane Partnership, and sharing the results and methodology of its study analyzing emission reduction pathways for its natural gas business with *As You Sow* and other stakeholders."[120]

With respect to Dominion: "Dominion announced it will incorporate emissions from the upstream fuel consumed by the Company for its power and gas distribution businesses. It will also include information on carbon dioxide emissions associated with the production of power purchased for resale and emissions from downstream customer use of natural gas products from its local natural gas distribution business."[121]

With respect to Duke Energy: "Duke Energy agreed to increase the greenhouse emissions captured in its Net Zero by 2050 greenhouse gas reduction target by including upstream methane leakage from natural gas production, customer use emissions, and purchased power emissions."[122]

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[120] As You Sow, *2022 Shareholder Impact Review: Changing Corporations for Good* 16 (2022), *available at* https://static1.squarespace.com/static/59a706d4f5e2319b70240ef9/t/6329ddc26540bb5740909b6b/1663688134390/AsYouSow2022_Shareholder+Impact+Review+Report_v7_FIN_20220920.pdf.

[121] *Id.* at 14.

[122] *Id.*

And for the 2023 proxy season, As You Sow (backed by Climate Action 100+'s weight) already obtained commitments from at least ten companies related to resolutions it filed seeking GHG reduction targets, including Scope 3 targets.[123] No vote was required.

Significantly, one of the commitments obtained in 2023 is from Ameren, in exchange for As You Sow withdrawing a proposal seeking to compel the company's Board to "issue short and long-term targets aligned with the Paris Agreement's 1.5oC goal requiring Net Zero emissions by 2050 for the full range of its Scope 3 value chain GHG emissions."[124] As You Sow has filed an identical shareholder resolution for 2023 involving Southern Company,[125] and a similar proposal involving CenterPoint.[126] It bears emphasis that these proposals thus seek "short-term" targets for *Scope 3 emissions*—the broadest category of emissions.

On March 27, 2023, CA100+ began listing "2023 Flagged Votes" and "2023 Withdrawals for Agreement" on its website.[127] It notes that there have been three withdrawals related to "greenhouse gas targets" and three withdrawals related to "climate lobbying." The "flagged votes" include two proposals related to Berkshire Hathaway—for the company to "[a]dopt board

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[123] *See* Ceres, *Engagement Tracker,* https://engagements.ceres.org/ (filter "By Status" for "Withdrawn: Commitment" and "By Filer" for "As You Sow"). As of March 22, 2023, these companies are Ameren Corporation, Choice Hotels International, Cleveland Cliffs, Deere & Company, Dollar Tree, Freeport-McMoRan Copper & Gold, Mueller Industries, Olympic Steel, Ryerson Holding Corp, and Westinghouse Air Brake Technologies Corporation.

[124] Ceres, *Adopt Scope 3 GHG targets (1.5C aligned) (AEE, 2023 Resolution)* ("Ameren 2023 Resolution"), https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000Vt8DBAAZ.

[125] Ceres, *Adopt Scope 3 GHG targets (1.5C aligned) (SO, 2023 Resolution)*, https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000Vt8K7AAJ.

[126] Ceres, Adopt Scope 3 GHG targets (1.5C aligned) (CNP, 2023 Resolution), https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000Vt8ETAAZ.

[127] CA100+, *Proxy Season & Flagged Shareholder Votes*, https://www.climateaction100.org/approach/proxy-season/

oversight of material sustainability issue(s)" and "[r]eport on physical and transition risks and opportunities."[128] It also includes proposals for Imperial Oil and Valero Energy Corp.[129]

Because many of these proposals never go to a vote, even if BlackRock does not ultimately vote yes on them, its continued involvement as a signatory to CA100+ still impacts company action because it lends support (through the horizontal agreement to join CA100+) to As You Sow and other CA100+ participants' ability to negotiate concessions that affect company operations. BlackRock is one of the largest shareholders in many American utilities and has vowed to vote against directors if their companies do not provide "scope 1 and 2 GHG emissions disclosures and meaningful short-, medium-, and long-term targets,"[130] so any effort that carries the weight of BlackRock's shares must be taken seriously by utilities. Moreover, companies must take into account the downside of a vote even if the vote does not get majority support. For example, proxy advisory firms will recommend voting against directors who do not "respond" even to losing shareholder resolutions. Glass Lewis says as little as 20% support for a shareholder proposal that management opposes should warrant "engage[ment] with shareholders [to] demonstrate some initial level of responsiveness."[131]

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[128] *Id.* (capitalization omitted). The CA100+ website links to these proposals: Ceres, *Adopt board oversight of material sustainability issue(s) (BRK.A, 2023 Resolutio*, https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000JKCrpAAH; Ceres, *Report on physical and transition risks and opportunities (BRK.A, 2023 Resolutio* https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000JKCrGAAX.

[129] CA100+, *Proxy Season & Flagged Shareholder Votes*, https://www.climateaction100.org/approach/proxy-season/.

[130] BlackRock, *2022 climate-related shareholder proposals more prescriptive than 2021* 2 (May 2022), *available at* https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf.

[131] Glass Lewis, *2023 Policy Guidelines* 10 (Nov. 2022), *available at* https://www.glasslewis.com/wp-content/uploads/2022/11/US-Voting-Guidelines-2023-GL.pdf.

E. Asset Managers (including BlackRock) Who Are Members of CA100+ and NZAM Collectively Own More than 20% of Utilities that Are Subject to Recent Shareholder Proposals

As noted above, the 2022 BlackRock Order limited equity ownership in aggregate by BlackRock and its affiliates or subsidiaries in any utility to 20%, or up to 10% ownership by any individual BlackRock fund.[132] However, BlackRock and the other asset managers who are members of CA100+, NZAM, or both, collectively hold greater than 20% of the shares in utility companies that are under FERC's jurisdiction. The examples below show that these associations or organized groups, as "holding companies," require authorization to hold greater than 20% of the shares in FPA-covered utilities, which is in excess of the Commission's precedent for asset managers.

FirstEnergy: FirstEnergy is an Ohio-based electric utility and a CA100+ focus company. In 2021 BlackRock voted against the Chairman of the Board for FirstEnergy because the company "does not have a rigorous net zero strategy."[133] FirstEnergy sells electricity wholesale on the PJM [electricity market], which is the subject of FERC's jurisdiction.[134]

More than 20% of FirstEnergy's shares appear to be held by just five asset managers who themselves (or their affiliates) are presently signatories to CA100+ and NZAM.

Company Name	**Percentage Ownership**[135]	**Membership**
BlackRock	7.81%	Member of CA100+ and NZAM
State Street	7.7%	Member of CA100+ and NZAM

[132] 2022 BlackRock Order at Ordering Paragraph (B).
[133] BlackRock, *Proxy Voting Search*, http://vds.issproxy.com/SearchPage.php?CustomerID=10228 (search for "FirstEnergy").
[134] *See, e.g.*, FirstEnergy, 2022 Form 10-K at 38-39, 42, 59-60, 86 (Feb. 13, 2023), *available at* https://investors.firstenergycorp.com/sec-filings-and-reports/sec-filings/sec-filings-details/default.aspx?FilingId=100117244749.
[135] FirstEnergy, *Institutional Ownership*, https://investors.firstenergycorp.com/stock-information/ownership/default.aspx.

Invesco (Invesco Ltd. & Invesco Capital Management)	2.26%	Member of CA100+ and NZAM
Wellington Management Group	1.85%	Member of CA100+ and NZAM
Legal & General Investment Management Limited	0.99%	Member of CA100+ and NZAM
Total	20.61%	

This shows that the 20% maximum in the Commission's blanket authorization orders is exceeded by the agreement of just five large asset managers through organizations such as CA100+. Another source shows that BlackRock's shares are worth $1.4B, and it recently has increased its ownership share in the utility.[136]

Moreover, more than 20% of FirstEnergy's shares are held by as few as four current members of NZAM. Adding Vanguard, which was a signatory to NZAM until late last year, increases the ownership by five asset managers to almost 33%.

Company Name	**Percentage Ownership**[137]	**Membership**
The Vanguard Group	11.66%	Former member of NZAM
BlackRock	7.81%	Member of CA100+ and NZAM
State Street	7.7%	Member of CA100+ and NZAM
T. Rowe Price	3.44%	Member of NZAM
Invesco (Invesco Ltd. & Invesco Capital Management)	2.26%	Member of CA100+ and NZAM
Total (excluding Vanguard)	21.21%	
Total (including Vanguard)	32.87%	

Ameren: Ameren is a Missouri-based electric utility. Part of Ameren's overall business consists of selling electricity through the MISO market and wholesale bilateral agreements, which are the subject of FERC's jurisdiction.[138] Ameren recently made a commitment to As You Sow in

[136] CNN Business, *FirstEnergy Corp*, https://money.cnn.com/quote/shareholders/shareholders.html?symb=FE&subView=institutional.
[137] FirstEnergy, *Institutional Ownership*, https://investors.firstenergycorp.com/stock-information/ownership/default.aspx.
[138] *See* Ameren, 2022 Form 10-K 10, 103, 106 (Feb. 21, 2023), *available at* https://d18rn0p25nwr6d.cloudfront.net/CIK-0001002910/65fe34c4-aeb2-4942-90af-17207c3d8f2e.pdf.

return for withdrawal of a shareholder proposal seeking to compel the company's Board to "issue short and long-term targets aligned with the Paris Agreement's 1.5oC goal requiring Net Zero emissions by 2050 for the full range of its Scope 3 value chain GHG emissions."[139] Moreover, Ameren Missouri has several natural gas or oil-fired facilities.[140] Therefore, the shareholder proposal offered by As You Sow, which Ameren agreed to resolve in return for withdrawal, could affect these facilities, the cost to generate electricity, and Ameren's competition with other electric utilities on the wholesale market.

More than 20% of Ameren's shares appear to be held by just three asset managers who themselves (or their affiliates) are presently signatories to CA100+ or NZAM. Adding Vanguard increases the ownership by just four asset managers to over 33%.

Company Name	**Percentage Ownership**[141]	**Membership**
The Vanguard Group	11.53%	Former member of NZAM
T. Rowe Price (T. Rowe Price Associates, Inc., and T. Rowe Price Investment Management, Inc.)	11.03%	Member of NZAM
BlackRock	5.45%	Member of CA100+ and NZAM
State Street	5.36%	Member of CA100+ and NZAM
Total (excluding Vanguard)	21.84%	
Total (including Vanguard)	33.37%	

This shows that the 20% maximum in the Commission's blanket authorization orders is exceeded by the agreement of just three large asset managers through organizations such as NZAM. BlackRock's shares are valued at $1.2B, and it has increased its holdings in Ameren by 4.11%.[142]

[139] Ameren 2023 Resolution.
[140] Ameren, *Ameren Missouri Facts* (Apr. 2023), *available at* https://www.ameren.com/-/media/missouri-site/files/aboutus/amerenmissourifactsheet.ashx.
[141] CNN Business, *Ameren Corp*, https://money.cnn.com/quote/shareholders/shareholders.html?symb=AEE&subView=institutional.
[142] *Id.*

Southern Company: Southern is a Georgia-based utility and CA100+ focus company that has entered into agreements with As You Sow in 2021 and 2022 to avoid shareholder proposals related to natural gas emissions, including Scope 3 emissions. Southern faces another proposal from As You Sow in the 2023 proxy season also related to Scope 3 emissions, which seeks to force the company to take further action to comply with CA100+'s climate standards. Southern sells electrical power on the wholesale market and is subject to FERC jurisdiction. For example, Plant Franklin[143] and Plant Harris[144] in Alabama are both natural gas-fueled generating plants that sell wholesale power. Therefore, the shareholder proposal offered by As You Sow could affect these facilities, the cost to generate electricity, and the wholesale market in Alabama.

More than 20% of Southern's shares appear to be held by just five asset managers who themselves (or their affiliates) are presently signatories to CA100+ or NZAM. Adding Vanguard increases the ownership by six asset managers to almost 30%.

Company Name	**Percentage Ownership**[145]	**Membership**
The Vanguard Group	8.54%	Former member of NZAM
State Street	5.99%	Member of CA100+ and NZAM
BlackRock Fund Advisers	5.64%	Member of CA100+ and NZAM
T. Rowe Price Associates, Inc.	5.53%	Member of NZAM
Massachusetts Financial Services Co.	2.44%	Member of NZAM
Franklin Resources (Franklin Advisers, Inc.)	1.33%	Member of CA100+ and NZAM
Total (excluding Vanguard)	20.93%	
Total (including Vanguard)	29.47%	

[143] Southern Power, *Plant Franklin* (Jan. 2020), *available at* https://www.southerncompany.com/content/dam/southern-company/pdf/southernpower/PlantFranklin_factsheet.pdf.
[144] Southern Power, *Plant Harris* (Jan. 2020), *available at* https://www.southerncompany.com/content/dam/southern-company/pdf/southernpower/PlantHarris_factsheet.pdf.
[145] CNN Business, *Southern Co*, https://money.cnn.com/quote/shareholders/shareholders.html?symb=SO&subView=institutional.

This shows that the 20% maximum in the Commission's blanket authorization orders is exceeded by the agreement of just five large asset managers through organizations such as NZAM. BlackRock's current interest is valued at $4.3B, and it has increased its holdings in Southern Company by 9.6%.[146]

F. Since Receiving the 2022 Authorization, BlackRock Has Continued to Acquire More Stock in Utility Companies.

The facts discussed above bear directly on BlackRock's reauthorization and the relief sought by the States because BlackRock continues "purchas[ing], acquir[ing], or tak[ing] any" further securities in excess of $10 million in an entity covered by FPA Section 203. *See* 16 U.S.C. § 824b(a)(2). BlackRock CEO Larry Fink issued his latest annual letter on or about March 15, 2023. That letter reports that BlackRock "manage[d] nearly $400 billion in long-term net new assets—including $230 billion in the U.S. alone."[147] The sources showing ownership of the three utility companies described above (FirstEnergy, Ameren, and Southern Company) also show BlackRock owning over $1 billion in each company (far more than the $10 million standard exception) and continuing to increase its percentage of ownership. BlackRock is using the Commission's authorization to purchase additional assets in utilities under the FPA.

II. The States' Motion to Intervene Should Be Granted

A. The States' Position and Basis for Intervening

Pursuant to Rule 214, the States respectfully request leave to intervene in this proceeding. BlackRock has vowed to pursue investment strategies that raise serious questions of public policy and call into doubt BlackRock's representations to this Commission. Indeed, BlackRock has apparently breached its representations and disclaimers under the blanket authorizations to be a

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[146] *Id.*

[147] BlackRock, *Larry Fink's Annual Chairman's Letter to Investors* ("Fink 2023 Letter"), https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter.

"passive investor" and not to influence control of the day-to-day management or operations of utilities. As demonstrated by BlackRock's own pledges to horizontal organizations of asset managers, corporate engagements, and voting record, BlackRock has indeed sought to exercise control of utilities by pressuring them to conform to ideological environmental pursuits related to net zero.

B. The States' Interest in Intervening

The Attorneys General represent the interests of the States as well as individuals and entities residing therein who consume electricity or are otherwise affected by the Commission's decision on BlackRock's Application. Intervention is proper here because the Attorneys General both "represent[] an interest which may be directly affected by the outcome of the proceeding" and because their participation would be in the public interest.[148] The Attorneys General are public officers charged with various statutory duties related to representing their States.[149] The Commission's 2022 order extending blanket authorizations to BlackRock may directly affect the interests of everyday consumers and other ratepayers in the States whose rates or reliability of electricity supply may be adversely affected, as well as other participants in the States. Multiple investor-owned utilities serve residents of the States that are joining this Motion. If these utilities' services became less reliable, or costs increased, then consumers in the States would necessarily be harmed.

BlackRock itself has admitted that the transition to net zero that it is advocating will result in a "rise in inflation" and "can introduce inflationary pressures."[150] While BlackRock believes its approach is "manageable" and overall preferable, its concession regarding inflation nonetheless

[148] *See* 18 C.F.R. § 385.214(b)(2).
[149] *See generally* Ind. Code § 4-6-1-6; Utah Code Ann. § 67-5-1.
[150] Managing the Net-Zero Transition at 2; Climate-Related Risk and the Energy Transition at 1.

admits harm to the States and their citizens. The States have suffered an injury that is a proper basis for intervention.

For example, PacifiCorp, which serves Utah, is owned by Berkshire Hathaway Energy, which is owned by Berkshire Hathaway, Inc. (Berkshire). In 2021, "Blackrock voted for two shareholder proposals requiring Berkshire Hathaway Inc. to issue disclosures addressing how the company is managing climate risk, noting that the company 'is not adapting to a world where environmental, social, governance (ESG) considerations are becoming much more material to performance.'"[151] "Though neither proposal was approved, Blackrock's dissatisfaction prompted other institutional investors to express their discontent, increasing pressure on the company to modify its approach."[152] Berkshire Hathaway's website shows that currently 20% of PacifiCorp's energy comes from coal or natural gas generation. https://brkenergy.com/esg-sustainability/environmental. In Utah, this includes the Currant Creek, Hunter, and Huntington facilities. https://www.pacificorp.com/energy/thermal.html. Consumers in Utah would be harmed if their costs went up because of closure of these facilities or substitution of more expensive energy sources.

Indiana is similarly served by multiple investor-owned utilities, whose ultimate parent companies are publicly traded.[153] These include Northern Indiana Public Service Company, (NIPSCO), which is a subsidiary of NiSource; Indiana-Michigan Power (I&M), which is a

[151] Jason Halper et al., *Investors and Regulators Turning up the Heat on Climate-Change Disclosures* (Oct. 4, 2021), *available at* https://corpgov.law.harvard.edu/2021/10/04/investors-and-regulators-turning-up-the-heat-on-climate-change-disclosures/ (citing Dawn Lim and Geoffrey Rogow, *BlackRock at Odds With Warren Buffett's Berkshire Hathaway Over Disclosures*, Wall St. J., May 6, 2021, https://www.wsj.com/articles/blackrock-at-odds-with-warren-buffetts-berkshire-hathaway-over-disclosures-11620306010).
[152] *Id.*
[153] https://www.in.gov/oed/indianas-energy-landscape/electricity/investor-owned-utilities/.

subsidiary of American Electric Power; Duke Energy, which is a subsidiary of Duke Energy Corporation; Indianapolis Power & Light (IPL), which is a subsidiary of AES Corporation; and Vectren, which is a subsidiary of CenterPoint Energy.[154] These companies presently supply consumers with energy generated from coal and natural gas.[155] Consumers in Indiana would be harmed if their costs went up because of closure of these facilities or substitution to more expensive energy sources.

Alabama is served by the Alabama Power Company, which is a subsidiary of the Southern Company. https://www.southerncompany.com/about/our-companies.html. The Southern Company is a publicly traded company and a Climate Action 100+ focus company. https://www.climateaction100.org/company/the-southern-company/.

Alaska Electric Light & Power Company is a subsidiary of Avista Corp., which is a publicly traded company. *See* Avista Corp., *Our Company*, available at https://www.myavista.com/about-us/our-company; Alaska Electric Light &Power Co., *available at* https://www.aelp.com/. Avista Corporation is in BlackRock's Climate Focus Universe, which consists of what BlackRock terms are "carbon-intensive public companies." *See* Blackrock Investment Stewardship, *Climate Focus Universe* at 3, *available at* https://www.blackrock.com/corporate/literature/publication/blk-climate-focus-universe.pdf. BlackRock has stated it will continue to engage with these companies. *See id*. at 2. BlackRock reported that in 2022 it engaged with Avista twice regarding "Climate Risk Management." *See* BlackRock Investment Stewardship, *Investment Stewardship Global Engagement Summary Report: Q1-Q4 2022* at 6, *available at* https://www.blackrock.com/corporate/literature/press-

[154] *Id.*
[155] *See, e.g.*, https://www.duke-energy.com/energy-education/how-energy-works/energy-from-coal; *see also* https://www.duke-energy.com/our-company/about-us/power-plants.

release/investment-stewardship-global-quarterly-engagement-summary.pdf. In addition, BlackRock is Avista's largest shareholder, owning 18% of shares outstanding.[156]

Arkansas, Louisiana, and Texas are similarly served by subsidiaries of Entergy Corporation. https://www.entergy.com/residential/. Arkansas is served by Entergy Arkansas LLC. Louisiana is served by Entergy Louisiana, LLC and Entergy New Orleans, LLC. Texas is Served by Entergy, Texas Inc.

American Electric Power Co., Inc. ("AEP") serves 5.5 million customers in eleven states—Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia. https://www.aep.com/about/facts. AEP is a Climate Action 100+ target company, and in 2020 set an ambition to achieve Net zero GHG Emissions by 2050. https://www.climateaction100.org/company/american-electric-power-company-inc/. However, Climate Action 100+ has graded AEP in every category other than 2050 ambition as not meeting its criteria or only partially meeting its criteria. *Id*. AEP now reports that its strategy is to achieve "net zero carbon dioxide emissions by 2045, with an interim goal to cut emissions 80% from 2005 levels by 2030." https://www.aep.com/about/ourstory/cleanenergy. Moreover, AEP reports that, as of 2022, 41% of its electricity generation came from coal, and 27% came from natural gas. https://www.aep.com/about/businesses/generation. It reports that it intends to cut its percentage of electricity generation from coal from 41% to 19% by 2032 and increase its percentage of generation from hydro, wind, solar & pumped storage from 23% to 53% during the same time period. *Id*. Consumers in the proposed intervenor States will be required to pay for this transition,

[156] *See* Simply Wall St, *Avista Corporation (NYSE:AVA) is a favorite amongst institutional investors who own 88%* (Apr. 13, 2023), *available at* https://finance.yahoo.com/news/avista-corporation-nyse-ava-favorite-150847603.html#:~:text=BlackRock%2C%20Inc.%20is%20currently%20the,4.8%25%20of%20the%20company%20stock.

pay any increased costs from these alternative sources of energy, and suffer the consequences of any loss of reliability in their power supply.

Iowa, Nebraska, and South Dakota are served by MidAmerican Energy Co., which is a subsidiary of Berkshire Hathaway Energy. https://www.brkenergy.com/our-businesses/midamerican-energy-company. Alliant Energy Corporation (LNT) also provides power in Iowa. As of December 31, 2022, Blackrock disclosed a 9% stake in Alliant, owning 22.70 million shares with a value of just over $1 billion. https://www.nasdaq.com/articles/blackrock-inc.-cuts-stake-in-alliant-energy-corporation-lnt.

Mississippi is served by investor-owned utilities, whose ultimate parent companies are publicly traded. These include Mississippi Power Company, a subsidiary of Southern Company which conducts its business through electric operating companies in three states, natural gas distribution companies in four states, a competitive generation company serving wholesale customers across America, and a leading distributed energy infrastructure company, (https://www.southerncompany.com/sustainability/southern-company-overview.html), and Entergy Mississippi, LLC, a subsidiary of Entergy Corporation which is an integrated energy company engaged in electric power production, transmission and retail distribution operations in four states, (https://www.entergy.com/about-us/). These companies presently supply consumers in Mississippi and elsewhere in the Southeastern United States with energy generated from fossil fuel sources, including coal and natural gas. (https://www.southerncompany.com/about/our-business.html); (https://www.entergy.com/operations-information/). Consumers in Mississippi

would be harmed if their costs went up because of closure of these facilities or substitution to more expensive energy sources.

Missouri is served in part by Ameren Missouri, which is a subsidiary of Ameren Corporation. https://www.ameren.com/company/about-ameren. Ameren Transmission Company designs and builds regional transmission projects. *Id.* As discussed more fully above, BlackRock owns over 5% of Ameren's stock. *See supra* Section I.E. Moreover, Ameren has been a target of shareholder proposals by As You Sow, and therefore could affect its facilities, the cost to generate electricity, and Ameren's competition with other electric utilities on the wholesale market. *Id.*

Montana is served by NorthWestern Energy, which is a publicly traded, investor-owned utility. https://www.northwesternenergy.com/about-us. For example, NorthWestern Energy has a 30% ownership interest in Colstrip Unit 4 in Montana, which uses sub-bituminous coal. https://www.sec.gov/ix?doc=/Archives/edgar/data/73088/000007308822000019/nwe-20211231.htm at 13. NorthWestern states that stricter carbon limitations by governmental bodies "has the potential to limit or curtail our operations, including the burning of fossil fuels at our coal-fired power plants." *Id*. at 21. Investors imposing this separate from government regulation would logically have the same effect.

South Carolina is served by several publicly traded utilities or subsidiaries of those utilities. Consumers in South Carolina would be harmed if their costs went up because of substitution to more expensive energy sources.

In addition, the States that the Attorneys General represent are themselves consumers of energy, and decisions by utility companies can affect the reliable and affordable supply of energy that the States themselves consume, which creates a pecuniary interest in this matter. These direct and substantial interests will not be adequately protected without the intervention of the States

through their Attorneys General. On top of this, participation by the States through their Attorneys General is in the public interest. Because the Attorneys General are elected officials who regularly take actions involving consumer protection and competition, they bring an important consumer-protection and pro-competitive perspective. For these reasons, intervention is in the public interest, and the Commission should grant the Attorneys General on behalf of the States leave to intervene in this proceeding with full rights as a party.

C. The States' Motion Is Timely Or, in the Alternative, There Is Good Cause to Intervene Out of Time

1. The States' Motion Is Timely.

Rule 214 allows intervention at any time when there has not been a period set for such motion under Rule 210, and it allows intervention out of time upon a showing of good cause.[157] The intervention here is not to oppose the grant of blanket authorization to BlackRock in the first place. Rather, it is (1) to ask the Commission to determine if there are separate holding companies (CA100+ and NZAM, as well as their members) that have not been disclosed or received authorization from the Commission under FPA Section 203, and (2) to ask the Commission to audit and exercise its ongoing jurisdiction under that authorization.

First, as to the additional holding companies, the only relevant deadline set was the deadline of March 11, 2022, for the application by BlackRock for reauthorization itself. The Commission has never undertaken to grant blanket authorization to CA100+ or NZAM, so no notice or deadline was provided to intervene in such an authorization.

Second, the States' request for audit and exercise of ongoing jurisdiction also does not challenge the blanket authorization itself, and thus the deadline to intervene for the reauthorization itself does not appear to apply on its face. Because there is no deadline for intervention other than

[157] 18 C.F.R. § 385.214(b)(3), (d)(1).

relating to reauthorization, and this motion is not disputing the reauthorization but rather asking the Commission to exercise ongoing jurisdiction that the Commission expressly reserved, this motion is timely. However, even if the Commission treats this as a motion for intervention out of time, it is supported by good cause as explained below.

2. If the States' Motion Is Out-of-Time, Then There Is Good Cause for Failure to File a Motion Within the Time Prescribed.

The States submit that there is good cause for not having sought timely intervention. If the movant can "show good cause why the time limitation should be waived," the Commission may act upon an out-of-time motion.[158] Specifically, the Commission may consider whether: (1) the movant had good cause for failing to file the motion within the time prescribed; (2) any disruption to the proceeding or prejudice to existing parties might result from intervention; and (3) the movant's interest is not adequately represented by other parties in the proceeding.[159]

At bottom, the States have brought this motion now because it is clear (as of March 15, 2023) that BlackRock will not voluntarily withdraw from CA100+ and NZAM, but instead will stay the course of horizontal agreements to influence utility companies. Historically, BlackRock appeared to focus on its portfolio companies' investment returns. In 2018 and 2019, for example, BlackRock supported around only 10% of climate-related shareholder resolutions.[160] Just a year later, however, BlackRock decided that climate change had ushered in "a fundamental reshaping of finance."[161] In the second half of 2020, after joining CA100+, BlackRock supported 54% of all

[158] *Id.*
[159] *Id*. § 385.214(d)(1). The Commission may also consider whether the motion states "the position taken by the movant and the basis in fact and law for that position," as well as whether the movant "represents an interest which may be directly affected by the outcome of the proceeding" and whether the "movant's participation is in the public interest." *Id.* § 385.214(b)(1)-(3). The States believe they have adequately addressed these considerations in Section II.B–C of this motion and, therefore, will not devote more attention to them here.
[160] Cruise et al., *supra* note 93.
[161] Fink 2020 CEO Letter.

environmental and social proposals.[162] BlackRock also "voted against the election of 255 directors as a result of climate-related concerns."[163]

Although BlackRock's promises to shape American energy policy began in 2020, until more recently the States could not predict the lengths BlackRock would go in its quest to cure climate change. This includes BlackRock taking voting action against the boards of utility companies for failure to conform to BlackRock's environmental ideology. Only recently has national attention on BlackRock's commitment to the environmental, social, and governance movement resulted in the public exposure of relevant explanations and facts from BlackRock.[164] Indeed, a BlackRock representative's testimony before a Texas committee in December was the first time BlackRock publicly explained its ESG practices under oath.[165]

While this was ongoing, multiple Commissioners made statements regarding the Commission's practice of granting blanket authorizations that have informed the States of the risks

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[162] Fink 2021 Client Letter at p. 10; *see also* Cruise et al., *supra* note 93.

[163] Cydney Posner, *BlackRock Flexes its Muscles During 2020-21 Proxy Period*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 16, 2021), *available at* https://corpgov.law.harvard.edu/2021/08/16/blackrock-flexes-its-muscles-during-the-2020-21-proxy-period/.

[164] *See* Letter from Nineteen Attorneys General to Laurence D. Fink, CEO, BlackRock Inc. (Aug. 4, 2022), *available at* https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf; Letter from Dalia Blass, Head of External Affairs, BlackRock to Attorneys General (Sept. 6, 2022), *available at* https://www.blackrock.com/us/individual/literature/press-release/blackrock-response-attorneys-general.pdf; *see also* Lauren Foster, *BlackRock CEO Stands Firm on ESG Investing*, BARRON'S (Apr. 13, 2022*), available at* https://www.barrons.com/articles/blackrock-ceo-fink-esg-investing-51649868290; Rupert Darwall, *2022: The Year ESG Fell to Earth*, REAL CLEAR ENERGY (Dec. 27, 2022), *available at* https://www.realclearenergy.org/articles/2022/12/27/2022_the_year_esg_fell_to_earth_872040.html.

[165] Brendan Walsh & Danielle Moran, *BlackRock and State Street Grilled by Texas Lawmakers in ESG Debate*, BLOOMBERG (Dec. 15, 2022), *available at* https://www.bloomberg.com/news/articles/2022-12-15/blackrock-state-street-grilled-by-texas-lawmakers-in-esg-debate.

posed by BlackRock specifically relating to authorization under Section 203. Vanguard filed an application for reauthorization of its blanket authorizations.[166] After the Commission staff granted a brief extension to Vanguard, Commissioners Danly and Christie issued a joint statement, demanding more scrutiny over asset managers that "could potentially exercise profound control over the Utilities [they] own."[167] The Commissioners ordered Vanguard to answer certain questions and produce various documents so that the Commission could ensure that the blanket authorizations were in the public interest.[168] Vanguard filed a new request for an extension, apparently without producing the information or documents requested by Commissioners Danly and Christie.[169] On November 28, 2022, the States moved to intervene in that matter, and Vanguard pulled out of its membership in NZAM. As discussed, Vanguard has since indicated that it will not continue to pledge fealty to the cause of ESG. *See supra* pages 4–5.

Following the States' intervention in Vanguard, and Vanguard's withdrawal from NZAM, the States were then waiting to see what BlackRock would do. Normally BlackRock speaks through its CEO Larry Fink's annual letters to CEOs and clients issued in January. However, this year, BlackRock delayed issuing the letters and then only issued a single letter on March 15, 2023.[170] That letter makes it clear BlackRock would not follow Vanguard's lead and withdraw from the horizontal organizations it joined—including NZAM and CA100+.

Given BlackRock's continued membership, the Commission must examine, with a robust evidentiary record, the effect of this horizontal organization on competition, rates, and regulation.

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[166] Docket Nos. EC19-57-001 and EC19-57-002.
[167] Joint Statement of Comm'rs Danly & Christie at P 7, *The Vanguard Grp., Inc.*, Docket No. EC19-57-001 (Aug. 11, 2022).
[168] *Id.* at Ordering Paragraph I.A–E.
[169] Request for Extension of Blanket Authorizations to Acquire Securities Under Section 203(a)(2) of the Federal Power Act, *The Vanguard Grp., Inc.*, Docket No. EC19-57-002 (Nov. 7, 2022).
[170] Fink 2023 Letter.

As described above, the States have a clear interest in whether BlackRock may attempt to control public utilities operating in our markets. The States therefore respectfully request that the Commission find good cause for any untimeliness in the motion and allow the Attorneys General to fulfill their statutory duties to protect their States' interests.

3. Disruption and Prejudice

The States' intervention will not cause disruption to these proceedings nor prejudice to BlackRock. The States are cognizant that BlackRock received reauthorization, and this Motion specifically does not challenge that prior decision. But the Commission always has the authority to set an evidentiary hearing and/or issue a supplemental order.[171] When the Commission extended BlackRock's blanket authorizations in April 2022, it warned BlackRock that the agency "retain[ed] authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate" and that BlackRock was "subject to audit to determine whether [it is] in compliance with the representations, conditions, and requirements that the authorizations granted in this order are based on."[172] The Commission has therefore put BlackRock on notice that it might take further action under the 2022 BlackRock Order before the end of the three-year reauthorization period.

To the extent that BlackRock's representations remain accurate—that it is a merely passive investor in utility companies—BlackRock would have ample opportunity in an evidentiary hearing to prove up those representations. To the extent that BlackRock's representations were inaccurate or incomplete, BlackRock cannot be heard to claim prejudice against attempts to bring that

[171] *See* 16 U.S.C. § 824b(b) ("The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate."); *id.* § 825h ("The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.").
[172] 2022 BlackRock Order at Ordering Paragraph (E), (L).

discrepancy to light and ensure the legitimacy of the Commission's processes and observance of the rule of law.

4. Adequate Representation

Finally, the interests of the States are not adequately represented by any other party. The States note that Public Citizen, Inc.—a non-profit advocacy organization—intervened in this proceeding in March 2022 as to the reauthorization itself. Public Citizen protested BlackRock's request for reauthorization on the grounds that it is impossible for a fund manager of BlackRock's size and influence to remain a passive investor and that allowing BlackRock to acquire up to 20% of a utility's voting securities without any analysis on the effects on competition or rates violates the public interest.[173] The Commission denied Public Citizen's protest, finding that BlackRock had "provided assurances sufficient to demonstrate that [it] will not be able to influence control over U.S. Traded Utilities."[174]

The States do not believe that Public Citizen adequately represents the States' interests, which include the interests of citizens, businesses, utilities, statutes, and regulatory regimes concerning utilities that are affected by the decisions of this Commission—interests distinct from that of Public Citizen. Second, Public Citizen did not argue that BlackRock had violated the Commission's condition not to control the day-to-day operations or management of utilities. Nor did Public Citizen cite evidence regarding BlackRock's flagrant motive to control utilities to promote the transition to net zero carbon emissions. These commitments raise additional issues relevant to the public interest and vital to determining whether BlackRock has complied with the Commission's order. Finally, Public Citizen has taken the opposite position of the Attorneys

[173] Protest of Public Citizen, Inc., *BlackRock, Inc.*, Docket No. EC16-77-002 (Mar. 11, 2022).
[174] 2022 BlackRock Order at P 19.

General (and of the explicit conditions of the Commission's authorizations) by arguing that asset managers should exercise *more* control over utilities. According to media reports, Public Citizen stated its position was "very different from what the AGs are saying" and expressed concern that asset managers did not "push companies harder on climate change."[175] Absent the States' intervention, no party will fully brief these issues for the Commission's consideration.

III. The States' Motion for the Commission to Exercise Its Ongoing Authority Under the Reauthorization Should Also Be Granted

A. The Commission Must Investigate Whether CA100+ and NZAM Constitute "Holding Companies," and It Must Issue Appropriate Orders as to BlackRock, Which Is a Member of Both.

Both CA100+ and NZAM, including their members and signatories such as BlackRock, fall under the plain language of a "holding company" in Section 203 of the FPA. This is significant for two reasons: First, on information and belief, neither of these larger holding companies has received Commission approval to acquire shares (through its members) in utilities beyond the limits in FPA Section 203. But even if these holding companies were to seek authorization now, the Commission's has established a limit of 20% ownership by any asset-manager holding company,[176] and each organization's members collectively hold more than that limit for certain utilities. *See supra* pages 37-41. The Commission also has required holding companies to agree to conditions, which CA100+ and NZAM have never agreed to—the Commission does not simply rubber stamp whatever ownership a holding company seeks.[177] CA100+'s and NZAM's actions

[175] Kevin Stocklin, *State AGs Sound Alarm About BlackRock, Vanguard Buying Large Stakes in Utilities*, EPOCH TIMES (Dec. 19, 2022), *available at* https://www.theepochtimes.com/state-attorneys-general-sound-the-alarm-about-blackrock-vanguard-buying-large-stakes-in-americas-utilities_4930451.html.

[176] *See, e.g.*, *Franklin Res., Inc.*, 126 FERC ¶ 61,250 at P 39–40, *order on reh'g*, 127 FERC ¶ 61,224.

[177] *See, e.g.*, *Franklin Res., Inc.*, 127 FERC ¶ 61,224 at P 8 (noting "Applicants' commitment not to engage in certain specified activities that could lead to the exercise of control over the management or affairs of a U.S. Traded Utility").

are therefore fundamentally at odds with the Commission's requirements for FPA Section 203. And BlackRock, as a member of these holding companies, would likewise be in violation of Section 203 for the collective actions of the larger holding companies that have not been authorized.

The definitions of "holding company" are broad and cover an "association" or unincorporated "organized group" consisting of CA100+ and its investor signatories acquiring shares in utilities. FPA Section 203(a)(2) prohibits a "holding company in a holding company system that includes a transmitting utility or an electric utility" from "purchas[ing], acquir[ing], or tak[ing] any security with a value in excess of $10,000,000 … without first having secured an order of the Commission authorizing it to do so."[178]

FPA Section 203(a)(6) provides that the term "'holding company' … [has] the meaning given [it] in the Public Utility Holding Company Act of 2005" ("PUHCA").[179] PUHCA provides that the definition of "holding company" can be met by either of the following:

> (i) any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company; and
>
> (ii) any person, determined by the Commission, after notice and opportunity for hearing, to exercise directly or indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a controlling influence over the management or policies of any public-utility company or holding company as to make it necessary or appropriate for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this part upon holding companies.[180]

PUHCA further defines "company" as "a corporation, partnership, ***association***, joint stock company, business trust, ***or any organized group of persons, whether incorporated or not***, or a

[178] 16 U.S.C. § 824b(a)(2).
[179] *Id*. § 824b(a)(6).
[180] 42 U.S.C. § 16451(8)(A).

receiver, trustee, or other liquidating agent of any of the foregoing."[181] And it defines a "person" as "an individual or company."[182]

CA100+ and its signatories fall within the plain language of the first definition of "holding company," because they constitute an "association" or "any organized group of persons, whether incorporated or not." Interpreting similar language in Section 3(3) of the FPA,[183] the Commission described this choice of words by Congress as "very broad."[184] The Commission's predecessor also held, "***[c]ertainly, Cotton Valley Operators Committee*** comes within the definition of the term 'person', as it is used under the [Natural Gas] Act and the Commission's Rules, since it ***is at the very least, an organized group of persons***"; it was thus a "Natural-gas company" under that act.[185]

CA100+ is an "association" or an "organized group of persons" because it has formal membership through "signatories to the initiative."[186] That membership status has consequences, including that members are "responsible for direct engagements with focus companies, individually and/or collaboratively."[187] CA100+ further spells out its "engagement process":

> Engagement with focus company executives and board members is spearheaded by a lead investor or investors, who work cooperatively with a number of collaborating investors. ***Investors*** can also engage with focus companies on an individual basis, but ***are required to: liaise with relevant network staff and/or lead investors to ensure engagement priorities and ambition are aligned with the goals of the initiative, as well as with the overall collaborative approach*** (as appropriate in each sector). Engagement is cent[e]red around the three asks of the initiative, and

[181] 42 U.S.C. § 16451(4) (emphasis added).
[182] *Id*. § 16451(12).
[183] 16 U.S.C. § 796(3)
[184] New Reporting Requirement Implementing Section 213(b) of the Fed. Power Act & Supporting Expanded Regul. Resps. Under the Energy Pol'y Act of 1992 & Conforming & Other Changes to Form No. FERC-714, 65 FERC ¶ 61,324, 62,452 (1993).
[185] Midstates Oil Corp., 20 F.P.C. 70, 88 (1958) (emphasis added).
[186] CA100+, Investor Signatories, https://www.climateaction100.org/whos-involved/investors/.
[187] *Id.*

> ***a central message of each engagement is that inaction by companies following engagement may result in investors taking further action.***
>
> …
>
> Lead investors, and those engaging companies individually, ***must disclose through a bi-annual survey their engagement plans and priorities over the coming 12 months to ensure strong and concerted action.***[188]

The reference to "further action" and "strong and concerted action" appears to encompass voting. Moreover, CA100+ states that investors handling an engagement are "not preclude[d from] referring to the total number of signatories and/or represented assets of the full initiative."[189] CA100+ also has a formal leadership structure and steering committee.[190]

While CA100+ claims that its signatories retain ultimate decision-making on how to vote their shares, this is not something that exempts CA100+ and its members from FPA Section 203(a)(2) and (6). The members of CA100+ (and therefore CA100+ as a "company") "own[], control[], or hold[], with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company." *See* 42 U.S.C. § 16451(8)(A). Because CA100+ works to achieve a common goal among their members related to influencing utilities they own shares in to adopt net zero in their operations, it follows that the acquisition of stock by any one of their members (such as BlackRock) is attributable to each of the other members for purposes of the definition of a "holding company."[191]

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[188] CA100+, *Engagement Process* (emphasis added), https://www.climateaction100.org/approach/engagement-process/.

[189] *Id.*

[190] *See, e.g.*, CA100+ 2022 Benchmark Increase Statement (providing quotes from chair, vice-chair, and members of the "global Steering Committee").

[191] *See Brady v. Comm'r*, 25 T.C. 682, 689 (1955) (holding that, in a joint venture, "the acts of each are attributable to all"); *BP Exploration & Prod. Inc. v. Cashman Equip. Corp.*, 132 F. Supp. 3d 876, 894 (S.D. Tex. 2015) ("By the general law of partnership, the act of each partner, during the continuance of the partnership and within the scope of its objects, binds all the others." (quoting *Bell v. Morrison*, 26 U.S. 351, 370 (1828))); *Seybolt v. Bio-Energy of Lincoln, Inc.*, 38 B.R. 123,

NZAM is also an organized group of persons that meets the first definition of a "holding company." It explains that "301 asset managers, with USD 59 trillion in assets*, have committed to achieve net zero alignment by 2050 or sooner, drawing on the Net Zero Investment Framework to deliver these commitments."[192] NZAM further explains what the "commit[ment]" by signatories requires.[193] This includes, "[a]cross all assets under management … [i]mplement a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with our ambition for all assets under management to achieve net zero emissions by 2050 or sooner."[194] The commitment at issue thus not only references engagement but also voting.

CA100+ and NZAM also meet the second definition of "holding company." 42 U.S.C. § 16451(8)(A)(ii). The Commission has explained that the second definition "pertains to situations where the entity does not fall within the formal definition of a holding company set forth in [42 U.S.C. § 16451(8)(A)(i)], but there is nevertheless a reason to treat that entity as a holding company."[195] For all of the reasons discussed above, CA100+ and NZAM, including their members, have "such a controlling influence over the management or policies of any public-utility company or holding company as to make it necessary or appropriate for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this part upon holding companies."[196] The Commission should thus decide that these organized groups are "holding companies."

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127 (Bankr. D. Mass. 1984) (noting that a "partner's action binds the partnership whether the . . . partner acts in his own name or in the partnership name").

[192] NZAM, *Signatories*, https://www.netzeroassetmanagers.org/signatories/.

[193] NZAM, *Commitment*, https://www.netzeroassetmanagers.org/commitment/.

[194] *Id.*

[195] *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,209, 62,087 (2008).

[196] 42 U.S.C. § 16451(8)(A)(ii).

Moreover, CA100+ and its investor signatories would not meet the exception the Commission has previously set forth for not aggregating shares owned by different entities within a larger holding company. For example in *Capital Research & Management Co.*, the Commission ruled that the holdings of the different subsidiaries would not be aggregated, but that was in part because they were "conduct[ing] their . . . proxy voting activities independently."[197] Here, as discussed above, many of the "proxy voting activities" related to net zero—including but not limited to engagement of focus companies and the threat of "further action"—is coordinated by CA100+. CA100+ even has a formal list of 166 "focus companies" for coordinated action,[198] and requires that signatories coordinate with "lead investors" engaging with each of the "focus companies" in order "to ensure engagement priorities and ambition are aligned with the goals of the initiative."[199] Aggregating the holdings of the investor signatories across the "holding company" of CA100+ and its members is therefore proper and cannot be exempted.

NZAM similarly would not meet the exception the Commission's prior decisions have set forth for not aggregating shares owned by different entities within a larger holding company. As discussed above, NZAM members are required to commit to "[i]mplement a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with our ambition for all assets under management to achieve net zero emissions by 2050 or sooner."[200] Thus, as to net zero, the proxy voting activities of the members are not sufficiently independent that the Commission would not aggregate their holdings across the "holding company."

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[197] *See, e.g.*, *Cap. Rsch. & Mgmt. Co.*, 116 FERC ¶ 61,267, 62,068 P 22-23 (2006); *see also Franklin Res., Inc. & Its Inv. Mgmt. Subsidiaries & Applicant Funds*, 126 FERC ¶ 61,250 at P 39–40, *order on reh'g*, 127 FERC ¶ 61,224 (rejecting request for "unlimited blanket authorization").
[198] CA100+, *Companies*, https://www.climateaction100.org/whos-involved/companies/.
[199] CA100+, *Engagement Process*, https://www.climateaction100.org/approach/engagement-process/.
[200] NZAM, *Commitment*, https://www.netzeroassetmanagers.org/commitment.

B. The Commission Must Also Investigate and Issue Appropriate Orders Regarding BlackRock's Actions to Influence Control of Utilities

There is a second, independent reason why the Commission must exercise its ongoing authority under the reauthorization: BlackRock has not acted as a "passive, non-controlling investor[]" as to its own shares, as it represented to the Commission it would throughout its reauthorization and authorization applications over the past 13 years.[201]

The Commission's orders have never authorized BlackRock to engage in "any activity designed to … influence the day-to-day commercial conduct of [an FPA-covered utility's] business,"[202] or to "[s]eek to determine or influence whether generation, transmission, distribution or other physical assets of the Utility are made available or withheld from the marketplace; … or·[s]eek to participate in or influence any other operational decision of the Utility."[203] Those representations continue to bind BlackRock through its subsequent requests for reauthorization. In fact, in 2022, the Commission specifically relied on the fact that BlackRock "provided assurances sufficient to demonstrate that they will not be able to influence control over U.S. Traded Utilities."[204] The Commission cannot simply ignore the representations that BlackRock made and actions BlackRock disclaimed when it sought authorization and reauthorization from the Commission to file Schedule 13G or 13D forms. The facts raised in the States' motion show that BlackRock has acted contrary to those representations.

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[201] *See* 2022 BlackRock Application at 10; *see also id.* at 11 (stating that "the interests acquired by the Applicants would be passive").
[202] 2010 BlackRock Order at 61,307 P 21 (discussing BlackRock's representations of its actions when filing S.E.C. Schedule 13G forms with the Commission).
[203] 2016 BlackRock Order at *2 (discussing BlackRock's representations of its actions when filing S.E.C. Schedule 13D forms with the Commission).
[204] 2022 BlackRock Order at P 19.

As discussed throughout, BlackRock has used its enormous financial clout to influence and control the day-to-day conduct and operational decisions of FPA-covered utilities. *See, e.g., supra* pages 26-30. Some of the publicly available evidence indicating BlackRock's activist intentions include:

- BlackRock CEO Larry Fink stated in his 2020 Letter to CEOs—including CEOs of publicly traded utility companies—that he "believe[s] we are on the edge of a fundamental reshaping of finance."[205]

- Mr. Fink said BlackRock will be "increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures **and** the business practices and plans underlying them."[206]

- Mr. Fink's 2021 Letter to Clients stated that "BlackRock [is] making sustainability our new standard for investing."[207] He also stated that BlackRock is "explicitly asking that all companies disclose a business plan aligned with the goal of limiting global warming to well below 2ºC, consistent with achieving net zero global greenhouse gas emissions by 2050."[208]

- BlackRock—consistent with joining CA100+ and NZAM—adopted a policy seeking disclosure and targets aligned with less than 2°C of global warming. And BlackRock specifically urges portfolio companies to disclose targets that are "[c]onsistent with the TCFD, … including a scenario in which global warming is limited to well below 2°C, and considering global ambitions to achieve a limit of 1.5°C."[209]

- In the second half of 2020, after joining CA100+, BlackRock supported 54% of all environmental and social proposals, up from about 10% of such proposals prior to the 2020 proxy season.[210] This represents a five-fold increase in support of activist proposals by BlackRock since joining CA100+. BlackRock touted that it not only took voting action against 69 companies but also put 191 companies "on watch," meaning such "on watch" companies face risk of ongoing voting action unless they make progress on their "transition plans to a net zero economy."[211] During the

[205] Fink 2020 CEO Letter.
[206] *Id.* (emphasis added).
[207] Fink 2020 Client Letter.
[208] *Id.*
[209] Climate-Related Risk and the Energy Transition at 2.
[210] Fink 2021 Client Letter; *see also* Cruise et al., *supra* note 93.
[211] Fink 2021 Client Letter.

2020–2021 proxy season, BlackRock held over 2,300 company "engagements" on environmental issues with its portfolio companies.[212]

- In 2021, BlackRock voted against the Chairman of the Board for FirstEnergy, an Ohio-based electric utility that is a CA100+ focus company because the company "does not have a rigorous net zero strategy."[213]

- BlackRock voted in 2021 against a director for Dominion Energy—another CA100+ focus company—because the company did not meet BlackRock's "expectations of having adequate climate risk disclosures against all 4 pillars of TCFD at this time, including Scope 3 disclosures."[214]

The Commission must ensure that BlackRock is adhering to the limitations on "influence," regardless of whether BlackRock is filing a Schedule 13G or 13D disclosure for a particular U.S. Traded Utility. The Commission should do so as a proper exercise of its audit and supplemental order powers under the 2022 BlackRock Order. If BlackRock returns to functioning as a passive owner and withdraws from CA100+, NZAM, and other associations seeking to influence control of FPA-covered utilities, it may properly continue acquiring shares to the limits established by the Commission. Absent those corrective actions, it must not be permitted to acquire more shares in violation of § 824b(a)(2).

C. The Commission Should Set an Evidentiary Hearing on the States' Motion

The States also request that the Commission set an evidentiary hearing on their Motion, with sufficient opportunity for fact-gathering. The issues raised are of major public importance. To be able to decide the issues, the Commission will need the benefit of facts. BlackRock's application did not provide facts on the issues raised herein. This hearing and evidence-gathering will in turn assist the Commission in determining whether it should further exercise its

[212] Pursuing Long-Term Value for Our Clients at 8.

[213] *See* BlackRock, *Proxy Voting Search*, http://vds.issproxy.com/SearchPage.php?CustomerID=10228 (search for "FirstEnergy").

[214] *See* BlackRock, *Proxy Voting Search*, http://vds.issproxy.com/SearchPage.php?CustomerID=10228 (search for "Dominion Energy").

supplemental order authority under Sections 203(b) and 309 regarding BlackRock's 2022 reauthorization.

D. In the Alternative, the Commission Should Treat the States' Motion as a Complaint.

If the Commission denies intervention or concludes the relief requested is not properly sought under Rules 212 and 214, then the States request in the alternative that the Commission issue an order treating this filing as a complaint under Rule 206 for violations of 16 U.S.C. § 824b(a)(2) and proceed accordingly.[215] The requirements of Rule 206(b) and portions of the motion above that satisfy those requirements are set forth below:

(1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;	*See* pages 11-41 (Background Facts).
(2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;	*See* pages 54-62.
(3) Set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant;	*See* pages 41-48 (discussing impact to the States and their citizens from BlackRock's actions and its admission that the net zero agenda will cause inflation).
(4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;	As one data point, the U.S. Bureau of Labor Statistics provides that energy inflation for electricity has been 10.2% for the twelve months ending in March 2023.[216] The U.S. Energy Information Administration ("EIA") provides that the average electricity consumption by a residential utility consumer was 10,632 kWh in 2021.[217] It also reports, as an example, that the average cost per kWh in the East South Central region

[215] *See* 18 C.F.R. § 385.206.
[216] U.S. Bureau of Labor Stat., *Consumer Price Index Summary*, https://www.bls.gov/news.release/cpi.nr0.htm.
[217] EIA, *Frequently Asked Questions (FAQS)*, https://www.eia.gov/tools/faqs/faq.php?id=97&t=3.

	increased from 11.68 cents in January 2022 to 13.40 cents in January 2023.[218] This represents an annual increase of approximately $182.87 per household (this works out to increasing from $1,241.82 to $1,424.69/year). Alabama's population is 5.07 million. Assuming the above number is on a household basis, and there are 2.57 persons per household,[219] Alabamians are paying $360.8 million more for residential electricity. Similar calculations could be performed for the other States joining in this filing. The States are not able to apportion the financial impact beyond these estimates at this time.
(5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction;	On information and belief, the transition away from fossil fuels in electricity generation to non-fossil fuel technologies will reduce the reliability of electricity generation because generation sources like solar are inherently less reliable and are heavily reliant on foreign sources. To compensate for this, utilities will have to install battery storage. It unclear that this is technologically feasible at the scale that CA100+, NZAM, and their members demand to reduce fossil fuel usage to 25% by 2030 or net zero by 2035. It is also unclear how those additional requirements will affect costs to consumers.
(6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;	The States believe that timely resolution can be achieved in the forum of the Commission's ongoing authority under BlackRock's blanket authorization. They have brought this complaint only as an alternative.

[218] EIA, *Electric Power Monthly: Table 5.6.A. Average Price of Electricity to Ultimate Consumers by End-Use Sector*, https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_5_6_a.
[219] U.S. Census Bureau, *Quick Facts: Alabama*, https://www.census.gov/quickfacts/AL.

(7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;	The States respectfully ask the Commission: 1) to audit whether Applicants[220] are in compliance with their representations and commitments in their application for reauthorization and the terms of the 2022 BlackRock Order, and 2) to issue supplemental orders and other appropriate relief, including ordering Applicants to function as passive, non-controlling investors and to cease all coordination with other asset managers and asset owners to influence control of utility operations before "purchas[ing], acquir[ing], or tak[ing] any" further securities in any FPA-covered utility. *See* 16 U.S.C. §§ 824b(a)(2), (b), 825h.
(8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;	This brief cites documents in footnotes as applicable. The States do not presently have any contracts other than those explained in the CA100+ and NZAM websites, which are cited herein. The States do not presently have any affidavits.
(9) State (i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used; (ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint; (iii) What types of ADR procedures could be used; and (iv) Any process that has been agreed on for resolving the complaint.	The States do not believe that any of the resolutions described in paragraph (9) are applicable to the nature of issues raised in this Motion.

[220] "Applicants" refers to BlackRock, Inc., the Investment Management Subsidiaries, and the Applicant Funds, collectively. *See* supra note 2.

Finally, if the Commission decides to proceed with this filing as a complaint rather than a Motion, the States will prepare a form of notice of the complaint suitable for publication in the Federal Register in accordance with the specifications in 18 C.F.R. § 385.203(d).

IV. Conclusion

For the foregoing reasons, the States of Utah, Indiana, Alabama, Alaska, Arkansas, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Texas, and West Virginia respectfully request that the Commission grant the motion to intervene to participate in this proceeding with full rights as parties thereto. The States also respectfully request that the Commission exercise its ongoing authority under the 2022 BlackRock Order 1) to audit whether Applicants are in compliance with their representations and commitments in their application for reauthorization and the terms of the 2022 BlackRock Order, and 2) to issue supplemental orders and other appropriate relief, including ordering Applicants to function as passive, non-controlling investors and to cease all coordination with other asset managers and asset owners to influence control of utility operations before "purchas[ing], acquir[ing], or tak[ing] any" further securities in any FPA-covered utility.[221] The States further request that the Commission order an evidentiary hearing on this motion. If the Commission denies intervention or concludes that the relief requested is not properly sought under Rules 212 and 214, then the States request in the alternative that the Commission issue an order treating this filing as a complaint under Rule 206 for violation of 16 U.S.C. § 824b(a)(2) and proceed accordingly.

[221] *See* 16 U.S.C. §§ 824b(a)(2), (b), 825h.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated May 10, 2023.

/s/ Melissa A. Holyoak

Document Content(s)

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

BlackRock, Inc. its affiliated Investment Management Subsidiaries and Applicant Funds	)))	Docket No. EC16-77-002

STATES' MOTION FOR LEAVE TO REPLY AND CONSOLIDATED REPLY TO BLACKROCK, INC.'S ANSWER TO MOTION TO INTERVENE AND MOTION FOR RELIEF AND PUBLIC CITIZEN'S ANSWER IN OPPOSITION TO LATE INTERVENTION OF THE STATES AND ATTORNEYS GENERAL

Pursuant to Rule of Practice and Procedure ("Rule") 213(a)(2),[1] the States of Utah, Indiana, Alabama, Alaska, Arkansas, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Texas, and West Virginia, by and through their Attorneys General (collectively, the "Attorneys General" or the "States"), move for leave to file the reply contained herein to BlackRock Inc.'s Answer to Motion to Intervene and Motion for Relief, filed on May 25, 2023 (the "BlackRock Answer"), and Public Citizen's Answer In Opposition to Late Intervention of the States and Attorneys General, filed on May 12, 2023 (the "Public Citizen Answer").

I. Motion for Leave to Reply

Leave to file a reply should be granted in light of the importance of the issues raised in the States' Motion to Intervene and Motion for Relief Regarding BlackRock's Blanket Authorizations, filed May 10, 2023 (the "Motion"). The Commission grants leave to file a reply when it "provides information that assist[s] [it] in [the] decision-making process."[2] The below reply clearly meets

[1] 18 C.F.R. § 385.213(a)(2).
[2] *Old Dominion Elec. Coop. & Direct Energy Bus., LLC*, 171 FERC ¶ 61,149, 62,062–63 (2020); *see also Fla. Power & Light Co.*, 147 FERC ¶ 61,044, 61,147 (2014) ("We will accept FPL's

that standard. Most significantly, the reply shows that the Commission must take some action on the Motion, either through granting intervention and exercising the ongoing authority that it expressly retained in the 2022 BlackRock Order[3] or, alternatively, treating the Motion as a complaint. BlackRock and Public Citizen appear to agree with this, and simply advocate for treating the Motion as a complaint (with BlackRock only opposing that result in a footnote based on the incorrect application of collateral estoppel).

The reply also shows that BlackRock has not advanced any meaningful merits arguments on whether it has complied with its prior representations to the Commission when obtaining blanket authorizations, and whether Climate Action 100+ (CA100+) or the Net Zero Asset Managers' Initiative ("NZAM"), including their members, are "holding companies" under Section 203 of the Federal Power Act ("FPA").

The reply thus assists the Commission in its decision-making process on both the procedural and substantive issues raised in the Motion and Answers. Leave should be granted.

II. Consolidated Reply to BlackRock and Public Citizen's Answers

A. The States Have Properly Sought Intervention and Relief Under Rules 212 and 214 Or, In the Alternative, Filed A Complaint Under Rule 206.

Both BlackRock and Public Citizen's Answers fail to address the full grounds on which the States have moved to intervene. At most, the Answers challenge whether the Commission should address the substance of the States' Motion through additional proceedings in this docket or as a stand-alone complaint. No party has provided arguments supporting the Commission taking *no* action on the substance of the States' Motion. It is also important to note that no party challenges

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Answer and the Replies because they have provided information that assisted us in our decision-making process."); *Rockies Express Pipeline LLC*, 134 FERC ¶ 61,248, 62,315 (2011) ("The Commission accepts … the replies submitted by BP and Ultra because they have provided information that assisted our decision-making process.").

[3] *See BlackRock, Inc.*, 179 FERC ¶ 61,049 (2022) ("2022 BlackRock Order").

the States' interests in intervening or that those interests are not adequately represented by an existing party. *See* Motion at 42-48, 53-54.

The States' motion to intervene is timely because intervention here is not to oppose the grant of blanket authorization to BlackRock but rather 1) to ask the Commission to determine if there are separate holding companies (CA100+ and NZAM, as well as their members) that have not been disclosed or received authorization from the Commission under FPA Section 203, and 2) to ask the Commission to audit and exercise its ongoing jurisdiction under the 2022 BlackRock Order related to BlackRock's representations that it would be passive.[4] Importantly, the Sates are not asking the Commission to revoke authorization for BlackRock to operate as a passive investor as it represented to the Commission it would. Intervention is therefore not governed by the prior deadline for intervention set by the Commission.[5] And logically, if the Commission is going to retain ongoing jurisdiction for the entirety of the authorization (as it did in the 2022 BlackRock Order), it is appropriate for interested persons like the States to seek to invoke that jurisdiction.[6]

BlackRock opposes the States intervention under Rule 214 solely on the assumption that it is untimely.[7] But BlackRock's cases do not address a motion analogous to the States' Motion in the instant matter, which seeks an exercise of supplemental jurisdiction under 16 U.S.C. § 824b(b) and § 825h pursuant to authority retained in an order. As noted, the States are not challenging the underlying blanket authorization, and the Commission expressly reserved its ongoing authority in the 2022 BlackRock order—BlackRock's timelines arguments simply ignore these critical facts.

[4] Motion at 48.
[5] *Id.* at 48-49.
[6] *Id.*
[7] *See* ("BlackRock Answer") at 2– 3.

BlackRock also argues that permitting intervention would be burdensome because it would require reopening the proceeding and taking new evidence.[8] The States agree that the Commission needs to take evidence of stock ownership, coordination, and engagement with utility companies. But the issues presented are limited to whether BlackRock is complying with the representations it made in obtaining authorization and whether there are other holding companies that are triggering Section 203 of the FPA but have not received approval. BlackRock does not explain how addressing those issues would be any more burdensome than any other exercise of the Commission's ongoing jurisdiction (which was expressly reserved in the 2022 BlackRock Order) or more burdensome than adjudicating those same issues a stand-alone complaint. Because the Commission must confront these issues in one form or another, BlackRock's burdensomeness argument is unpersuasive.

Finally, BlackRock briefly argues that treating the Motion as a complaint would permit a collateral attack on the Commission's prior orders.[9] This is plainly wrong because the basis of the Motion is that BlackRock is not following the commitments it made in seeking blanket authorization (embodied in the blanket authorization), and BlackRock is part of larger, undisclosed holding companies that have never received Commission consideration or approval. Those issues were clearly not addressed or decided by the Commission in granting authorization. It would be nonsensical to say that a company such as BlackRock cannot be challenged on whether it is adhering to a Commission order because such a challenge is a collateral attack on the order. Such a rule would provide companies with a blank check to make whatever promises and commitments necessary to obtain authorization and then ignore and breach them down the road.

[8] *Id.* at 3
[9] *Id.* at 4 n.13.

In fact, the Commission has recognized that it may need to exercise its ongoing authority when conditions are not met by companies that have received certain approvals. For example, in *New PJM Companies*, the Commission "cited its authority under section 203(b) of the FPA."[10] "Under this authority, the Commission preliminarily found that, unless AEP was able to fulfill its commitment to join [a Regional Transmission Organization], it would be operating in a manner that could allow for the exercise of significant market power through its control of transmission, to the detriment of customers. The Commission ruled that AEP's commitment to join PJM needed to be accomplished quickly, and established the October 1, 2004 date for that integration to occur."[11] The Commission can similarly address BlackRock's commitments.

In addition, the Commission has rejected application of collateral estoppel in situations with far more overlap than the overlap between the instant Motion and the blanket authorization. For example, in *Cimarron Windpower II, LLC*, the Commission rejected the argument that collateral estoppel barred a complaint even though "the Commission considered many of the same factual issues in the Remand Order proceeding in Docket No. ER16-1341, and that some of the remedies that Cimarron seeks overlap with what SPP sought in that proceeding."[12] The Commission reasoned that the "[c]omplaint raises new questions not previously considered," such as "an argument not considered by the Commission in the Remand Order proceeding: that SPP violated the Tariff during the historical period."[13] The Commission also noted that "while Cimarron filed an out-of-time motion to intervene in Docket No. ER16-1341, it did so after the

[10] 107 FERC ¶ 61,271, 62,210 (2004) (citing *New PJM Companies, et al.*, 105 FERC ¶ 61,251 (2003)).
[11] *Id.*
[12] *Cimarron Windpower II, LLC*, 181 FERC ¶ 61,136 (2022), *petition for review pending Cimarron Windpower II*, LLC v. FERC, No. 23-1525 (8th Cir., filed 3/17/2023).
[13] *Id.*

issuance of the Remand Rehearing Order. It also did not file arguments in that proceeding, nor was it granted party status."[14] The Commission's reasoning in *Cimarron* shows that there is no collateral-attack bar on treating the States' Motion as a complaint. Unsurprisingly, BlackRock's cited authority does not support its extreme position.[15]

Public Citizen's Answer is brief and is limited to arguing (at 1-2) that the States' Motion does not satisfy the requirement for late intervention. Public Citizen suggests that the States' Motion proceed as a complaint, which is consistent with the alternative relief requested in the Motion. The States do not disagree that they have properly filed a document that can be deemed a complaint under Rule 206. However, Public Citizen is incorrect that the States' Motion is procedurally defective under Rules 212 and 214. Public Citizen never addresses the fact that the States are seeking the Commission to exercise its ongoing and supplemental authority and require BlackRock to conform to the terms of the blanket authorization. Both as a matter of the notice initially provided by the Commission and the logic of seeking exercise of ongoing jurisdiction, there is nothing improper or untimely about the States' Motion under Rules 212 and 214.

In sum, the Commission should either grant intervention or, in the alternative, treat the Motion as a complaint under Rule 206.

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[14] *Id.*

[15] BlackRock's Answer (at n.13) cites *Californians for Renewable Energy Inc. v. Calpine Energy Services L.P. and the California Department of Water Resources*, 106 FERC ¶ 61,055, 61,185 at PP 11–12 (2004). The first issue in that case was whether CARE could file a motion for rehearing without first seeking to intervene. *Id.* at P 11. The States are not seeking to do that in this case. Second, CARE was seeking "a rejection of the Renegotiated Contracts ab initio." *Id.* at P 12. The States are not seeking a rejection of the blanket authorization granted to BlackRock. Instead, they are asking the Commission to exercise its ongoing authority to enforce the conditions in that authorization and also to determine whether there are separate holding companies that have not received authorization.

B. The Commission Must Consider the States' Claim that BlackRock Has Not Complied With Its Representations Regarding Influence That It Made When Obtaining Blanket Authorization.

The States' Motion demonstrated (at 5-6, 12-13, 60-62) that BlackRock has made specific representations to the Commission in seeking blanket authorization and reauthorizations since 2010, and the Commission has incorporated these as requirements in granting such requests.

The Commission's orders have never authorized BlackRock to engage in "any activity designed to … influence the day-to-day commercial conduct of [an FPA-covered utility's] business,"[16] or to "[s]eek to determine or influence whether generation, transmission, distribution or other physical assets of the Utility are made available or withheld from the marketplace; … or·[s]eek to participate in or influence any other operational decision of the Utility."[17] Because ownership by BlackRock over 5% requires either a 13G or a 13D filing with the SEC, these dual representations foreclose exercise of "influence" in either possible scenario. In fact, in 2022, the Commission specifically relied on the fact that BlackRock "provided assurances sufficient to demonstrate that they will not be able to influence control over U.S. Traded Utilities."[18]

BlackRock's representations to the Commission are clearly fundamental to the blanket authorizations the Commission has granted, and given the evidence presented in the Motion, the Commission must address whether BlackRock is in compliance with those representations. The Commission has stated clearly that it does not "delegate[] its responsibilities under FPA section 203 to" other agencies such as the SEC.[19] And the Commission has made clear that it "does not

[16] BlackRock, Inc., 131 FERC ¶ 61,063, 61307 at P 21 (2010) ("2010 BlackRock Order") (discussing BlackRock's representations of its actions when filing SEC Schedule 13G forms with the Commission).
[17] BlackRock, Inc., 155 FERC ¶ 62,051, at *2 (2016) ("2016 BlackRock Order") (discussing BlackRock's representations of its actions when filing SEC Schedule 13D forms with the Commission).
[18] 2022 BlackRock Order at P 19.
[19] *Mario J. Gabelli*, 175 FERC ¶ 61,004 at ¶31 (2021).

accept eligibility to file SEC forms, including Schedule 13G, as a definitive statement regarding control. ***Rather, the Commission relies on the terms and conditions committed to by a blanket authorization applicant to allow the Commission to conclude that the applicant does not have the right to manage or control the management, policies, and operations of a public utility, and therefore that the blanket authorization will be consistent with the public interest***. Furthermore, the Commission can and does review SEC filings that are submitted and can take action as appropriate."[20] In *Franklin Resources*, one of the key concessions by the applicant was that they would not "[s]eek[] to determine or influence whether generation, transmission, distribution, or other physical assets are made available or withheld from the marketplace."[21]

In *Entegra Power Group*, the Commission rejected the argument that a "21 percent" ownership was insufficient to influence control of a utility.[22] "The Commission has rejected the notion that mere minority ownership is insufficient to exert a degree of control sufficient to require authorization under section 203."[23] The Commission thus placed limits on the applicants, including that they may "not cast any votes or take any action that directly or indirectly dictates the price at which power is sold from Entegra's generating facilities, or directly or indirectly specifies how and when power generated by the facilities will be sold."[24]

BlackRock's representations in obtaining approval similarly center around the concept that BlackRock would not seek to influence or control the utilities in which it owns shares. But independently, and through its association with CA100+ and NZAM, BlackRock appears to be doing precisely the opposite—taking an activist position to force substantial changes in utility

[20] *Id.* at ¶ 32 (emphasis added).
[21] *Franklin Res., Inc.*, 126 FERC ¶ 61,250, 62,393 ¶18 (2009).
[22] *See Entegra Power Grp. LLC.*, 125 FERC ¶ 61,143, 61,718 ¶33 (2008).
[23] *Id.*
[24] *Id.* at 61,722 ¶40 (F).

operations based on the goal of achieving net zero greenhouse gas emissions by 2050. Forcing utility companies to change their operations is contrary to BlackRock's representations to the Commission that it would refrain from influencing operations.

For example, in BlackRock's answer to Public Citizen last year, it recognized that "[t]he Commission has based [its] determinations [that blanket authorizations for large asset managers such as BlackRock are consistent with the public interest], in part, on the conditions placed on Applicants and the other blanket authorization holders, which prevent such blanket authorization holders from exercising control over the utilities in which they acquire voting securities pursuant to the blanket authorization."[25] BlackRock expressly based its request as being "[c]onsistent with Commission precedent."[26] BlackRock further stated that it was seeking "an extension—without modification—of the blanket authorizations that the Commission has granted multiple times to Applicants and several other entities since at least 2010."[27] And it thus described Public Citizen's protest as "nothing more than a collateral attack on the Commission's prior orders granting such blanket authorizations."[28] BlackRock further represented "there have been no changes in material facts and circumstances that would alter the Commission's analysis since the Blanket Reauthorization Order [in 2019] and the Original Authorization Order [in 2010]."[29] It is necessary and appropriate for the Commission to determine whether BlackRock is in fact functioning in a way that does not influence utility operations—a consistent requirement of the authorization orders going back to 2010.

[25] BlackRock's Mtn. for Leave to Answer and Answer to Protest by Public Citizen, No. EC16-77-002 at 2 (filed 3/18/2022).
[26] *Id.*
[27] *Id.*
[28] *Id.* at 2.
[29] *Id.* at 2–3.

BlackRock's Answer to the States' Motion ignores its previous representations to the Commission, focusing on whether it is "exercis[ing] control" rather than its prior statements of "influenc[ing] control."[30] The only times that BlackRock mentions "influencing" are in discussing the SEC requirements for Section 13G and in a footnote describing the 2022 BlackRock Order.[31] But BlackRock's prior representation to the Commission regarding the circumstances when it would file a 13G was more limited, and is the operative statement for purposes of the Commission's analysis because "the Commission relies on the terms and conditions committed to by a blanket authorization applicant."[32] BlackRock said that if it filed a 13G, that would mean it was not engaging in "any activity designed to … influence the day-to-day commercial conduct of [an FPA-covered utility's] business,"[33] BlackRock also said in 2022 that it was seeking "an extension—without modification—of the blanket authorizations that the Commission has granted multiple times to Applicants and several other entities since at least 2010."[34] BlackRock cannot backtrack on those commitments to the Commission under *Mario J. Gabelli*.

BlackRock also surprisingly asserts in its Answer that it "does not coordinate its … engagements … for U.S. Traded Utilities with other asset managers, asset owners or external groups or organizations."[35] This statement is belied by BlackRock's own reports and voting patterns. BlackRock Investment Stewardship's 2020 report titled *Our approach to sustainability*, states, "[w]e have engaged companies on grounds similar to the strategy of Climate Action 100+,

[30] *See* BlackRock Answer at 4.
[31] *Id.* at 4 & 6 n.20.
[32] *Mario J. Gabelli*, 175 FERC ¶ 61,004 at ¶32 (2021).
[33] 2010 BlackRock Order at P 21.(discussing BlackRock's representations of its actions when filing S.E.C. Schedule 13G forms with the Commission).
[34] BlackRock's Mtn. for Leave to Answer at 6 and Answer to Protest by Public Citizen, No. EC16-77-002 at 2 (filed 3/18/2022).
[35] BlackRock Answer at 5.

which we joined in January of this year."[36] It further states, "BlackRock joined Climate Action 100+ (CA 100+) in January of this year, a natural progression in our work to advance corporate reporting aligned with TCFD. ***CA 100+ is a group of investors that engages with companies to*** improve climate disclosure and ***align business strategy with the goals of the Paris Agreement***."[37] CA100+'s press release when BlackRock joined stated that BlackRock would "bring even more heft to investor engagement" and had committed to "accelerating engagements with the largest corporate greenhouse gas emitters on climate change," which would "send[] a powerful signal to companies to reduce emissions."[38]

In 2018 and 2019 BlackRock supported around only 10% of climate-related shareholder resolutions.[39] In the second half of 2020, after joining CA100+, BlackRock supported 54% of all environmental and social proposals.[40] BlackRock also "voted against the election of 255 directors as a result of climate-related concerns."[41] BlackRock's memorandum to Climate Action 100+ does not say that it will not coordinate engagements or votes; it only says it will "independently exercise

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[36] BLACKROCK, 2020 BLACKROCK SUSTAINABILITY REPORT 17, *available at* https://www.blackrock.com/corporate/literature/publication/our-commitment-to-sustainability-full-report.pdf.

[37] *Id.* at 19 (emphasis added).

[38] Climate Action 100+, BlackRock Joins Climate Action 100+ to Ensure Largest Corporate Emitters Act on Climate Crisis (Jan. 9, 2000), *available at* https://www.climateaction100.org/news/blackrock-joins-climate-action-100-to-ensure-largest-corporate-emitters-act-on-climate-crisis/.

[39] Motion at 49 & n.160 (citing Sinead Cruise et al., BlackRock vows tougher stance on climate after activist heat, Reuters (Jan. 14, 2020), *available at* https://www.reuters.com/article/us-blackrock-fink/blackrock-vows-tougher-stance-on-climate-after-activist-heat-idUSKBN1ZD12B).

[40] *Id.* at 49–50 & n.162 (citing Cruise et al., supra note 32, and BlackRock, Net zero: a fiduciary approach ("Fink 2021 Client Letter") at p. 10, *available at* https://www.blackrock.com/corporate/investor-relations/2021-blackrock-client-letter).

[41] *Id.* at 50 & n.163 (citing 3 Cydney Posner, BlackRock Flexes its Muscles During 2020-21 Proxy Period, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 16, 2021), *available at* https://corpgov.law.harvard.edu/2021/08/16/blackrock-flexes-its-muscles-during-the-2020-21-proxy-period/).

its fiduciary duties to [its] clients in determining how [to] prioritize engagements and how [to] vote proxies."[42] This is a much narrower disclaimer than the disclaimer BlackRock made to the Commission regarding 13G and its statement it is making in its Answer.

Climate Action 100+'s 2020 Progress Report states, "Participants in Climate Action 100+ are required to join at least one engagement group and actively contribute to company engagement. Supporters of the initiative must be asset owners (asset managers can only join as participants) and are required to encourage their asset managers to join the initiative to engage on their behalf."[43] As an example of how engagement works, French oil company Total agreed in May 2020 to a net zero pledge. "The move followed similar net zero pledges in recent months from Shell, BP and Repsol and came after a months-long engagement process with institutional investors through global green investor group Climate Action 100+."[44] And, consistent with Climate Action 100+'s coordinated approach to engagement, BNP Paribas Asset Management was designated "engagement co-lead."[45] BlackRock's own 2020 report describes how it "intensified" its engagement with Total during the "same period" that other CA100+ members engaged with Total.[46] After reaching a resolution with Total, "BlackRock and many other members of CA 100+ declined to support a shareholder proposal seeking enhancements to the company's long-term targets, since the company, through its own actions (as reflected in the joint Total-CA 100+ statement), had already substantively met the request made in the proposal."[47]

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[42] BlackRock Answer at 5–6 & n.19

[43] Climate Action 100+, *2020 Progress Report* at p. 82, *available at* https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf.

[44] *See* Cecilia Keating, *"Totally insincere": Splits emerge over investor response to Total's net zero pledge*, GreenBiz (May 7, 2020), *available at* https://www.greenbiz.com/article/totally-insincere-splits-emerge-over-investor-response-totals-net-zero-pledge.

[45] *Id.*

[46] 2020 BlackRock Sustainability Report, *supra* note 31, at p. 20.

[47] *Id.*

BlackRock's coordination as part of NZAM is partially set forth in a formal "Initial Target Disclosure Report" dated May 2022, where BlackRock sets out its "policy on coal and other fossil fuel investments" for other asset managers that are part of NZAM.[48] This includes a policy on thermal coal, investment stewardship, and a heightened scrutiny framework for climate risk.

These activities by BlackRock are not limited to foreign oil companies. The Motion extensively laid out how BlackRock has taken actions to influence U.S. utilities, including FirstEnergy and Dominion, to change their business practices—transitioning to net zero 2050.[49] Contrary to BlackRock's argument in the Answer that it is merely carrying out its fiduciary obligations, these attempts at influencing control are much more specific and designed to make changes of the type that BlackRock had disclaimed to the Commission.[50] And in a closely related context, BlackRock's CEO has made clear that he is not shy about "asking companies" to "forc[e] behaviors."[51] This heavy-handed approach seems to be BlackRock's method of operation when it comes to its ESG agenda.

C. The Commission Must Investigate Whether CA100+ and NZAMI, Including Their Members, Are "Associations" or "Organized Groups" that Qualify as "Holding Companies."

BlackRock argues that whether CA100+ and/or NZAM are holding companies is outside the scope of the existing proceeding.[52] BlackRock Answer at 7-8. The States agree that BlackRock neither sought nor obtained Commission approval to engage in transactions covered by Section

[48] Net Zero Asset Managers Initiative, Initial Target Disclosure Report at p. 27 (May 2022), *available at* https://www.netzeroassetmanagers.org/media/2022/05/NZAM-Initial-Target-Disclosure-Report-May-2022-1.pdf.
[49] *See, e.g.*, Motion at 61–62; *see also id.* at 28–32.
[50] BlackRock Answer at 5.
[51] *See* Recording of NYT DealBook 2017 at 27:51 (discussing in the context of diversity), *available at* https://www.youtube.com/watch?v=-cCs9Kh2Q08.
[52] Public Citizen also appears to make this argument. *See* Public Citizen Answer at 2. The arguments herein respond to Public Citizen as well.

203(a)(2) of the FPA in connection with its and other asset managers' membership in the larger holding companies that include CA100+ and NZAM. However, BlackRock's failure to inform the Commission or request such approval is not a defense to the States' Motion. Rather, it compels the Commission to grant intervention and conduct proceedings under its ongoing authority to issue supplemental orders or, alternatively, to address the issue in the context of a complaint. *See* Part A, *supra*. This is because Commission approval is *required* under the plain language of Section 203(a)(2) if CA100+ or NZAM—including their members—qualify as holding companies.[53] It would be arbitrary and capricious to refuse to consider this important aspect of the problem as it relates to BlackRock's ongoing acquisition and holding of stock.[54]

In determining whether to grant approval, the Commission analyzes whether a "proposed transaction is 'consistent with the public interest' in light of its possible effects on competition, rates, and regulation."[55] The premises behind the Commission's blanket authorization for BlackRock to acquire stock in utilities beyond the limits in Section 203 is the combination of 1) the conclusion that ownership below 20% cannot generally influence control of utilities and 2) BlackRock's promises not to use its holdings to influence utility operations or control. *See* Part B. Given these premises, the Commission did not conduct any particularized economic analysis.[56] But neither of those premises can be relied on in the presence of larger holding companies whose

[53] If either association or organized group counts as a holding company, then their actions violate the prohibition that "***[n]o*** holding company" may take action absent Commission approval. 16 U.S.C. § 824b(a)(2) (emphasis added); *see generally United Food & Com. Workers Union, Loc. 1119, AFL-CIO v. United Markets, Inc.*, 784 F.2d 1413, 1415 (9th Cir. 1986) ("'No' means 'not any….'") (citing Webster's Third International Dictionary 1532 (16th ed. 1971)).
[54] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).
[55] Motion at 11 & n.21.
[56] *Cf.* 18 C.F.R. § 2.26(c)–(d) (envisioning consideration of data and potential for "substantial issues of relevant fact").

members collectively own greater than 20% in utilities and combine their ownership to exert greater control than any one member could exert individually.

In fact, CA100+ has stated that it "is now the largest ever investor engagement initiative on climate change."[57] CA100+ further stated with respect to utilities that "[i]nvestors are engaging with utilities to understand how investment decisions and transition plans align with the goals of the Paris Agreement, including investments to retire, maintain or expand fossil fuel infrastructure. ***They are also calling for ambitious emissions reduction targets.***"[58] CA100+ further stated that "[n]otable progress has occurred in the United States where six electric utilities have now committed to net-zero emissions by 2050…."[59] CA100+ has also stated "[b]oth coal and gas fired generation *must be phased out* to achieve global net-zero emissions by mid-century."[60]

NZAM similarly stated in its FAQ: "What is the reach of the Net Zero Asset Managers initiative? Our 273 signatories to date manage over USD 61.3 trillion of assets*. The transition to net zero will be the biggest transformation in economic history. The opportunities to allocate capital to this transition over the coming years cannot be underestimated. ***Our industry's ability to drive the transition to net zero is extremely powerful.*** Without our industry on board, the goals set out in the Paris Agreement will be difficult to meet."[61]

BlackRock does not dispute that it is a member of these organizations or that their express purpose is to influence utility operations, and the States' Motion showed that BlackRock both

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[57] Climate Action 100+, *2020 Progress Report* at 5, *available at* https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf
[58] *Id.* at 41 (emphasis added).
[59] *Id.*
[60] Climate Action 100+, *2020 Progress Report* at 44, *available at* https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf (emphasis added).
[61] *FAQ, NETZEROASSETMANAGERS* (2023), https://www.netzeroassetmanagers.org/faq/ (emphasis added).

engages and votes its shares in certain instances when a utility is not making sufficient "progress" on business practices related to climate change.[62]

The percentage of ownership collectively held by a larger holding company is thus directly relevant to whether BlackRock's ownership levels can influence utility operations or control. Because BlackRock is one of the members of larger holding companies that are engaging to influence utility operations through their collective holdings, BlackRock's acquisition of additional stock in utilities not only affects BlackRock's ability to impact competition and rates but also those larger holding companies' ability to impact competition and rates. This point is undisputed by CA100+, who expressly touts its impact resulting from its members' stock ownership. *See, e.g.*, Motion at 25-26 (collecting sources and statements).

Moreover, granting approval for BlackRock without even considering whether the overall ownership of shares by BlackRock and those with whom it is coordinating exceeds 20% would violate the Commission's established practice of limiting ownership by asset managers to the 20% level and aggregating ownership within an overall holding company absent strict controls.[63] It is not hard to conceive of situations where substantial ownership stakes in multiple utilities could result in utilities not competing as vigorously with each other in certain respects, particularly when the utilities are operating in the same wholesale markets. And Congress has mandated that the Commission carry out the duty of approving such transactions. Up to this point, the Commission

[62] *See, e.g.*, Motion at 16, 28.

[63] *See* Motion at p. 4 & n.10 (citing *Franklin Res., Inc.*, 126 FERC ¶ 61,250 at PP 39–40 (2009), *order on reh'g*, 127 FERC ¶ 61,224 (2009)); Motion at p. 59. As discussed above, in *Entegra Power Group*, the Commission rejected the argument that a "21 percent" ownership was insufficient to influence control of a utility and placed limits on the applicants, including that they may "not cast any votes or take any action that *directly or indirectly* dictates the price at which power is sold from Entegra's generating facilities, or *directly or indirectly* specifies how and when power generated by the facilities will be sold." *See Entegra Power Grp. LLC.*, 125 FERC ¶ 61,143, ¶61720 P 33,¶61722 P (F) (2008) (emphasis added).

has not done so. The Commission must therefore exercise its ongoing authority through granting intervention or considering a complaint. And if it decides to depart from its prior factual finding that requires a 20% limit on stock ownership by asset managers, it must provide a more detailed explanation for doing so.[64] The cases cited by BlackRock are inapposite because the existence of additional holding companies and coordination by BlackRock as part of those holding companies does directly bear on whether the transaction of BlackRock holding and acquiring additional utility stock will have an adverse effect on competition and rates.[65]

Second, BlackRock's argument on the merits of whether CA100+ and NZAM, including their members, are holding companies also fails. The States demonstrated that both qualify as "holding companies" under the FPA based on *either* of the definitions in 42 U.SC. § 16451(8)(A)(i)-(ii). Motion at 54-59. As to the first definition, contained in clause (i), the Motion demonstrated that the definition of "holding company," through the use of the defined term "company," expressly covers an unincorporated "association" or "organized group." Motion at 55-56 (citing 42 U.S.C. § 16541(4), (12)). The Motion cited Commission precedent that recognizes that an "organized group of persons" qualifies as a holding company in analogous circumstances.[66]

[64] *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

[65] *See* BlackRock Answer at 8 n.27. For example, in *Entergy Nuclear FitzPatrick, LLC Exelon Generation Co., LLC*, 157 FERC ¶ 61,183 (2016), the "ZEC Program" existed irrespective of the transaction, and Public Citizen did not identify any aspect of the transaction that changed "the potential effects of the ZEC Program on the NYISO market." BlackRock also cites *NRG Energy, Inc. GenOn Energy, Inc.*, 141 FERC ¶ 61,207, 62,023 (2012). The issue found outside of the scope in that case was an ongoing easement negotiation. Here, when BlackRock acquires more stock as part of the CA100+ or NZAM holding companies, those holding companies directly gain power to influence utility operations through the transaction. In other words, the transactions covered by the blanket authorizations *do* have an impact on rates and competition that is directly tied to the issues the Commission is supposed to consider when granting approval under Section 203 of the FPA.

[66] Motion at 56 n.185 (citing Midstates Oil Corp., 20 F.P.C. 70, 88 (1958)).

BlackRock does not even attempt to address the "very broad" statutory definition or the Midstates Oil Corp. decision.[67]

BlackRock limits its substantive response to the straw man that neither CA100+ nor NZAM themselves "owns, controls, or holds, with power to vote, 10 percent or more of the outstanding securities of BlackRock" or any other utility or holding company.[68] But that argument misses the mark because the States are not arguing that CA100+ by itself is a holding company under clause (i). They are arguing that CA100+ as well as its members (which indisputably includes BlackRock) constitutes an "association" or an "organized group" that qualifies as a holding company.[69] The States are making the same argument as to NZAM.[70] The States argue that since the definition of "company" expressly covers unincorporated associations or organized groups, "the acquisition of stock by any one of their members (such as BlackRock) is attributable to each of the other members for purposes of the definition of a 'holding company.'"[71] BlackRock never engages with how to apply "holding company" to an unincorporated "association" or "organized group" that through its various members directly or indirectly owns, controls, or holds, with power to vote, the requisite shares to meet the statutory definition. Given that the statute expressly includes these categories of organizations in the definition of "company," BlackRock's failure to address the States' argument is fatal to its position.[72]

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[67] *Compare* Motion at 56, *with* BlackRock Answer at 8.
[68] BlackRock Answer at 8.
[69] Motion at 56–57.
[70] Motion at 58.
[71] Motion at 57–58 & n.191 (collecting multiple authorities for this general proposition regarding associations or partnerships).
[72] The authority BlackRock cites similarly does not address an "association" or "organized group." *See* BlackRock Answer at 8 n.30. BlackRock relies on *The Goldman Sachs Group, Inc.*, 114 FERC 61,118, at P 13 (2006). There are important limitations built into that case. First, the Commission noted that it was "in the early stages of implementing EPAct 2005." *Id.* at P 27. And it predates

BlackRock also argues that applying the plain language of "company" would create the allegedly absurd result that other industry initiatives could similarly trigger the requirement for Commission approval.[73] But it is hardly absurd that industry initiatives in certain circumstances can run afoul of laws designed to protect competition. "[F]orming a trade association does not shield joint activities from antitrust scrutiny: Dealings among competitors that violate the law would still violate the law even if they were done through a trade association."[74] Far from being absurd, BlackRock admitted when it joined Climate Action 100+ that "[c]ertain types of collective action can have regulatory ramifications," and it is now backtracking from its own commonsense statement when faced with the States' Motion and the "very broad" statutory definitions incorporated into Section 203.[75] The issue here is that the association's activities are not limited to lobbying governmental bodies or pro-competitive standard setting, but rather aggregating the power of each member's holdings to influence utility company operations for a specific end—adoption of "ambitious emissions reduction targets"[76] and "driv[ing] the transition to net zero."[77]

Franklin Res., Inc., 126 FERC ¶ 61,250 at P 31, 39–41 (2009), which set forth a much more detailed analysis of when the Commission would or would not aggregate voting rights. Second, Goldman and its nonutility subsidiaries nonetheless sought blanket authorizations. 114 FERC 61,118 at ¶ 21. Third, there was no indication that the non-utility subsidiaries were coordinating their engagement or voting with each other or the parent. Therefore, there was no argument made to the Commission that the nonutility subsidiaries and the upstream parent were all one "holding company." In contrast, the States are arguing that CA100+, including its members, constitutes a single holding company for purposes of Section 203.

[73] BlackRock Answer at 8.

[74] FTC, *Spotlight on Trade Associations*, *available at* https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations

[75] Motion at 14 n.36 (citing BlackRock's CA100+ Sign-On Statement, *available at* https://www.blackrock.com/corporate/literature/publication/our-participation-in-climate-action-100.pdf).

[76] Climate Action 100+, *2020 Progress Report* at 41, *available at* https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf.

[77] *FAQ*, NETZEROASSETMANAGERS (2023) https://www.netzeroassetmanagers.org/faq/.

If the other industry groups that BlackRock identifies in its Answer are engaged in similar behavior, the Commission must investigate them as well. There is nothing absurd about this.

Finally, BlackRock does not even address the second definition, contained in clause (ii), thereby conceding that the Commission has additional authority to conclude after notice and opportunity for hearing that CA100+ and NZAM, including their members, are holding companies. 42 U.S.C. § 16451(8)(A)(ii). BlackRock provides no merits argument as to why the Commission can properly refuse to exercise that discretion, particularly given the extensive evidence cited in the States' Motion regarding these associations/groups' activities.

In sum, BlackRock's merits arguments do not refute the detailed merits analysis laid out in the States' Motion, and the Commission must grant intervention and exercise its ongoing powers or treat the Motion as a complaint and conduct further proceedings.

III. Conclusion

The Commission should grant leave to file the reply contained herein. The Commission should further grant the relief requested in the Motion. This is to permit intervention by the States and exercise the Commission's ongoing authority under the 2022 BlackRock Order to determine if BlackRock is complying with that order and also whether it is part of an undisclosed, larger holding company. In the alternative, the Commission should treat the Motion as a complaint under Rule 206 and proceed accordingly.

Dated June 9, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated June 9, 2023.

/s/ Melissa A. Holyoak

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