sifma
asset management group

March 26, 2024
Via E-Filing
Hon. Debbie-Anne A. Reese, Acting Secretary
Federal Energy Regulatory Commission
888 First Street NW – Attn: SC-1
Washington DC 20426

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

The Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG")[1] files these initial comments in the captioned Notice of Inquiry proceeding.[2] SIFMA AMG files these comments in its own name[3] on not on behalf of any particular SIFMA AMG member. Individual members of SIFMA AMG reserve the right to file separate comments.

SIFMA AMG appreciates the Federal Energy Regulatory Commission's ("FERC" or "Commission") invitation to provide comments to the Notice of Inquiry. As SIFMA AMG

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. SIFMA's broker-dealer members comprise 80% of U.S. market share by revenues and 70% of financial advisors managing $18 trillion of client assets. On behalf of our industry's nearly one million employees, we advocate on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA AMG, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS, and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg.

[2] 185 FERC ¶ 61,192 (December 19, 2023)(the "Notice of Inquiry").

[3] To the extent necessary in a Notice of Inquiry, SIFMA AMG moves for permission to intervene in the captioned proceeding. SIFMA AMG's participation was invited by the Commission's Federal Register notice (88 FR 89346, December 27, 2023), SIFMA AMG is not otherwise represented in the Notice of Inquiry, the interests of SIFMA AMG's membership, as managers of client accounts and funds that hold securities of public utilities, are directly affected by the Notice of Inquiry proceeding, and SIFMA AMG's participation in the Notice of Inquiry is in the public interest. SIFMA AMG is therefore entitled to party status under 18 C.F.R. § 385.214.

explains in this letter, the Commission's case-specific orders under Section 203 of the Federal Power Act ("FPA") that confer blanket authorization ("Blanket Authorizations")[4] on certain investors' acquisitions of the publicly traded voting securities of public utilities and holding companies are part of a comprehensive and effective system of regulation. There is no legal or factual reason for the Commission to depart from its historic practices and policies in issuing Blanket Authorization orders to investment funds and managers.

In this letter, SIFMA AMG addresses the subject matter of several of the questions posed in the Notice of Inquiry. In particular, the letter focuses on:

- explaining the Section 203 Blanket Authorization Order process and the robust requirements that applicants must meet in order to qualify;
- clarifying why the Commission is compelled by law to grant Blanket Authorizations when applicants successfully meet the necessary requirements;
- outlining the significant compliance conditions that investors must abide by to keep a Blanket Authorization, which effectively ensures that Blanket Authorizations only allow for investment and not control; and
- recommending that the Commission conclude this Notice of Inquiry and continue with current practices.

SIFMA AMG reserves the right, in any reply comments, to further address these and other issues raised in the Notice of Inquiry and in other comments that are filed in this proceeding.

The Commission's Regulation of Investment Advisor Practices Under the Section 203 Blanket Authorization Order Process is Robust and Comprehensive

FPA Section 203 directs all of the Commission's regulatory practices and policies relating to Blanket Authorizations, from initial application and eligibility requirements and public disclosure processes to the Commission's considerations of the merits of each individual application, through to post-order reporting and renewal requirements. Investors[5] seek Blanket Authorizations so that they can make non-controlling investments – for the purpose of investment, and not of control - in publicly-traded utility and holding company securities in percentage-amounts of voting securities that are above the FPA Section 203 jurisdictional level of ten percent but are far below the level required to exercise actual control over the issuing utility or holding company. In the absence of Blanket Authorizations, investors would be limited to making investment in smaller and less efficient amounts that are less than optimal from a portfolio management perspective, and an investor would face crippling limitations on the potential amount of investment capital that could be invested in any one public utility.[6]

[4] In this letter, SIFMA AMG addresses the Blanket Authorizations that the Commission confers on "individual" (Notice of Inquiry Para. 4) or "case-specific" (Notice of Inquiry Para. 5) bases. The Notice of Inquiry did not request comments or propose questions on any but one by-rule blanket authorization conferred under 18 C.F.R. § 33.1(c). SIFMA AMG and its members reserve the right to address any issues raised with respect to that provision of § 33.1(c) in reply comments.

[5] Notice of Inquiry fn.1 adopts the Investment Company Act of 1940's definition to identify the "investment company[ies]" that hold Blanket Authorizations. SIFMA AMG notes that there may be many pooled investment vehicles, funds, and co-investment vehicles that could be affected by the Commission's action in the Notice of Inquiry that do not fall within the Investment Company Act definition.

[6] *Capital Research and Management Company, et al*., Docket No. EC06-129, 116 FERC ¶ 61,267 (Sept. 22, 2006)("Capital Research") P 5.

Limitations on obtaining and holding Blanket Authorizations would also operate to the detriment of publicly-traded utilities that depend on the markets for their equity capital, and any increase in the cost of, or risk associated with, their equity capital would ultimately be borne by their customers.

Since the 2005 enactment of FPA Sections 203(a)(4) and (a)(5), and the Commission's issuance of its *Order on Request for Blanket Authorizations to Acquire Securities* in *Capital Research*, the Commission has issued Blanket Authorizations to many investment managers and funds. The issuance of these orders in each case has required a public application under Section 203 of the FPA that satisfies the Commission's Section 203 disclosure and public interest requirements.[7] In the Section 203 application, the investor requesting Blanket Authorization must disclose certain of its existing "energy affiliates" and "energy subsidiaries" and energy-related business arrangements, and demonstrate that the conferral of Blanket Authorization will do no harm to the public interest.[8]

The investor must establish eligibility in these granular, public-record applications, so as to demonstrate that:

> with the conditions proposed … and accepted here, as modified above, [the investment entity] will be unable to exercise control over the public utilities and public utility holding companies whose securities are acquired under the blanket authorization requested under section 203(a)(2). Thus, we find that the transactions under that requested blanket authorization have no adverse effect on competition.[9]

The Commission's regulation of investment fund investment practices under Blanket Authorization orders is robust and comprehensive. Blanket Authorizations for investors serve the capitalization needs of the electric sector, including those of traditional franchised utilities.[10] The theory and practice behind Blanket Authorizations is well-settled law, and is consistent with the express text of FPA Section 203 and related Commission policy, as FERC recognized in FERC proceedings for eighteen years, since the Commission's issuance of the first such Blanket Authorization order.[11]

Blanket Authorization practices are rigorously regulated. Commission orders granting Blanket Authorizations involve record evidence of control and governance compliance practices. The Commission has noted in Blanket Authorization orders that approval is predicated on record findings that:

> With the conditions imposed in granting [the] request for section 203(a)(2) authorization, we find that the transactions under the blanket authorization requested … will not result in the change in control of a public utility or jurisdictional facilities, or the sale, lease or merger of a public utility or jurisdictional facilities.[12]

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[7] See, 18 C.F.R. § 33.2.
[8] 16 U.S.C. § 824b(a)(4).
[9] *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,209 (2008)("Horizon") at P. 50
[10] See, e.g., Motion To Intervene Out Of Time And Comments Of Eversource Energy, Docket No. EC19-57-002 (filed Dec. 5, 2022).
[11] *Capital Research*.
[12] *Horizon*, P. 37.

And

> When combined with other factors, the Commission has previously relied upon an applicants' filing of Schedule 13G, along with the associated regulatory and enforcement regime administered by the SEC, to ensure that the applicant would not exercise control over public utilities or public utility holding companies.[13]

These requirements in many respects exceed the requirements that the Commission imposes on single-closing transactions in FPA Section 203 proceedings and impose significant substantive limitations on the post-closing rights of the investor that holds the Blanket Authorization. The Notice of Inquiry does not identify a single instance in which an investor holding a Blanket Authorization order has exceeded any of the limited governance rights conveyed by the applicable order.

The Commission is Compelled by Law under Section 203 to Confer Blanket Authorizations on Eligible Applicants

The Commission does not confer Blanket Authorizations out of habit or history. Section 203 of the FPA directs the mechanics and the results of Commission review of direct and indirect dispositions of voting securities of public utilities, and acquisitions of voting securities by "holding companies" defined under the FPA.

The Commission's statutory instructions include:

> (4) After notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

And

> (5) The Commission shall, by rule, adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions, under this section. Such rules shall identify classes of transactions, or specify criteria for transactions, that normally meet the standards established in paragraph (4). The Commission shall provide expedited review for such transactions. … [14]

The statutory text that directs the Commission leaves no room for debate: consistency with the public interest, for Section 203 purposes, simply means the absence of harm,[15] and unless actual

[13] *Horizon*, P. 45 (internal citations omitted).
[14] 16 U.S.C. §§ 824b(a)(4) and (5), *amended by* Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005).
[15] The Commission has repeatedly acknowledged in Section 203 rulemakings that its Section 203 public interest analysis is nothing more than an absence-of-harm standard; see, e.g., *Blanket Authorization Under FPA*

harm to the public interest is identified – and the Notice of Inquiry makes no such finding – the Commission is compelled by law to grant a Section 203 application, including a Section 203 application that seeks Blanket Authorization. Nothing in the text of FPA Section 203 authorizes the Commission to impose higher than a public-interest (that is, a no-harm) standard to applications for Blanket Authorizations. In fact, as is discussed below, pursuant to FPA Section 203(b), the Commission applies far more intensive and detailed compliance conditions on Blanket Authorizations than the Commission does on most Section 203 orders. The Commission should recognize that the language of FPA Section 203, on its face, requires the Commission to approve Section 203 applications, which include those seeking Blanket Authorization, if there is no actual harm to the public interest. The Blanket Authorizations that are addressed in the Notice of Inquiry present no harm to the public interest, and are entitled, pursuant to the text of Section 203, to approval. And the Commission is required to provide for rapid processing of applications such as Blanket Authorization applications that conform to Commission precedents.

Even if the Commission were invested with the authority to impose more stringent legal requirements on Blanket Authorizations than are set forth in the Commission's enabling legislation, there would be no reason to do so. First, obtaining a Blanket Authorization requires the investment entity to satisfy largely the same regulatory requirements as other Section 203 applicants; the Blanket Authorization process is not a waiver of regulatory compliance requirements; instead, the Commission imposes numerous protective conditions in every Blanket Authorization order. These protective conditions, the most common of which are enumerated below, ensure that every Blanket Authorization holder continually demonstrate that it invests under its Blanket Authorization solely for purposes of investment and not for purposes of control. Blanket Authorization orders sit at the outer edge of granular Commission direction in Section 203 proceedings, which more often than not impose post-ordering requirements limited to a brief and discrete set of compliance actions within a narrow temporal period. The investment entity must demonstrate that the investment activity will do no harm to competition, rates, nor the exercise of regulatory jurisdiction, and will not involve certain cross-subsidization, pledge, encumbrance, or securitization practices.[16]

Second, as is discussed below, the Commission's Blanket Authorization conditions are rigorous and exhaustive. In fact, the effectiveness of the Commission's current compliance requirements and practices for Blanket Authorizations is evident from the fact that the Commission has never once revoked a Blanket Authorization for any non-compliance reason, in the eighteen years that current Blanket Authorization practices have been in effect. The Commission has consistently, and appropriately, rejected protests filed in Blanket Authorization proceedings that rest on speculation and on assumptions that the dollar-size of the investible assets that are available to a particular investor – the only investor characteristic that is discussed with specificity in the Notice of Inquiry[17] – defines the investor's capacity to comply with well-established Blanket Authorization requirements.

Section 203, Order No. 708-A, 124 FERC ¶ 61,048 (2008)(passim.); see also, Notice of Inquiry P 5, Capital Research at P 32.

[16] 18 C.F.R. § 2.26.

[17] See, Notice of Inquiry pp. 11, 13.

Comprehensive Common Baseline Conditions Ensure Investors Do Not Exercise Control

An investor holding Blanket Authorization may not exercise control over the public utility in which the investment is made, and the Commission enforces this requirement by means of comprehensive compliance conditions. These compliance conditions are significant, assure that the Blanket Authorization may only be relied upon for purposes of investment and not of control, are preconditions to both the conferral and the continuing effectiveness of the Blanket Authorizations, and are expressly recited in every Blanket Authorization order. No investor seeking or holding a Banket Authorization is excused from these conditions, irrespective of its investible dollar-size. The conditions typically require that the investor:

- only acquire the securities of publicly-traded public utilities;[18]
- not acquire 10 percent or more of the voting securities of any one public utility in any one fund or similar vehicle;
- not acquire more than 20 percent of the voting securities of any one public utility;
- maintain governing policies (and comply with other legal requirements) that prohibit the exercise of day-to-day control over public utilities whose securities they hold;
- maintain their status as beneficial owners (as holders of the public utility or holding company securities for purposes of investment, and not of control) that will be and remain eligible to file Schedule 13G under SEC rules with respect to acquiring more than five percent of any class of voting securities of a public utility;
- file a copy of Schedule 13D and 13G with the Commission when they file it with the Securities and Exchange Commission;
- publicly identify every fund, vehicle, or other investment that will engage in transactions that are subject to the order;
- report publicly to FERC on its ownership of certain public utility securities, each quarter;
- comply with such audit requirements as the Commission may adopt under the FPA;
- notify the Commission publicly of any changes in status that are material to the order or the investor's eligibility to transact under the order; and
- reapply to renew its Blanket Authorization, including full support that would be required in an initial application for Blanket Authorization, every three years.[19]

The Commission Should Conclude this Notice of Inquiry Proceeding and Continue with Current Practices

The Notice of Inquiry seeks information to define and propose a regulatory resolution for a problem that the Commission has not identified or described. The Notice of Inquiry identifies no reason to impose new requirements for, or restrictions on, Blanket Authorization orders. The Notice of Inquiry does not define any non-compliance, let alone any specific harm, that has been realized as a result of the issuance of Blanket Authorization orders to investors.[20]

[18] References to public utilities in each case include the applicable security-issuing holding company.

[19] These conditions, as refined, have been adopted in one or another form in substantially every investment blanket authorization order since the Commission's issuance of Horizon.

[20] In fact, the Notice of Inquiry does not identify what investing entities prompt whatever concern gave rise to the Notice of Inquiry. The Notice of Inquiry states, at fn. 1, that "'investment companies' refers to those companies meeting the definition of "investment companies" in the Investment Company Act of 1940 ... If commenters believe the Commission should apply a different definition or use a different term, they are

The Commission's Blanket Authorization orders work effectively and as they are intended to work. They have been widely relied upon. They come with clear and understood requirements. SIFMA AMG encourages the Commission to consider the numerous process, substantive, and business reasons to maintain its Blanket Authorization policies in their current form.

SIFMA AMG appreciates the opportunity to comment on the notice of inquiry. If you have any questions or would like to discuss anything in this letter further, we welcome the opportunity to engage with you. Please feel free to contact Lindsey Keljo at 202-962-7312 or lkeljo@sifma.org, or our counsel Mark Williams at 202-263-3070 or MarkWilliams@mayerbrown.com.

Respectfully submitted,

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Cc: Mark Williams, Mayer Brown LLP

encouraged to explain in their comments." As a result, the Notice of Inquiry does not make clear exactly what classes or kinds of investment vehicle are being scrutinized.