sifma
asset management group

April 25, 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") hereby replies to certain comments filed in the captioned Notice of Inquiry proceeding.[1] The Notice of Inquiry has provided the Commission with no basis whatsoever to modify its policies and practices relating to Blanket Authorization orders. The Commission should terminate the Notice of Inquiry proceeding.

Industry Consensus Favors Existing Policies And Practices

The representative membership associations of the private-sector US electric power industry – that is, the associations of businesses in which Blanket Authorization-holders invest – have submitted not one single request or proposal seeking any modification of Blanket Authorization policies or practices. They urge the Commission to retain its current Blanket Authorization policies and practices.

The comments submitted by Edison Electric Institute ("EEI") reflect a consensus among utility and holding company issuers of stock that have appeared in this proceeding – a consensus in which SIFMA AMG joins. EEI warns the Commission that "[c]hanges to the Commission's blanket authorization policy could have significant impacts on the investment landscape for public utilities, *including chilling interest in investment in the sector*."[2] The Electric Power Supply Association ("EPSA") (" … the Commission should refrain from going down a path in considering (or adopting) policy changes in this or other proceedings that could hurt reliability and consumers by chilling investment in public utilities ...")[3] and the American Council on Renewable Energy ("ACORE") ("altering this policy creates a risk of impeding financial investment")[4] concur in this view.

[1] SIFMA AMG timely submitted comments on March 26, 2024 and, to the extent necessary in a notice of inquiry proceeding, timely moved to intervene with party status; see, Acc. No. 20240326-5072 ("SIFMA AMG Comments"). Capitalized terms used herein but not otherwise defined have the same meanings as in the SIFMA AMG Comments or in other comments that are cited.

[2] EEI Comments at 8 (emphasis added).

[3] EPSA Comments at 3.

[4] ACORE Comments at 1.

Critically, EEI believes that the Notice of Inquiry neither presents concrete evidence that would support changes to the Commission's existing policy nor explains how or why the current policy is inadequate.[5] EEI refutes the central assumption of the Notice of Inquiry: investment funds and vehicles that hold Blanket Authorization orders "do not dictate or restrict utility operations or drive the implementation of particular public policy goals. These investors do not hold utility board seats and are not engaged in the day-to-day operation or control of the assets in which they are invested" and the "Commission's current section 203(a)(2) blanket authorization order conditions continue to ensure that investors that hold securities acquired pursuant to blanket authorization approval do not have the ability to control the utilities whose voting securities they acquire."[6]

Given the capital investments required by the electric power sector, which is required to reliably serve growing demand, and withstand extreme weather, any action by the Commission that creates new regulatory friction for those investments or discourages capital investments would not be helpful for the economy, utilities charged with providing reliable service, and their customers. EEI notes that many of its member utilities and holding companies rely upon capital investment from institutional investors that have acquired such securities pursuant to Blanket Authorization orders. EEI informs the Commission that any revision of the Commission's longstanding policy that has the effect of constraining future transactions may stymie investment in the electric industry, which would be contrary to the Commission's own precedent and stated goals for ensuring a safe, affordable, and reliable electric grid in the U.S.[7]

EEI also agrees that Commission safeguards, and the strict requirements of the Securities and Exchange Commission concerning investments made not for the purposes of control, dispense with the control-related questions that the Notice of Inquiry raises.[8]

EEI concludes that "[g]iven the relative lack of influence that blanket authorization holder investors have on a utility's operations as a result of the Commission's current blanket authorization policy protections preventing such investors from exercising control over the utilities whose securities they own, the [Notice of Inquiry]'s focus on investment funds with blanket authorizations is misplaced."[9] SIFMA AMG joins in EEI's conclusion, for the reasons stated in EEI's comments and for the further reasons set forth in this reply letter.

<u>This Proceeding Establishes No Legal Basis For Any Policy Change</u>

FPA Section 203 is a harm-prevention statute that does not empower the Commission to do anything but review applications for consistency with applicable law, rather than conduct wider legal or policy exercises.[10] Despite the limited and clear purpose of Section 203, some comments urge the Commission to use this proceeding so as to limit the availability of, or the rights conferred to investors and utilities by, Blanket Authorizations.[11] Those comments

[5] EEI Comments at 4, noting that "it is not clear from the [Notice of Inquiry] that the growth in index funds the Commission highlights is concentrated in investments in public utilities."

[6] EEI Comments at 4-5.

[7] EEI Comments at 2.

[8] EEI Comments at 7-8.

[9] EEI Comments at 6.

[10] See, EPSA Comments at 7.

[11] Manhattan Institute Comments at 2-4.

effectively ask the Commission to recast its enabling legislation. The Notice of Inquiry enunciates no reason whatsoever to do so.

FPA Sections 203(a)(4) and 203(a)(5) *require* that the Commission approve applications under FPA Section 203 when there is no harm to the public interest, and that the Commission expeditiously consider such applications, and identify classes of transactions that will normally satisfy the Commission's standards for rapid approval. These requirements are not hypothetical. They are not empty words that the Commission is free to disregard. They direct that "the Commission *shall approve*" transactions that do not harm the public interest, and that the Commission "*shall, by rule, adopt procedures for the expeditious consideration* of applications for the approval of dispositions, consolidations, or acquisitions, under this section."[12]

Every Blanket Authorization application includes comprehensive disclosures and conduct-commitments, and every Commission order conferring or renewing any Blanket Authorization likewise recites limitations and ongoing conditions. Transactions under Blanket Authorizations have repeatedly been found, as a class, not to harm the public interest. An eligible, compliant, Blanket Authorization applicant is no less entitled to receive a favorable Commission order, on an expeditious basis, than any other acquirer. The comments of Manhattan Institute encourage the Commission to fundamentally redefine the terms of the Commission's enabling legislation. The Commission cannot lawfully do so.

Consistent with the clear obligations imposed by statute, multiple comments[13] inform the Commission that there is no legal reason for any change in Blanket Authorization policies. These comments reflect an understanding that investment vehicles that hold the voting securities of Commission-regulated public utilities and holding companies are subject to both Commission regulation and to regulation by the Securities and Exchange Commission under the Investment Company Act of 1940 (1940 Act); Commission Blanket Authorization orders require that an asset manager holding the Blanket Authorization be and remain eligible to acquire securities subject to Schedule 13G reporting, which prohibits the asset manager of the investment vehicle from acquiring securities for purposes of control.[14] Both 1940 Act and Securities Exchange Act of 1934 (1934 Act) reporting requirements are triggered at either the five or ten percent level, often resulting in the submission to the Commission by various different holders of Blanket Authorizations of multiple Schedule 13G filings per week in their respective Blanket Authorization dockets. Each such Schedule 13G includes a requirement that the investor that submits the Schedule 13G certify that the applicable securities:

> were acquired and are held in the ordinary course of business and were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect.[15]

The Commission has relied on the dual regulation, by the Securities and Exchange Commission and by this Commission, of investor activities since the enactment of the current version of

[12] 16 U.S.C. §§ 824b(a)(4), (a)(5).

[13] See, e.g., Investment Company Institute Comments (passim); EPSA Comments at 7; EEI Comments (infra.).

[14] This Commission requirement is preclusive; Blanket Authorization orders do not authorize nor apply to investments made for control purposes.

[15] See, 17 CFR § 240.13d-102 Item 10.

FPA Section 203.[16] No comment submitted in this proceeding refutes the legal sufficiency and consistency of this regime.

Comments Seeking Changes Outside The Scope Of The Proceeding Lack Merit

Some commenters have asked that the Commission make avulsive changes to fundamental legal definitions on which the Commission, investors, the electric power and utility industries, and the public widely rely. These changes include reductions in allowable investment percentages, from ten percent down to five percent,[17] under Commission regulations that are not even referenced in the Notice of Inquiry, and that exhibit little if any relationship to Commission Blanket Authorization orders. These comments would have the Commission disregard 2019 amendments to FPA Section 203,[18] and implement changes to its regulations in direct contravention of statute.

And these changes would also make the Commission's Section 203 regulations substantially inconsistent with dozens – perhaps one hundred or more – regulations under the FPA that employ a ten percent standard for affiliation. On its face, the text of Section 203 does not adopt a five percent standard for affiliation.[19] The Commission's Section 203 regulations in not one case adopt a five percent standard applicable to the acquisition or ownership of a voting security; those same regulations repeatedly reference a ten percent standard.[20] The Commission's electric power sales and rate regulations, which apply to all public utilities whose securities may be acquires under Blanket Authorization orders, reference a ten percent standard with respect to essentially all "affiliate" matters – ranging from cross-subsidization restrictions[21] to market-based rate affiliation[22], excepting only certain affiliate transactions between a franchised or transmitting public utility and a five percent-affiliated exempt wholesale generator[23] - the latter, completely unrelated to Blanket Authorization policies and practices.

Comments seeking a reduced percentage threshold for investments invite the Commission to create disuniformity and invite confusion about exactly what percentage does or does not create affiliation; those comments present the Commission with no simple, transparent method for reconciling the inconsistency that they seek. They should be rejected.

[16] See, Transactions Subject to FPA Section 203, Order No. 669, 113 FERC ¶ 61, 006 (2005) at fn. 107.

[17] State Entities Comments at 2-3.

[18] See, "An Act to amend section 203 of the Federal Power Act" (Act), Public Law 115–247, 132 Stat. 3152 (2019); Mergers or Consolidations by a Public Utility, Order No. 855, 84 F.R. 6075 (2019).

[19] In fact, Congress appears to have intentionally excluded the five percent "affiliate" definition from applicability to Section 203; other defined terms are adopted from PUHCA, but not the five percent "affiliate" definition. See, 16 U.S.C. §§ 824b(a)(6).

[20] See, e.g., 18 C.F.R. §§ 33.1(c)(2), (9), (10), (11), and (12).

[21] 18 C.F.R. § 35.43(a)(1).

[22] 18 C.F.R. § 35.36(a)(9).

[23] 18 C.F.R. § 35.43(a)(1)(ii).

Comments Asserting Affiliation Via Association Membership Are Misguided

The States[24] seek both increased enforcement by FERC of passivity requirements that attach to transactions under Blanket Authorization orders, and the States and Consumers Research[25] also ask the Commission to find that membership in a trade, business, or advocacy organization amounts to "coordination" that should itself be subject to Commission regulation in the context of Blanket Authorization orders, with the association in which investors participate becoming treated as "holding companies"[26] that should be subject to Commission regulation. The States believe that investors holding Blanket Authorization orders should be required to report to the Commission on all shareholder votes that they cast that do not mirror the recommendations of a utility's or holding company's management, and on "all engagements with utilities."[27]

As to the former request, given that the States and Consumers Research have not identified a single instance of an investor that holds a Blanket Authorization violating any express requirement or prohibition set forth in the applicable Commission order, it is entirely uncertain precisely what enhanced enforcement of existing requirements the States seek. Blanket Authorization holders are required to apply, to disclose their energy affiliates and energy subsidiaries, to identify their funds and vehicles that invest subject to Blanket Authorizations, to file key Securities and Exchange Commission reports contemporaneously with the Commission, to submit quarterly reports, to notify the Commission of changes in their status, and to triennially renew their authorizations. It is not difficult to determine that the opportunities for non-compliance are sparse, such that the Commission has never undertaken a revocation for noncompliance reasons of any Blanket Authorization.

The States' and Consumers Research's further request concerning investor participation in associations and in undefined investor "engagement" with utilities are unprecedented. The Commission's adoption of them would be both unprecedented and disruptive. If an "association" that "seeks to influence utilities' operations" is itself a "holding company," then the dozens of different utility-related associations would likewise themselves be holding companies; effectively all public utilities in the United States would be part of a single holding company system. All of these utility associations and their member utilities would be affiliates, for purposes of rates, transmission access, and Commission corporate regulation. FPA Section 203 would seldom apply to any transaction because most transactions would be internal reorganizations that would be undertaken with or among other utilities that fall within this unusually-broad single holding company. And the Commission would have no basis to come to any such conclusion absent formal proceedings that establish the rights and roles of every investor and every public utility that is within this expanded "holding company" definition. In that formal proceeding, for the States' arguments to prevail, the Commission would need to conclude that NOT holding a voting interest of 10 percent or greater generically is the same as holding a voting interest of 10 percent or greater – a conclusion that would require the Commission to completely disregard the text of the Federal Power Act and the Public Utility Holding Company Act.

[24] States Comments at 2, 6, 12 et seq.

[25] Consumers Research Comments at 18.

[26] States Comments at 12.

[27] States Comments at 2. The States have failed to note that investment companies registered under the 1940 Act already publicly disclose their voting records on SEC Form N-PX.

The States' unexplained demand for information concerning "engagement" sets forth no parameters whatsoever. Would an investor's request for disclosable financial information be a reportable "engagement?" Would an investor's inquiry concerning material litigation, disputes, or other exposures that affect share prices and/or income be a reportable "engagement?" Would an investor's request for procedural or administrative information be an "engagement?" The States have not explained the reasons for, nor defined the limits – if there are any limits – applicable to an unusually wide request for entirely new regulation.

At the same time, the States' acknowledge that:

> [Blanket Authorization] 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." The Commission … "placed limits on [Blanket Authorization] 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 [the utility's] generating facilities, or directly or indirectly specifies how and when power generated by the facilities will be sold." … [and] These types of commitments are critical to carrying out the FPA's competition and consumer-protection purposes.[28]

It appears that the States agree that, in light of the actual regulated activities that are in issue in this Notice of Inquiry, current Commission requirements are sufficient.

The States make no factual demonstration and offer no valid legal argument in support of any of the relief that they appear to seek – to the extent that their comments do anything except acknowledge, however grudgingly, the sufficiency of current policies and practices. The Commission should not afford the States any of their requested relief.

Comments Concerning Commission Market-Based Rate Regulations Warrant No Change in Policy

Both TAPS[29] and the State Ratepayer Advocates[30] raise general concerns with the Commission's market-based rate ("MBR") regulations[31] and related rulemakings and defined terms.

Those concerns are well outside the scope of this Notice of Inquiry. In addition, those comments disregard the special scrutiny to which investors relying on Blanket Authorizations are subject under the Commission's MBR regulations. An investor that holds a direct or indirect interest of ten percent or greater under a Blanket Authorization order has established, in obtaining that order, that it is a passive investor. Yet the investor must be treated by the applicable utility as an "ultimate upstream affiliate" and must be both treated as an affiliate and publicly disclosed as such – even though the investor is passive.[32] No other class of passive

[28] States Comments at 17 (internal citations omitted). Similarly, Consumers Research acknowledges that the investor commitments set forth in the Blanket Authorizations that they address are sufficient; Consumers Research Comments at 15.

[29] TAPS Comments, *passim*.

[30] State Ratepayer Advocates (also termed State Entities) Comments at 10, 19, 25.

[31] 18 C.F.R. Part 35 Subpart H.

[32] See, Data Collection for Analytics and Surveillance and Market-Based Rate Purposes, Order on Reh'g, Order No. 860-A, 170 FERC ¶ 61,129 (Feb. 20, 2020) at Paras. 9-11.

owner of securities is to be identified as an "ultimate upstream affiliate" for MBR purposes: investors holding Blanket Authorization orders are singled out for a higher level of continuing scrutiny. Neither TAPS nor the State Ratepayer Advocates acknowledge this heightened regulation nor explain the basis on which they seek to increase MBR requirements in this Section 203 Notice of Inquiry.

Comments Concerning The Financial Merits Of Investments Under Blanket Authorizations

A few of the Comments address economic policy issues that have little to do with the terms and conditions of conferring Blanket Authorizations on investors that comply with the Commission's current requirements. For example, Zycher raises wide-ranging questions having little directly to do with Blanket Authorization policies and practices, such as:

- whether a single-producer monopoly model is economically optimal,[33]
- whether state-established transmission investment policies for utilities and the roles of ISOs in transmission planning are aligned with Zycher's view of optimal market incentives,[34]
- the sufficiency of generator profit-maximization incentives to reasonably assure bulk power system reliability,[35] even though "the real reliability problem is likely to emerge in transmission and distribution."[36] and
- how and to what degree transmission pricing policy should be formulated so as to address reliability needs.[37]

The Zycher comments provide the Commission with no basis to modify any current Blanket Authorization policy or practice.

Similarly, Consumers Research discusses the fact that larger asset managers in fact manage large volumes of investor capital, and then leaps to the conclusion that large asset managers have the ability to control utility ratemaking decisions in secret, with no opportunity for public or ratepayer notice or comment.[38] This position expressed by Consumers Research seems plainly inconsistent with the assertions by the States and by Consumers Research itself that investor participation in various associations is open and can be readily demonstrated, and at bottom ignores the fact that essentially all Commission ratemaking and Section 203 proceedings are on the public record, and indeed Consumers Research cites to several Blanket Authorization and other Commission proceedings in its comments.

This Notice of Inquiry Proceeding Provides No Legal Basis For The Commission To Change Blanket Authorization Policies And Practices, and Should Be Terminated

The Notice of Inquiry sets forth a limited history of the Commission's Blanket Authorization practices and asks a number of questions, some of which appear to assume the insufficiency of

[33] Zycher Comments at 3.

[34] Zycher Comments at 7, 11.

[35] Zycher Comments at 8-10.

[36] Zycher Comments at 10.

[37] Zycher Comments at 12.

[38] Consumers Research Comments at 18.

current Commission requirements. The Notice of Inquiry makes no particular findings of fact. The Notice of Inquiry announces no new conclusions of law.

Investors, and the utilities and holding companies in which they invest, have relied on the Commission's policies in making significant economic decisions, for a period of many years. The Commission cannot modify its policies without a comprehensive proceeding in which the Commission must fairly and fully consider the nature and extent of widespread reliance on the policies that it might change.[39] As EEI has advised the Commission, if the Commission elects to consider the imposition of any change in policy or practice relating to Blanket Authorizations,

> …should the Commission continue in this inquiry, a complete and accurate record must be developed before the Commission takes any action**.** Any proposed changes to Commission policy should be subject to FERC's formal Notice of Proposed Rulemaking process and procedures and should not be implemented through the issuance of a policy statement that does not afford interested parties the opportunity for notice, comment, rehearing, and judicial review, as necessary.[40]

SIFMA AMG joins in this comment.

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

[40] EEI Comments at 3.