UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

NextEra Energy, Inc. American Electric Power Company, Inc. Evergy, Inc. Exelon Corporation Xcel Energy Services Inc.	Docket No. EL21-14-000

MOTION TO INTERVENE AND PROTEST OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

Pursuant to the Commission's November 5, 2020 Notice of Petition for Declaratory Order,[1] and Commission Rules of Practice and Procedure 211, 212, and 214, 18 C.F.R. §§ 385.211, 385.212, and 385.214, the Transmission Access Policy Study Group ("TAPS") moves to intervene in this proceeding and protests the October 30, 2020 Expedited Petition for Declaratory Order ("Petition") filed by NextEra Energy, Inc., American Electric Power Company, Inc., Evergy, Inc., Exelon Corporation, and Xcel Energy Services Inc. (collectively, "Petitioners").[2]

TAPS opposes Petitioners' request that the Commission issue a declaratory order (1) to provide that financial institutions that have received certain blanket authorizations under Federal Power Act ("FPA") section 203(a)(2) are exempt from the Commission's market-based rate requirements regarding "affiliates" or "ultimate upstream affiliates," and (2) to abolish the requirement that Sellers[3] identify their new passive owner(s) in the

---

[1] eLibrary No. 20201105-3020.

[2] eLibrary No. 20201030-5442.

[3] Under the Commission's market-based rate regulations, a "Seller" is "any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act." 18 C.F.R. § 35.36(a)(1).

narrative of their market-based rate filings and affirm that such ownership interests are passive. Petitioners seek declaratory relief that would (1) change the affiliate definition in 18 C.F.R. § 35.36(a)(9)(i), and (2) eliminate the affirmative disclosure obligation concerning new passive owner(s) in 18 C.F.R. § 35.37(a)(2), both of which were established in Order No. 860.[4] Such declaratory relief cannot be had because it is an impermissible collateral attack on Commission regulations and a final rule. The inappropriateness of doing so is amplified by the fact that the Petition is centrally premised on, and recycles, arguments that were raised in requests for rehearing and clarification of Order No. 860 and recently rejected in Order No. 860-A. Commission policy disfavors relitigation for reasons of economy and repose. Thus, the Petition should be denied on these procedural grounds alone.

In addition to these procedural defects, Petitioners' requests are substantively misguided and would undermine the integrity of the Commission's new reporting regime for market-based rates. As the Commission explained in Order No. 860-A, the newly established relational database depends on market-based rate filers correctly and consistently identifying their ultimate upstream affiliates and classifying passive ownership interests. The declaratory order sought by Petitioners would be a step in the wrong direction in terms of the Commission's efforts to establish clear and adequate reporting requirements.

---

[4] *Data Collection for Analytics and Surveillance and Mkt.-Based Rate Purposes*, Order No. 860, 168 FERC ¶ 61,039 (2019), *order on reh'g and clarification*, Order No. 860-A, 170 FERC ¶ 61,129 (2020).

I. MOTION TO INTERVENE

TAPS is an association of transmission-dependent utilities in more than thirty-five states.[5] Because TAPS members rely on transmission facilities owned and controlled by others, TAPS has a vital interest in the proper competitive functioning of wholesale power markets, including the prevention of the exercise of market power in wholesale capacity, energy, and ancillary markets. TAPS members have long been concerned about structural changes in the electric industry that could adversely affect competition, rates or regulation, or could expose consumers to harm from unmitigated market power. TAPS has commented on nearly all major electric industry Commission rulemakings, including those pertaining to market-based rates. Specifically, TAPS has actively participated in the rulemaking proceeding in Docket No. RM16-17 that led to Orders Nos. 860 and 860-A, which are the rulemakings challenged by the Petition in this proceeding.

TAPS has a clear and substantial interest in this proceeding that cannot be represented by any other party, and its participation would be in the public interest. TAPS should therefore be granted intervention. The names, addresses, and telephone numbers of the persons to whom communications concerning this matter should be addressed are as follows:[6]

---

[5] David Geschwind, Southern Minnesota Municipal Power Agency, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. Terry Huval is TAPS Executive Director.

[6] TAPS requests that the Commission waive Rule 203(b)(3) of its Rules of Practice and Procedure, 18 C.F.R. § 385.203(b)(3), to allow each of the individuals listed below to be placed on the official FERC service list in order to avoid delays in receipt of notices and responses to pleadings.

Terry Huval
Executive Director
TRANSMISSION ACCESS POLICY STUDY GROUP
P.O. Box 60551
Lafayette, LA 70596
Tel: (337) 278-0306
Email: thuval@tapsgroup.org

Cynthia S. Bogorad
Peter J. Hopkins
Jeffrey M. Bayne
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
Tel: (202) 879-4000
Email: cynthia.bogorad@spiegelmcd.com
peter.hopkins@spiegelmcd.com
jeffrey.bayne@spiegelmcd.com

PROTEST

Petitioners' requested declarations are impermissible collaterals attacks on the Commission's market-based rate regulations, as recently revised in Order Nos. 860 and 860-A. The affiliate definition in 18 C.F.R. § 35.36(a)(9)(i), and the affirmative disclosure obligation concerning new passive owner(s) established in 18 C.F.R. § 35.37(a)(2) can be altered only through the Administrative Procedure Act's notice and comment requirements.[7] The Supreme Court has held that section 2 of the Administrative Procedure Act "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[8] The Commission therefore cannot alter the applications of its current lawful regulations through so-called "clarifications" in response to the Petition in this proceeding, as "[a]gencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements."[9]

---

[7] *See* 5 U.S.C. § 553.

[8] *Perez v. Mortgage Bankers Ass'n.*, 575 U.S. 92, 101 (2015).

[9] *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019).

As the Commission has recognized, "[i]t is well-established that a challenge to an earlier, final Commission order is impermissible."[10] The proper venue for such challenges to a final rule is the proceeding in which that final rule was issued, not a collateral attack in a subsequent, separate proceeding.[11] The exact two changes to the Commission's reporting requirements requested by the Petitioners here were already raised in timely requests for rehearing and clarification of Order No. 860. The Commission expressly rejected those arguments in Order No. 860-A. Petitioners cannot, under the guise of a petition for declaratory order, relitigate issues that should have been, and in fact were, raised in Docket No. RM16-17 and decided with finality adverse to the relief Petitioners now seek.

Finally, even if the Petition were not procedurally infirm, there are strong policy reasons for not granting the relief sought. "Declaratory orders to terminate a controversy or remove uncertainty are discretionary," and the Commission should exercise its discretion to not grant the relief sought.[12] The Commission upheld its affiliation definition and rejected the arguments raised here on grounds that a clear affiliate definition was necessary for purposes of implementing the relational database. There is no good reason to change course at this late hour and before the Commission has gained

---

[10] *Ala. Elec. Light and Power*, 157 FERC ¶ 61,111, P 14 (2016) (citing *Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 298-99 (D.C. Cir. 2005)).

[11] *Fla. Gas Transmission Co., LLC*, 133 FERC ¶ 63,011, P 201 (2010) ("Infinite Energy is not challenging some application of this rule, but the rule itself. The venue to mount such a challenge was the proceeding in which the Commission issued [that rule]. Infinite Energy's attempt to challenge the rule in this proceeding amounts to an impermissible collateral attack on those earlier Orders."); *MidAmerican Energy Holdings Co.*, 113 FERC ¶ 61,298, P 57 (2005) ("[T]he current proceeding is not the proper venue . . . to challenge the validity of the Commission's regulations; its arguments are, in fact, a collateral attack on those regulations. We will not ignore our regulations because a party to a specific case argues that the regulations are invalid.").

[12] *New England Ratepayers Ass'n.*, 172 FERC ¶ 61,042, P 35 (2020) (footnote omitted).

any insight into the operation of the database. The same is true with respect to the narrative identification of new passive acquisitions, which the Commission also upheld as a necessary reporting requirement. The Commission cannot fulfill its obligation to ensure just and reasonable market-based rates if it lacks sufficient information to monitor for potential market power abuse.

II. PETITIONERS' REQUEST FOR AN EXCEPTION TO THE DEFINITIONS OF "AFFILIATE" AND "ULTIMATE UPSTREAM AFFILIATE" IN THE COMMISSION'S MARKET-BASED RATE REGULATIONS IS AN IMPERMISSIBLE COLLATERAL ATTACK.

Petitioners ask the Commission to find that financial institutions that have been granted blanket authority under FPA section 203(a)(2) to acquire up to 20 percent of the publicly traded voting securities of public utilities should not be treated as "affiliates" or "ultimate upstream affiliates" under the Commission's market-based rate regulations under FPA section 205.[13] The definition of "affiliate" in the Commission's market-based rate regulations includes "[a]ny person that directly or indirectly owns, controls, or holds with power to vote, *10 percent or more of the outstanding voting securities of the specified company*."[14] When the Commission revised its market-based rate regulations in Order No. 860, it incorporated this language in its new definition of "ultimate upstream affiliate,"[15] which is the lynchpin of the Commission's new relational database reporting

---

[13] *See, e.g.*, Petition at 1.

[14] 18 C.F.R. § 35.36(a)(9)(i) (emphasis added); *see also* Order No. 860, P 5 & n.10.

[15] 18 C.F.R. § 35.36(10) ("Ultimate upstream affiliate means the furthest upstream affiliate(s) in the ownership chain. The term "upstream affiliate" means *any entity described in §35.36(a)(9)(i)*.") (emphasis added).

regime.[16] These definitions do not contain any exceptions to exclude financial institutions that hold 10 percent or more of outstanding voting securities.

The Petitioners contend that by granting various financial institutions blanket authority under FPA section 203(a)(2) to acquire up to 20 percent of the publicly traded voting securities of public utilities, the Commission also ordered them excused from the 10 percent affiliation threshold of 18 C.F.R. § 35.36(a)(9)(i) under FPA section 205.[17] That is false. The Petitioners acknowledge that the Commission has already held that the relief they seek requires a change in Commission regulation:[18]

> [T]he Commission stated in Order No. 860-A that its regulations include no exemption for financial institutions that hold publicly traded securities, meaning that "to exempt these entities from this definition would require a change to the affiliate definition in [section] 35.36(a)(9)(i) because the determining criterion is voting securities."

The Petition fails to address, let alone explain, how the Commission can grant the relief sought outside of notice and comment rulemaking. The Commission cannot do so. Petitioners' request for a declaration changing the definition of affiliate and ultimate upstream affiliate in 18 C.F.R. § 35.36(a)(9)(i) and 35.36(10) must be denied.[19]

---

[16] *See* Order No. 860-A, P 86 (explaining that "for the relational database to work as intended, common ultimate upstream affiliates between Sellers must be correctly identified").

[17] Petition at 3-4. *See id.* at 23-25 (discussing the FPA section 203 blanket authorization orders).

[18] Petition at 3 (quoting Order No. 860-A, 170 FERC ¶ 61,129, P 10). *See also* Petition at 22 ("In Order No. 860-A, the Commission denied rehearing. The Commission stated that its market-based rate definition of 'affiliate' did not set forth any exception for ownership by financial institutions holding blanket section 203 authorizations.").

[19] *See Perez v. Mortgage Bankers Ass'n.*, 575 U.S. at 101; *Azar v. Allina Health Servs.*, 139 S. Ct. at 1812.

III. PETITIONERS' REQUEST TO ELIMINATE THE REQUIREMENT TO IDENTIFY PASSIVE OWNERS IN THE NARRATIVE OF MARKET-BASED RATE FILINGS IS AN IMPERMISSIBLE COLLATERAL ATTACK.

Petitioners also ask the Commission to issue a declaratory order stating "that securities a public utility deems passive *need not be set forth in the narrative* of the utility's change-in-status filings."[20] This declaration also conflicts with and would entail a change in Commission regulation and final rule. In Order No. 860, the Commission "adopt[ed] the proposal to require Sellers to make an affirmation . . . in their market-based rate narratives concerning their passive ownership interests," further clarifying "that Sellers should provide the identity of the new passive owner(s) in their narratives when making their passive affirmation."[21] That requirement is now codified at 18 C.F.R. § 35.37(a)(2).[22] Again, notwithstanding pages of argument claiming that the relief sought is consistent with Commission precedent, Petitioners cannot overcome the insurmountable obstacle that the relief sought is an impermissible collateral attack on Commission rule and regulation.

Thus, as in the case of Petitioners' first requested declaration, the Commission cannot grant Petitioners' second declaration. Because none of the relief sought in the Petition can be properly had, the Petition as a whole should be denied.

---

[20] Petition at 42 (emphasis added).

[21] Order No. 860, P 137, P 141 & n.209.

[22] "With respect to *any* investors or owners that a Seller represents to be passive, the Seller *must* affirm in its narrative that the ownership interests consist solely of passive rights that are necessary to protect the passive investors' or owners' investments and do not confer control." 18 C.F.R. 35.37(a)(2) (emphasis added).

IV. THE PETITION IMPROPERLY RELITIGATES ARGUMENTS RAISED AND REJECTED IN ORDER NO. 860-A.

The Commission disfavors needless relitigation. "Collateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged."[23] Indeed, this doctrine obtains even where a litigant was not a party to the first Commission preceding.[24] The core arguments presented in the Petition were recently raised, considered, and rejected in Order No. 860-A. Even if the Petition were otherwise proper (which it is not), the Commission should not reconsider these arguments in this proceeding.

With respect to its first request, the Petition (at 27) states directly that "[t]he question here is whether market-based rate sellers must disclose affiliate relationships in market-based rate filings under FPA section 205 when a financial institution acquires securities under a blanket authorization." The Commission rejected that exact argument when it was properly raised in requests for rehearing of Order No. 860. In seeking clarification of Order No. 860 with respect to the scope of ultimate upstream affiliates, NRG Energy, Inc. and Vistra Energy Corp. (together, "NRG/Vistra") "argue[d] that an investor should not be considered a Seller's ultimate upstream affiliate based solely on

---

[23] *Entergy Nuclear Operations, Inc.*, 112 FERC ¶ 61,117, P 12 (2005).

[24] *Pac. Gas & Elec. Co.*, 121 FERC ¶ 61,065, P 40 (2007) ("In *Alamito Co.*, the Commission expressly stated that its policy against relitigation of issues is not constrained by the limits of the doctrine of collateral estoppel.") (citing *Alamito Co.*, 41 FERC ¶ 61,312, at 61,829 (1987), *order denying reconsideration and granting request for clarification*, 43 FERC ¶ 61,274 (1988)). Here, Petitioner NextEra Energy, Inc. directly participated in Docket No. RM16-17, and the other Petitioners, who had notice and opportunity, chose not to do so. *See* Comments of NextEra Energy, Inc., Docket No. RM16-17-000 (Sept. 19, 2016), eLibrary No. 20160919-5181.

holdings of publicly traded securities."[25] Indeed, NRG/Vistra raised precisely the same argument as Petitioners have here, "that, at minimum, investors . . . that have obtained blanket FPA section 203 authorizations should not be considered ultimate upstream affiliates."[26] Like the Petitioners here, NRG/Vistra claimed that common ownership by these financial intuitions should be irrelevant to the Commission's analysis and monitoring of market power for purposes of ensuring just and reasonable market-based rates under FPA section 205.[27]

The Commission expressly considered and rejected these arguments in Order No. 860-A. It explained that "this determination is consistent with the affiliate definition in § 35.36(a)(9)," and that "[t]here is no exemption under [the definition of affiliate or ultimate upstream affiliate] for entities that hold publicly traded securities."[28] Thus, Sellers must report to the relational database all upstream owners that satisfy the regulatory definition of "affiliate" in 18 C.F.R. § 35.36(a)(9)(i).

With respect to its second request, the arguments Petitioners raise against the affirmative obligation to provide a narrative identification of new passive owner affiliations were likewise considered and rejected in Order No. 860-A. Certain participants in Docket No. RM16-17 argued that this requirement "is inconsistent with

---

[25] Order No. 860-A, P 5.

[26] *Id.* P 7.

[27] *Id.* P 6 ("As an example, NRG/Vistra states that the Vanguard Group, Inc. (Vanguard) has reported that it, together with certain related entities, owns more than 10 percent of the shares of NRG's common stock. NRG/Vistra maintains that, although these shares are voting securities, there is no reason to regard Vanguard as 'controlling' NRG or its Seller subsidiaries in any respect relevant to the Commission's analysis and monitoring of Sellers . . . .").

[28] *Id.* P 10.

Commission precedent,"[29] just as Petitioners have argued here.[30] The Commission, however, explained that "providing the names of such [passive] owners [in the narrative] *is consistent* with current practice."[31] In Order No 860-A, the Commission therefore affirmed that "*[c]onsistent with current Commission policy*, Sellers must continue to disclose new passive owners should the Seller acquire them unless those Sellers received case-specific determinations as to passivity and reporting obligations."[32]

The Commission has made clear: "[I]n the absence of new or changed circumstances requiring a different result . . . 'it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined.'"[33] That is the case here. Petitioners identify nothing new that was not already considered in Docket No. RM16-17 or which could have been. Indeed, Order No. 860-A was issued less than one year ago, and the relational database has yet to be implemented.

Petitioners' claims that compliance is infeasible are also contrary to recent statements in the record of Docket No. RM16-17 made by market-based rate filers.[34] For instance, the Electric Power Supply Association ("EPSA") filed comments addressing the

---

[29] Order No. 860-A, P 20.

[30] *See* Petition at 40-42.

[31] Order No. 860-A, P 32 (emphasis added) (citing Order No. 697-A, 123 FERC ¶ 61,055 at n.258).

[32] *Id.* P 32 (emphasis added).

[33] *Alamito Co.*, 41 FERC ¶ 61,312, at 61,829 (1987); (quoting *Central Kan. Power Co.*, 5 FERC ¶ 61,291, at 61,621 (1978)).

[34] Petition at 6-7 ("if the Commission denies the relief we seek, it will become impossible for public utilities to meet the existing deadlines in section 35.42(b) of the Commission's regulations for making change-in-status filings").

issue of compliance feasibility in Docket No. RM16-17.[35] EPSA supported an extension of time until May 6, 2021, for the implementation of Order No. 860 and the filing of initial baseline submissions, stating that it "share[d] the concern raised in EEI's motion that unexpected and extensive disruptions caused by the novel coronavirus (COVID-19) global pandemic can interfere with the resources needed for Order 860 compliance."[36] However, EPSA further observed that, other than issues raised by the pandemic, "[c]ompetitive power suppliers *stand ready to comply with the Commission's new platform and requirements based on the initial timeline* set out in Order 860."[37] If Petitioners disagreed with that assertion, or with the requirements of Order No. 860 in general, they should have raised those concerns in Docket No. RM16-17, and not by means of a collateral attack in this proceeding.

V. THE ADOPTION OF PETITIONERS' POSITION COULD UNDERMINE THE FUNCTION OF THE NEW RELATIONAL DATABASE.

In addition to the procedural flaws discussed above, the Petition seeks relief that could undermine the implementation of the relational database before it is operational. Because Sellers have yet to make their initial baseline submissions to the relational database,[38] and the proper functioning of the database and new reporting regime is not

---

[35] Comments of the Electric Power Supply Association in Support of Motion for Extension of Time, *Data Collection for Analytics And Surveillance and Market-Based Rate Purposes*, Docket No. RM16-17-000 (May 13, 2020), eLibrary No. 20200513-5208 ("EPSA Comments").

[36] *Id.* P 3.

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

[38] Notice of Extension of Time, Data Collection for Analytics and Surveillance and Market-Based Rate Purposes, Docket No. RM16-17-000 (May 20, 2020), eLibrary No. 20200520-3067 (extending the deadline for baseline submissions to August 2, 2021).

yet confirmed by any experience, the Commission should be particularly reluctant to reduce the reporting requirements that it just recently adopted.

With respect to the first issue raised in the Petition, the Commission should not undermine the clear regulatory definition of affiliate and ultimate upstream affiliate. The Commission explained in Order No. 860-A that "consistent and complete information on ultimate upstream affiliates will be crucial for database integrity and accuracy" and therefore "it is critical that ultimate upstream affiliates be consistently reported to the database."[39] Requiring Sellers to report their ultimate upstream affiliates based on that term's regulatory definition is the clearest way to ensure consistent reporting. Indeed, in response to TAPS' request for additional reporting requirements as safeguards during the initial implementation of the relational database, the Commission stated that "we believe [ultimate upstream affiliate] reporting errors will be minimal *as the Commission's definition for ultimate upstream affiliate is clear*."[40] The declaratory order sought by Petitioners, however, would undermine that clear definition.

Petitioners contend that the relational database will result in the identification of "mega-utilit[ies]" affiliated by means of upstream financial owners.[41] NRG/Vistra raised this same consideration on rehearing of Order 860.[42] But until the relational database is up and running, and the Commission and the public gain at least an initial experience with it, these prognostications are speculative. And if the new relational database does reveal market power in the form of highly concentrated markets dominated by mega-

---

[39] Order No. 860-A, P 11.

[40] *Id.* P 86 (emphasis added).

[41] Petition at 35.

[42] *See* Order No. 860-A, P 6.

utilities, it *is* serving its intended purpose. TAPS and others have cautioned that the Commission's delineation of passive ownership may not go far enough to protect against a host of anticompetitive conduct. In a declaration submitted in support of Joint Comments by APPA and NRECA in Docket No. RM11-14, Professor John Kwoka, Jr. explains that "[a]n extensive economic and policy literature on partial ownership arrangements emphasizes three distinct channels by which they may adversely affect the degree of competition between companies. These are control and influence, information revelation and exchange, and incentive alignment."[43] Professor Kwoka goes on to explain that the Commission's no-control and passive ownership provisions leave loopholes and substantial opportunities for abuse in all three areas.[44] The competition concerns associated with common horizontal shareholding in a market sector has only grown over time.[45]

---

[43] Joint Comments of American Public Power Association and National Rural Electric Cooperative Association, App., Declaration of Professor John Kwoka, Jr. at 4-5, Docket No. RM11-14-000 (May 23, 2011), eLibrary No. 20110523-5139.

[44] Kwoka Dec. at 23-25. TAPS filed comments in Docket No. RM11-14-000 supporting Professor Kwoka's declaration, noting that the competition concerns he identified regarding partial acquisitions are the very same problems that are also identified in the 2010 DOJ/FTC Horizontal Merger Guidelines. Joint Comments of the Transmission Access Policy Study Group and Transmission Dependent Utility Systems, *Analysis of Horizontal Market Power under the Federal Power Act*, Docket No. RM11-14-000 (May 23, 2011), eLibrary No. 20110523-5074. Although the Commission apparently found these considerations unpersuasive in the context of FPA section 203, these considerations are consonant with, and support the position the Commission adopted in Order No. 860-A for application in the section 205 context. In addition, "there are a number of areas in which the Commission's section 203 and market-based rate market power analyses differ." *Modifications to Commission Requirements for Review of Transactions under Section 203 of the Federal Power Act and Market-Based Rate Applications under Section 205 of the Federal Power Act*, Notice of Inquiry, 156 FERC ¶ 61,214 (2016). FERC has not acted on that Notice of Inquiry.

[45] According to "Vanguard's CEO and Chairman William McNabb: 'Some have mistakenly assumed that our predominantly passive management style suggests a passive attitude with respect to corporate governance . . . Nothing could be further from the truth.' Vanguard further explains, 'Because our funds own a significant portion of many companies (and in the case of index funds are practically permanent holders of companies), we have a vested interest in ensuring that these companies' governance ... practices support the creation of long-term value for investors.'" José Azar, Martin C. Schmalz, & Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, 73 J. Fin. 1513, 1533 (2018) (footnotes omitted). "Recent

In like regard, the identification of new passive owners in the narrative of market-based rate filings is also critical to the Commission's ability to monitor the potential for market power abuses and to the integrity of the relational database. The Commission explained in Order No. 860-A that "for the relational database to function correctly as intended, owners must be properly classified as passive."[46] If one Seller improperly concludes that an owner is passive, and does not report it as an ultimate upstream affiliate to the relational database, the relational database will fail to draw connections between related entities.

Requiring that Sellers at least identify passive owners in its narrative and affirm that the ownership interests are passive provides some degree of assurance that Sellers have, in fact, made an effort to "verif[y] that those ownership interests meet the requirements [for passivity] of *AES Creative*."[47] Otherwise, the Commission will have no way of knowing whether a particular Seller (1) determined that it has no passive owners, (2) verified that certain owners are passive and need not be reported to the relational database, or (3) failed to conduct any inquiry into whether it has passive owners. In addition, the Commission has previously been able to request that Sellers provide additional information about passive owners when it has determined more information is

---

research confirms that mutual fund families engage much like other investors do, albeit more often 'behind the scenes'. . . , and sometimes coordinate their activities in 'secret summits.' . . . . The largely 'passive' asset management firms such as BlackRock, Vanguard, and State Street thus play an important role in most corporate governance decisions of publicly traded firms in America, with their power having been compared to that of J.P. Morgan and John D. Rockefeller." Id. at 1533-34 (footnotes and citations omitted). *See also* Fiona M. Scott Morton and Herbert Hovenkamp Horizontal Shareholding and Antitrust Policy, 127 Yale L. J. (2018); Einer R. Elhauge, Horizontal Shareholding, 109 Harv. L. Rev. 1267 (2016), https://harvardlawreview.org/2016/03/horizontal-shareholding/.

[46] Order No. 860-A, P 35.

[47] *Id.* P 36 (citing *AES Creative Resources, L.P.*, 129 FERC ¶ 61,239 (2009)).

necessary before acting on a market-based rate filing.[48] But if the Seller never identifies its passive owners in the first place, the Commission will be unable to determine whether it has adequate information about the Seller's passive owners to provide market-based rate authority.

Moreover, there is little to no burden associated with this requirement. Petitioners concede that even under its proposed approach, public utilities would have an obligation to determine whether an investment is passive.[49] There is no basis for not sharing this determination with the Commission in the narrative of a market-based rate filing. This information is necessary for the Commission to meet its statutory obligation to ensure that market-based rates are just and reasonable and not unduly discriminatory.

CONCLUSION

For the reasons stated above, the Commission should grant TAPS intervention and deny the Petition.

---

[48] *See, e.g.*, Office of Energy Market Regulation, Letter advising EquiPower Resources Management, LLC that in order to process their application for market-based rate authority the Commission requires additional information under ER10-1089 at 1, *EquiPower Res. Mgmt., LLC*, Docket No. ER10-1089-000 (June 16, 2010), eLibrary No. 20100616-3031 (amended filing subsequently accepted in Letter Order, *EquiPower Res. Mgmt., LLC*, Docket Nos. ER10-1089-000, -002 (Aug. 27, 2010), eLibrary No. 20100827-3009).

[49] Petition at 40.

Respectfully submitted,

/s/ Cynthia S. Bogorad

Cynthia S. Bogorad
Peter J. Hopkins
Jeffrey M. Bayne

Attorneys for
Transmission Access Policy Study Group

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

November 30, 2020

CERTIFICATE OF SERVICE

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

Dated on this 30th day of November, 2020.

/s/ Jeffrey M. Bayne
Jeffrey M. Bayne

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000