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 FOR LEAVE TO ANSWER AND ANSWER OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure,[1] the Transmission Access Policy Study Group ("TAPS") moves for leave to answer and submits this answer to the December 15, 2020 Response to Protests filed by the Petitioners in this proceeding.[2] TAPS' answer will aid the Commission's understanding of certain issues raised in the protests submitted by TAPS and others and addressed in Petitioners' Response.[3]

At the outset, Petitioners' Response wrongly asserts (at 1) that "no one meaningfully disputes" that the relief sought in this proceeding would not give rise to substantive market power and competition concerns. In fact, many parties have shown that blanket authorization orders issued under Federal Power Act ("FPA") section 203,

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[1] 18 C.F.R. §§ 385.212 and .213.

[2] eLibrary No. 20201215-5184 ("Petitioners' Response").

[3] Although the Rules of Practice and Procedure prohibit answers to answers unless otherwise authorized by the Commission, 18 C.F.R. § 385.213(a)(2), the Commission may waive this prohibition for good cause, 18 C.F.R. § 385.101(e), and has found good cause exists where a reply would assist the Commission in its decision-making process. *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 152 FERC ¶ 61,216, P 58 (2015) (accepting answers to protests and answers to answers "because they have provided information that assisted us in our decision-making process"), *reh'g denied*, 155 FERC ¶ 61,134 (2016). To the extent TAPS does not respond to an argument in Petitioners' Response, that silence is not acquiescence.

16 U.S.C. § 824b, do not prevent anticompetitive conduct in the form of control and influence, information revelation and exchange, and incentive alignment.[4] Likewise, despite Petitioners' claim (at 4) that "no one meaningfully challenges our views on the second issue we presented," many parties highlighted problems with Petitioners' request to eliminate Sellers' obligation to affirm and identify passive owners in the narratives of their market-based rate filings.[5] According to the PJM Independent Market Monitor: "[g]ranting the petition would be harmful to competition."[6]

Petitioners' Response also wrongly asserts that blanket authorization orders issued under FPA section 203 exempt recipient financial institutions from the Commission's market-based rate regulations, which apply to all Sellers "unless otherwise ordered by the Commission."[7] As TAPS has shown,[8] and Petitioners concede,[9] Order No. 860-A rejected this exact argument, refusing to exempt financial institutions with

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[4] Motion to Intervene and Protest of the TAPS at 12-16 (Nov. 30, 2020), eLibrary No. 20201130-5151 ("TAPS Protest"); *see also* Motion to Intervene and Protest of American Public Power Association at 7-8 (Nov. 30, 2020), eLibrary No. 20201130-5251 ("APPA Protest"); Comments of the American Antitrust Institute at 2-7 (Nov. 30, 2020), eLibrary No. 20201130-5306; Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM at 2-5 (Dec. 15, 2020), eLibrary No. 20201216-5249 ("PJM Independent Market Monitor Answer").

[5] TAPS Protest at 8, 10-11, 15-16; APPA Protest at 8-9.

[6] PJM Independent Market Monitor Answer at 2.

[7] 18 C.F.R. § 35.36(b).

[8] TAPS Protest at 9-10.

[9] Petitioners' Response at 2. Petitioners seek (Petitioners' Response at 2-3 n.2) to distinguish their request from that of NRG/Vistra's request for rehearing of Order No. 860, because in addition to arguing that " investors . . . that have obtained blanket FPA section 203 authorizations should not be considered ultimate upstream affiliates" (Order No. 860-A, P 7) NRG/Vistra also sought similar relief for financial institutions filing Schedule 13D with the Securities and Exchange Commission. This contention is meritless because the Commission rejected NRG/Vistra's requested relief in whole. The Commission explained in Order No. 860-A (P 10) that its regulations require reporting based on the definition of "affiliate" and "ultimate upstream affiliate," which contain "no exemption . . . for entities that hold publicly traded securities . . . the determining criterion is voting securities."

FPA section 203 blanket authorizations from market-based rate reporting requirements of the new relational database.[10] Those arguments cannot be relitigated here.

Even if the Commission were to entertain Petitioners' "otherwise ordered" argument, it is without merit. On their face, the section 203 blanket-authorization orders at issue here *do not* exempt the recipient from the Commission's market-based rate reporting requirements. Instead, blanket-authorization orders routinely state that transactions authorized under FPA section 203 *are* subject to the Commission's market-based rate reporting requirements.[11] Indeed, the blanket-authorization order for Vanguard—which Petitioners cite as an example of the type of order that should be treated as ordering waiver of market-based reporting requirements[12]—expressly states that "[t]o the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they *must comply with the [reporting] requirements of Order No. 652*."[13]

Nor can Petitioners rely upon 18 C.F.R. § 35.36(b)'s "otherwise ordered" proviso as an exception that swallows the rule.[14] In establishing the relational database reporting

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[10] *Data Collection for Analytics and Surveillance and Mkt.-Based Rate Purposes*, Order No. 860-A, 170 FERC ¶ 61,129, P 9 (2020) ("We deny [the] request that the Commission clarify that an investor will not be considered a Seller's ultimate upstream affiliate based solely on holdings of publicly traded securities.").

[11] *See, e.g.*, *GenOn Cal. South, LP*, 172 FERC ¶ 61,265, P 36 (2020) (ruling that "sellers that have market-based rates are advised that they must comply with the" Commission's market-based rate reporting requirements for changes in status); *PSEG Fossil LLC and Yards Creek Energy, LLC*, 172 FERC ¶ 61,195, P 65 (2020) (same); *El Paso Elec. Co. and Sun Jupiter Holdings, LLC*, 172 FERC ¶61,083, P 23 n.21 (2020) (same); *Longview Power, LLC*, 172 FERC ¶61,071, P 37 (2020) (same); *Portland Gen. Elec. Co. and Wheatridge Wind Energy, LLC*, 172 FERC ¶62,185 at 64,376 (2020) (same).

[12] NextEra Energy, Inc., American Electric Power Company, Inc., Evergy, Inc., Exelon Corporation, and Xcel Energy Services Inc., Expedited Petition for Declaratory Order at 28-29 (Oct. 30, 2020), eLibrary No. 20201030-5442 ("Petition") (citing *The Vanguard Grp., Inc.*, 168 FERC ¶ 62,081 (2019)).

[13] *The Vanguard Grp., Inc.*, 168 FERC ¶ 62,081, at 64,221 (2019) (emphasis added).

[14] *See* Petitioners' Response at 1.

requirements in Order Nos. 860 and 860-A, the Commission rejected the exception that Petitioners urge here. What was established by rulemaking can only be altered by rulemaking.[15] Petitioners are not asking the Commission to interpret its new regulation or issue a case-specific waiver; they are seeking the creation of a new, generic exception to the regulation. Petitioners cannot end-run Administrative Procedure Act ("APA") notice and comment rulemaking requirements by trying to improperly shoehorn a generic change to a regulation into the "unless otherwise ordered" exception.[16]

Finally, the Petitioners' Response undermines their allegation of a "parade of horribles"[17] associated with compliance with the Commission's regulations. Petitioners concede that it "would not be too difficult" to report financial institutions that own 10 percent or more of a given entity.[18] But they do not want to report these entities as ultimate upstream affiliates.[19] Petitioners' apparent concern is not reporting burden, but that the new relational database will reveal affiliations they would prefer remain hidden.[20]

CONCLUSION

For the reasons stated above and in TAPS' Protest, the Commission should deny the Petition.

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

[16] The relief Petitioners seek here is a "statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," which squarely falls within the APA definition of "rule." 5 U.S.C. § 551(4); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

[17] Petition at 9-10; Petitioners' Response at 2 (reiterating that claim).

[18] Petitioners' Response at 4.

[19] *Id.* at 3-4.

[20] *See* TAPS Protest at 14-15 n.45.

Respectfully submitted,

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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 December, 2020.

/s/ Jeffrey M. Bayne
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