

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Federal Power Act Section 203 Blanket
Authorizations for Investment Companies

Docket No. AD24-6-000

**REPLY COMMENT OF THE U.S. DEPARTMENT OF JUSTICE ANTITRUST
DIVISION AND THE FEDERAL TRADE COMMISSION**
April 25, 2024

I. Introduction

On December 19, 2023, the Federal Energy Regulatory Commission (“FERC” or “the Commission”) issued a Notice of Inquiry (“NOI”) requesting public comments on FERC’s current policy regarding blanket authorizations for investment company ownership of public utilities under Section 203 of the Federal Power Act (“FPA”).¹ The NOI also seeks input on what constitutes “control” of a public utility in evaluating holding companies’ requests for blanket authorization under Section 203 and what factors FERC should consider when evaluating control over public utilities. FERC’s NOI comes against a backdrop of “consolidation in the public utility industry, as well as the growth of large index funds and asset managers.”²

The United States Department of Justice Antitrust Division (“Antitrust Division”) and the Federal Trade Commission (“FTC”) (collectively, “the Agencies”) appreciate FERC’s inclusion of questions in its NOI regarding the impact on competition of its current policies or of changes

¹ Federal Power Act Section 203 Blanket Authorizations for Investment Companies, 88 Fed. Reg. 89346 (Dec. 27, 2023) (hereinafter “NOI”).

² *Id.* at P 8.

to those policies.³ As the Supreme Court has explained, competition is a key part of FERC’s public interest assessment under Section 203(a)(4) of the Federal Power Act.⁴ In addition, consideration of competition is consistent with the Administration’s “whole-of-government” approach to competition policy embodied in the 2021 Executive Order on Promoting Competition in the American Economy.⁵ That Executive Order urges federal agencies to adopt regulations that promote the “[r]obust competition [that] is critical to preserving America’s role as the world’s leading economy,” and expressly recognizes that FERC administers authorities that can protect conditions of fair competition.⁶

As FERC assesses the use of blanket authorizations, the Agencies urge FERC to consider that acquisitions involving less than a controlling interest in competing firms can lessen competition. As other commenters have suggested, common ownership may result in competitive harm in certain industries, including public utility markets.⁷ In this comment, the Agencies describe how we analyze common ownership and welcome FERC’s consideration of how these theories apply to investments in public utilities. The Agencies recognize that the possibility of harm to competition is only one of the factors that FERC will consider in determining whether

³ Question four asks whether current policy “create[s] concerns regarding an adverse effect on competition or jurisdictional rates.” *Id.* at P 10. Question eleven asks about “the impacts on the public interest, both positive and negative, of holding companies, including investment companies, holding voting securities in multiple public utilities and Commission-regulated entities.” *Id.* at P 11.

⁴ *See infra* note 41.

⁵ Exec. Order No. 14,036, § 1, 86 Fed. Reg. 36987 (July 9, 2021).

⁶ *Id.*

⁷ The Agencies have reviewed the initial comments submitted in response to the NOI, with particular attention to those that focused on competition. These comments discuss the potential for a partial ownership interest to enable an investor to exercise influence or control over an issuer and, to a lesser extent, the potential for common ownership to lead to anticompetitive effects by altering competing firms’ incentives even in the absence of control. Not surprisingly, various commenters reach opposite conclusions regarding whether common ownership in the context of FERC’s blanket authorizations to institutional investors raises competition concerns.

and how to revise its blanket authorization policy, and thus we do not take a position at this time on what, if any, specific revisions FERC should undertake.

II. Interest of the Agencies

As the agencies responsible for promoting and protecting competition, the FTC and the Antitrust Division welcome the opportunity to share their views. The federal antitrust laws prohibit certain business practices and transactions that may harm competition. Free and fair competition is a core organizing principle of the American economy, and the Agencies protect competition as a “safeguard for the Nation’s free market structures” that ensures “the preservation of economic freedom and our free-enterprise system.”⁸ This quintessentially American form of industrial organization rests on the premise that free and fair competition “yield[s] the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”⁹ It also gives workers the benefits of higher wages, better job quality, and increased mobility.¹⁰

Through decades of law enforcement experience, the Agencies have developed expertise on the competitive effects of partial acquisitions that involve less than controlling interests.¹¹

⁸ See, e.g., *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494 (2015) (referencing “the Nation’s commitment to a policy of robust competition”); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

⁹ *NCAA v. Board of Regents*, 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4-5 (1958)).

¹⁰ See *Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. ____ (2021).

¹¹ See, e.g., Analysis of Agreement Containing Consent Order to Aid Public Comment, QEP Partners/EQT Corporation, FTC Matter No. 221-0212 (Aug. 16, 2023); Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comments, TC Group, L.L.C., Riverstone Holdings L.L.C., Carlyle/Riverstone Global Energy and Power Fund II, L.P., and Carlyle/Riverstone Global Energy and Power Fund III, L.P., FTC Matter No. 061-0197 (last updated Jan. 29, 2007); Analysis of Proposed Consent Order to Aid Public Comment, Time Warner, Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corp., FTC Matter No. 961-0004 (last updated June 16, 2006); Competitive Impact Statement, *United States v. U.S. West, Inc. and Continental Cablevision, Inc.*, No. 96-2529, (D.D.C. Nov. 5, 1996).

Over several iterations of the Agencies' Merger Guidelines, including as updated in 2023, the Agencies have explained the ways in which partial acquisitions can harm competition, even in the absence of controlling stakes.¹²

The Agencies also promote competition through advocacy efforts, which urge federal, state, and local governmental bodies to adopt policies that support robust and fair competition.¹³ These advocacy efforts include written comments on proposed rulemakings and legislation, discussions with regulators, and amicus filings. Participation in FERC proceedings has been a key part of this program,¹⁴ including participation in FERC's examination of the proper competition and market power analyses of transactions subject to authorization under Section 203 of the FPA.¹⁵

III. Partial Acquisitions Can Affect Competition

Section 203(a)(2) of the FPA requires that a holding company¹⁶ receive FERC authorization before purchasing, acquiring, or taking any security worth more than \$10,000,000 in a "transmission utility," an "electric utility," or a "holding company in a holding company

¹² See *infra* note 26.

¹³ *Mission*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/mission> (last updated Mar. 21, 2024); *Mission*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/mission> (last visited Mar. 21, 2024).

¹⁴ See, e.g., Comment of the U.S. Dep't of Justice & Fed. Trade Comm'n, FERC Docket No. RM21-17-000 (2022). The Agencies have also developed considerable expertise in examining wholesale electricity markets, including through pursuing enforcement actions as well as evaluating the effects of government regulations on competition in wholesale electricity markets and transmission development. Competitive Impact Statement, *United States v. Morgan Stanley*, 881 F. Supp.2d 563 (S.D.N.Y. Sept. 30, 2011); Competitive Impact Statement, *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633 (S.D.N.Y. Feb. 23, 2011); Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advocacy Sec., Antitrust Div., U.S. Dep't of Justice, to Travis Clardy, State Rep., Tex. House of Rep. (Apr. 19, 2019), <https://www.justice.gov/atr/page/file/1155881/download>.

¹⁵ See, e.g., Comment of the U.S. Dep't of Justice, FERC Docket No. EC23-74-000 (Aug. 22, 2023); Comment of the U.S. Dep't of Justice & Fed. Trade Comm'n, FERC Docket No. RM16-21-000 (Nov. 28, 2016); Comment of the Fed. Trade Comm'n, FERC Docket No. RM09-16-000 (Mar. 29, 2010); Comment of the Fed. Trade Comm'n, FERC Docket No. PL09-3-000 (Apr. 29, 2009).

¹⁶ "Holding company" is defined "as 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," 42 U.S.C. § 16451, and so includes many large investment firms.

system.”¹⁷ FPA Section 203(a)(4) provides that FERC must approve the transactions specified by FPA Section 203(a)(2) if they are “consistent with the public interest.”¹⁸ To make that determination, FERC looks to a transaction’s effect on competition, rates, and regulation.¹⁹ With respect to the effect on competition, FERC’s rules establish filing requirements that, among other things, seek information to aid in the analysis of the potential competitive impacts of the transaction.²⁰ There are, however, certain circumstances where FERC will presume that transactions are consistent with the public interest and grant blanket authorizations, subject to certain conditions. Blanket authorizations exempt an acquirer from FPA Section 203’s requirements: a competitive analysis prescribed by FERC’s regulations as well as pre-approval for each individual investment in a jurisdictional facility.²¹

FERC’s regulations currently provide blanket authorization for a holding company’s acquisition or purchase of “any non-voting security (that does not convey sufficient veto rights over management actions so as to convey control) in a transmitting utility or electric utility company.”²² With respect to voting securities, FERC’s regulations provide blanket authorizations if an acquisition or transfer of such securities results in the acquirer’s holding less

¹⁷ 16 U.S.C. §§ 796(22), (23).

¹⁸ 16 U.S.C. § 824b(a)(4). The provision also requires FERC to find that the proposed transaction “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 FERC determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.” 16 U.S.C. § 824b(a)(4). FERC’s regulations establish verification and informational requirements for entities that seek a determination that a proposed transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets. 18 C.F.R. § 33.2(j) (2023).

¹⁹ 1996 Merger Policy Statement, Order No. 592, 61 Fed. Reg. 68606, FERC Stats. & Regs. ¶ 31,044 (1996) (*codified at* 18 C.F.R. § 2.26); *Revised Filing Requirements Under Part 33 of the Commission’s Regulations*, Order No. 642, 65 Fed. Reg. 70984 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh’g*, Order No. 642-A, 66 Fed. Reg. 16121 (Mar. 23, 2001), 94 F.E.R.C. ¶ 61,289 (2001) (*codified at* 18 C.F.R. Part 33).

²⁰ 18 C.F.R. §§ 33.3, 33.4.

²¹ Transactions Subject to FPA Section 203, Final Rule, 71 Fed. Reg. 1348, 1365, at PP 144, 145 (Jan. 6, 2006); Transactions Subject to FPA Section 203, Final Rule, Order on Rehearing, 71 Fed. Reg. 28422, 28434-35, at PP 95-103 (May 16, 2006).

²² 18 C.F.R. § 33.1(c)(2)(i).

than 10 percent of the issuer’s outstanding voting securities.²³ Further, FERC grants blanket authorizations, on a case-specific basis, that allow investment companies to acquire up to 20 percent of an issuer’s outstanding voting securities.²⁴ As with the blanket authorizations granted by regulation, the rationale underlying these individual blanket authorizations is that these investors lack the ability to control or influence the public utility in a manner that would harm the public interest.²⁵

FERC’s blanket authorizations may lead to investment companies holding less than controlling interests in competing firms. Without opining on the competitive effects of any specific holdings, the Agencies note that in some situations the acquisition of less-than-full control may still influence decision-making at the acquired firm or another firm in ways that may substantially lessen competition.

The Agencies’ Merger Guidelines recognize that harm to competition can result from partial acquisitions that involve cross-ownership or common ownership.²⁶ Cross-ownership “refers to holding a non-controlling interest in a competitor,” while common ownership “occurs when individual investors hold non-controlling interests in firms that have a competitive relationship that could be affected by those joint holdings.”²⁷ The 2023 Merger Guidelines

²³ 18 C.F.R §§ 33.1(c)(2)(ii), (12)(i).

²⁴ NOI at P 5.

²⁵ *Id.* The Agencies recognize that in *TransAlta*, FERC held that it considers the appointment of an “investor’s own officer or director, or other appointee accountable to the investor” to the board of directors to be a change of control that requires section 203 approval regardless of the size of the investor’s ownership stake. 181 FERC ¶ 61,055 at P 29.

²⁶ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, MERGER GUIDELINES at 28-29 (Dec. 18, 2023), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [hereinafter 2023 MERGER GUIDELINES]; U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 33-34 (Aug. 19, 2010), *available at* <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [hereinafter 2010 MERGER GUIDELINES].

²⁷ 2023 MERGER GUIDELINES, *supra* note 26, at 28.

describe three types of competition concerns that can arise from partial acquisitions, including common ownership, which is the focus of our discussion below.²⁸

First, a partial acquisition “can lessen competition by giving the partial owner the ability to influence the competitive conduct of the target firm.”²⁹ An investor’s ability to influence a target firm can manifest itself in “the right to appoint members to the board of directors, influence capital budgets, determine investment return thresholds, or select particular managers.”³⁰ Moreover, in some instances, an investor holding a nonvoting interest may retain the ability to “prevent, delay, or discourage important competitive initiatives, or otherwise impact competitive decision making.”³¹ In both scenarios, “[s]uch influence can lessen competition because the partial owner could use its influence to induce the target firm to compete less aggressively.”³²

Second, a partial acquisition “can reduce competition by softening firms’ incentives to compete, even absent any specific anticompetitive act or intent.”³³ These effects can arise even if the investors/owners do not play active roles in management of the owned firms, and even if the competing target firms do not engage in collusion.³⁴ The issue of potential anticompetitive effects from common ownership due to incentives alone—i.e., even without direct control or influence—recently has received increasing attention in legal and economic scholarship.³⁵

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018).

³⁵ See, e.g., Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1268-69 (2016) (reviewing the issue and earlier empirical work); Lysle Boller & Fiona Scott Morton, *Testing the Theory of Common Stock Ownership*

Third, a partial acquisition “can lessen competition by giving competing firms or their common owners access to non-public, competitively sensitive information about each other.”³⁶ Indeed, a transaction that “facilitates the flow of competitively sensitive information” increases the risk of coordinated effects by enhancing the ability of the commonly owned firms to coordinate conduct.³⁷ Moreover, it can enhance the ability of the competing firms to coordinate their behavior and make other accommodating responses faster and more targeted. Even if coordination does not occur, the partial owner may use that information to preempt or appropriate a rival’s competitive business strategies for its own benefit. For example, the Department of Justice’s complaint against ValueAct, an activist hedge fund with stakes in both Halliburton and Baker Hughes, alleged that ValueAct shared with Halliburton’s CEO the plans that Baker Hughes expected to pursue if its proposed merger with Halliburton did not close.³⁸ In

(Natl. Bur. of Econ. Rsch., Working Paper No. 27515, 2020) (a cross-industry study providing evidence that by reducing incentives to compete, horizontal common ownership increases firm profitability and share prices); Florian Ederer & Bruno Pellegrino, *A Tale of Two Networks: Common Ownership and Product Market Rivalry* (Natl. Bur. of Econ. Rsch., Working Paper No. 30004, 2023) (a theoretical model indicating increases in deadweight loss from common ownership); Azar et al., *supra* note 34 (providing empirical evidence that common ownership led to higher airfares on domestic flights, particularly on the most concentrated routes); Patrick Dennis, Kristopher Gerardi & Carola Schenone, *Common Ownership Does Not Have Anticompetitive Effects in the Airline Industry*, 77 J. FIN. 2765, 2766-2798 (2022) (a critique of the methodology used in Azar et al. (2018)); José Azar, Martin C. Schmalz & Isabel Tecu, *A Refutation of “Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry”* (Eur. Corp. Governance Inst., Finance Working Paper No. 837/2022, 2022) (refuting the claims of Dennis et al., (2022)); José Azar & Xavier Vives, *Revisiting the Anticompetitive Effects of Common Ownership* (Eur. Corp. Governance Inst., Finance Working Paper No. 827/2022, 2022) (observing that effects of common ownership specifically by large index funds may be procompetitive due to their economy-wide holdings); Miguel Antón, Florian Ederer, Mireia Giné & Martin C. Schmalz, *Innovation: The Bright Side of Common Ownership* (Natl. Bur. of Econ. Rsch., Working Paper No. 32192, 2024) (finding evidence of procompetitive benefits from common ownership); Hadiye Aslan, *Common Ownership and Creative Destruction: Evidence from US Consumers*, REV. FIN. (forthcoming) (last revised Mar. 10, 2024) (common ownership increases the rate of new product introductions); Andrew Kock, Marios Panayides & Shawn Thomas, *Common Ownership and Competition in Product Markets*, 139 J. FIN. ECON. 109 (2021) (finding no anticompetitive effects of common ownership across various industries); Katharina Lewellen & Michelle Lowry, *Does Common Ownership Really Increase Firm Coordination?*, 141 J. FIN. ECON. 322 (2021) (increased cross-ownership of financial institutions has no effect on firm profitability, investment, mergers, or strategic alliances).

³⁶ 2023 MERGER GUIDELINES, *supra* note 26, at 29.

³⁷ *Id.*

³⁸ Complaint ¶¶ 26-31, *United States v. VA Partners I, LLC*, No. 16-cv-01672, 2016 U.S. Dist. LEXIS 163605 (N.D. Cal. Nov. 1, 2016).

a conversation with Halliburton’s CEO, “ValueAct offered to use its position as a shareholder to pressure Baker Hughes’s management to change its business strategy in ways that could affect Baker Hughes’s competitive future.”³⁹ The parties abandoned the deal after a challenge by the Antitrust Division.⁴⁰

Competition is a core component of Section 203(a)(4)’s public interest standard. As discussed above, FERC’s evaluation of whether a transaction is “consistent with the public interest” involves evaluating the transaction’s effect on competition, rates, and regulation. This approach draws on Supreme Court precedent, which explained that “[t]he [Federal Power] Act did not render antitrust policy irrelevant to the Commission’s regulation of the electric power industry”⁴¹ and that FERC’s “power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations.”⁴² Underscoring the importance of FERC’s focus on the competitive implications of its decisions, the Court continued: “Consideration of antitrust and anticompetitive issues by [FERC], moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.”⁴³

³⁹ *Id.* ¶ 37.

⁴⁰ The FTC recently addressed information-sharing concerns in the cross-ownership context in the EQT/Quantum matter. There, the proposed acquisition would have made Quantum one of EQT’s largest shareholders and given Quantum – an active investor in natural gas production in the region – a seat on EQT’s board of directors, which the FTC alleged raised concerns that the two companies would have access to each other’s competitively-significant, non-public information and could participate in, or have influence over, competitive decision-making at each firm. The FTC’s order prohibited Quantum from occupying an EQT board seat to prevent anticompetitive information exchange. Press Release, Fed. Trade Comm’n, FTC Approves Final Order to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (Oct. 10, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-approves-final-order-prevent-interlocking-directorate-arrangement-anticompetitive-information>.

⁴¹ *Gulf States Utilities Co. v. Fed. Power Comm’n*, 411 U.S. 747, 759 (1973).

⁴² *Id.* at 758.

⁴³ *Id.* at 760.

The Agencies recognize that, as part of FERC's analysis, it will also consider the issues of administrability as well as the burdens that any changes to its policies are likely to create. The Agencies further acknowledge that there may be potential benefits to blanket authorizations that do not necessarily relate to competition. Nevertheless, the Agencies urge FERC, in undertaking its overall assessment, to consider the potential for common ownership across electricity markets to impact competition given the mechanisms of harm discussed above.

The Agencies commend FERC for undertaking this inquiry into its blanket authorization policies, and we appreciate the opportunity to provide our views in response to the NOI. Recognizing that FERC must ultimately balance any purported benefits of the blanket authorization policy against potential harms, the Agencies encourage FERC to closely examine the issues that we and others have raised about the competitive consequences of common ownership.