UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

BlackRock, Inc. its affiliated Investment Management Subsidiaries and Applicant Funds	)))	Docket No. EC16-77-002

STATES' MOTION FOR LEAVE TO REPLY AND CONSOLIDATED REPLY TO BLACKROCK, INC.'S ANSWER TO MOTION TO INTERVENE AND MOTION FOR RELIEF AND PUBLIC CITIZEN'S ANSWER IN OPPOSITION TO LATE INTERVENTION OF THE STATES AND ATTORNEYS GENERAL

Pursuant to Rule of Practice and Procedure ("Rule") 213(a)(2),[1] the States of Utah, Indiana, Alabama, Alaska, Arkansas, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Texas, and West Virginia, by and through their Attorneys General (collectively, the "Attorneys General" or the "States"), move for leave to file the reply contained herein to BlackRock Inc.'s Answer to Motion to Intervene and Motion for Relief, filed on May 25, 2023 (the "BlackRock Answer"), and Public Citizen's Answer In Opposition to Late Intervention of the States and Attorneys General, filed on May 12, 2023 (the "Public Citizen Answer").

I. Motion for Leave to Reply

Leave to file a reply should be granted in light of the importance of the issues raised in the States' Motion to Intervene and Motion for Relief Regarding BlackRock's Blanket Authorizations, filed May 10, 2023 (the "Motion"). The Commission grants leave to file a reply when it "provides information that assist[s] [it] in [the] decision-making process."[2] The below reply clearly meets

[1] 18 C.F.R. § 385.213(a)(2).
[2] *Old Dominion Elec. Coop. & Direct Energy Bus., LLC*, 171 FERC ¶ 61,149, 62,062–63 (2020); *see also Fla. Power & Light Co.*, 147 FERC ¶ 61,044, 61,147 (2014) ("We will accept FPL's

that standard. Most significantly, the reply shows that the Commission must take some action on the Motion, either through granting intervention and exercising the ongoing authority that it expressly retained in the 2022 BlackRock Order[3] or, alternatively, treating the Motion as a complaint. BlackRock and Public Citizen appear to agree with this, and simply advocate for treating the Motion as a complaint (with BlackRock only opposing that result in a footnote based on the incorrect application of collateral estoppel).

The reply also shows that BlackRock has not advanced any meaningful merits arguments on whether it has complied with its prior representations to the Commission when obtaining blanket authorizations, and whether Climate Action 100+ (CA100+) or the Net Zero Asset Managers' Initiative ("NZAM"), including their members, are "holding companies" under Section 203 of the Federal Power Act ("FPA").

The reply thus assists the Commission in its decision-making process on both the procedural and substantive issues raised in the Motion and Answers. Leave should be granted.

II. Consolidated Reply to BlackRock and Public Citizen's Answers

A. The States Have Properly Sought Intervention and Relief Under Rules 212 and 214 Or, In the Alternative, Filed A Complaint Under Rule 206.

Both BlackRock and Public Citizen's Answers fail to address the full grounds on which the States have moved to intervene. At most, the Answers challenge whether the Commission should address the substance of the States' Motion through additional proceedings in this docket or as a stand-alone complaint. No party has provided arguments supporting the Commission taking *no* action on the substance of the States' Motion. It is also important to note that no party challenges

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Answer and the Replies because they have provided information that assisted us in our decision-making process."); *Rockies Express Pipeline LLC*, 134 FERC ¶ 61,248, 62,315 (2011) ("The Commission accepts … the replies submitted by BP and Ultra because they have provided information that assisted our decision-making process.").

[3] *See BlackRock, Inc.*, 179 FERC ¶ 61,049 (2022) ("2022 BlackRock Order").

the States' interests in intervening or that those interests are not adequately represented by an existing party. *See* Motion at 42-48, 53-54.

The States' motion to intervene is timely because intervention here is not to oppose the grant of blanket authorization to BlackRock but rather 1) to ask the Commission to determine if there are separate holding companies (CA100+ and NZAM, as well as their members) that have not been disclosed or received authorization from the Commission under FPA Section 203, and 2) to ask the Commission to audit and exercise its ongoing jurisdiction under the 2022 BlackRock Order related to BlackRock's representations that it would be passive.[4] Importantly, the Sates are not asking the Commission to revoke authorization for BlackRock to operate as a passive investor as it represented to the Commission it would. Intervention is therefore not governed by the prior deadline for intervention set by the Commission.[5] And logically, if the Commission is going to retain ongoing jurisdiction for the entirety of the authorization (as it did in the 2022 BlackRock Order), it is appropriate for interested persons like the States to seek to invoke that jurisdiction.[6]

BlackRock opposes the States intervention under Rule 214 solely on the assumption that it is untimely.[7] But BlackRock's cases do not address a motion analogous to the States' Motion in the instant matter, which seeks an exercise of supplemental jurisdiction under 16 U.S.C. § 824b(b) and § 825h pursuant to authority retained in an order. As noted, the States are not challenging the underlying blanket authorization, and the Commission expressly reserved its ongoing authority in the 2022 BlackRock order—BlackRock's timelines arguments simply ignore these critical facts.

[4] Motion at 48.
[5] *Id.* at 48-49.
[6] *Id.*
[7] *See* ("BlackRock Answer") at 2– 3.

BlackRock also argues that permitting intervention would be burdensome because it would require reopening the proceeding and taking new evidence.[8] The States agree that the Commission needs to take evidence of stock ownership, coordination, and engagement with utility companies. But the issues presented are limited to whether BlackRock is complying with the representations it made in obtaining authorization and whether there are other holding companies that are triggering Section 203 of the FPA but have not received approval. BlackRock does not explain how addressing those issues would be any more burdensome than any other exercise of the Commission's ongoing jurisdiction (which was expressly reserved in the 2022 BlackRock Order) or more burdensome than adjudicating those same issues a stand-alone complaint. Because the Commission must confront these issues in one form or another, BlackRock's burdensomeness argument is unpersuasive.

Finally, BlackRock briefly argues that treating the Motion as a complaint would permit a collateral attack on the Commission's prior orders.[9] This is plainly wrong because the basis of the Motion is that BlackRock is not following the commitments it made in seeking blanket authorization (embodied in the blanket authorization), and BlackRock is part of larger, undisclosed holding companies that have never received Commission consideration or approval. Those issues were clearly not addressed or decided by the Commission in granting authorization. It would be nonsensical to say that a company such as BlackRock cannot be challenged on whether it is adhering to a Commission order because such a challenge is a collateral attack on the order. Such a rule would provide companies with a blank check to make whatever promises and commitments necessary to obtain authorization and then ignore and breach them down the road.

[8] *Id.* at 3
[9] *Id.* at 4 n.13.

In fact, the Commission has recognized that it may need to exercise its ongoing authority when conditions are not met by companies that have received certain approvals. For example, in *New PJM Companies*, the Commission "cited its authority under section 203(b) of the FPA."[10] "Under this authority, the Commission preliminarily found that, unless AEP was able to fulfill its commitment to join [a Regional Transmission Organization], it would be operating in a manner that could allow for the exercise of significant market power through its control of transmission, to the detriment of customers. The Commission ruled that AEP's commitment to join PJM needed to be accomplished quickly, and established the October 1, 2004 date for that integration to occur."[11] The Commission can similarly address BlackRock's commitments.

In addition, the Commission has rejected application of collateral estoppel in situations with far more overlap than the overlap between the instant Motion and the blanket authorization. For example, in *Cimarron Windpower II, LLC*, the Commission rejected the argument that collateral estoppel barred a complaint even though "the Commission considered many of the same factual issues in the Remand Order proceeding in Docket No. ER16-1341, and that some of the remedies that Cimarron seeks overlap with what SPP sought in that proceeding."[12] The Commission reasoned that the "[c]omplaint raises new questions not previously considered," such as "an argument not considered by the Commission in the Remand Order proceeding: that SPP violated the Tariff during the historical period."[13] The Commission also noted that "while Cimarron filed an out-of-time motion to intervene in Docket No. ER16-1341, it did so after the

[10] 107 FERC ¶ 61,271, 62,210 (2004) (citing *New PJM Companies, et al.*, 105 FERC ¶ 61,251 (2003)).
[11] *Id.*
[12] *Cimarron Windpower II, LLC*, 181 FERC ¶ 61,136 (2022), *petition for review pending Cimarron Windpower II*, LLC v. FERC, No. 23-1525 (8th Cir., filed 3/17/2023).
[13] *Id.*

issuance of the Remand Rehearing Order. It also did not file arguments in that proceeding, nor was it granted party status."[14] The Commission's reasoning in *Cimarron* shows that there is no collateral-attack bar on treating the States' Motion as a complaint. Unsurprisingly, BlackRock's cited authority does not support its extreme position.[15]

Public Citizen's Answer is brief and is limited to arguing (at 1-2) that the States' Motion does not satisfy the requirement for late intervention. Public Citizen suggests that the States' Motion proceed as a complaint, which is consistent with the alternative relief requested in the Motion. The States do not disagree that they have properly filed a document that can be deemed a complaint under Rule 206. However, Public Citizen is incorrect that the States' Motion is procedurally defective under Rules 212 and 214. Public Citizen never addresses the fact that the States are seeking the Commission to exercise its ongoing and supplemental authority and require BlackRock to conform to the terms of the blanket authorization. Both as a matter of the notice initially provided by the Commission and the logic of seeking exercise of ongoing jurisdiction, there is nothing improper or untimely about the States' Motion under Rules 212 and 214.

In sum, the Commission should either grant intervention or, in the alternative, treat the Motion as a complaint under Rule 206.

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[14] *Id.*

[15] BlackRock's Answer (at n.13) cites *Californians for Renewable Energy Inc. v. Calpine Energy Services L.P. and the California Department of Water Resources*, 106 FERC ¶ 61,055, 61,185 at PP 11–12 (2004). The first issue in that case was whether CARE could file a motion for rehearing without first seeking to intervene. *Id.* at P 11. The States are not seeking to do that in this case. Second, CARE was seeking "a rejection of the Renegotiated Contracts ab initio." *Id.* at P 12. The States are not seeking a rejection of the blanket authorization granted to BlackRock. Instead, they are asking the Commission to exercise its ongoing authority to enforce the conditions in that authorization and also to determine whether there are separate holding companies that have not received authorization.

B. The Commission Must Consider the States' Claim that BlackRock Has Not Complied With Its Representations Regarding Influence That It Made When Obtaining Blanket Authorization.

The States' Motion demonstrated (at 5-6, 12-13, 60-62) that BlackRock has made specific representations to the Commission in seeking blanket authorization and reauthorizations since 2010, and the Commission has incorporated these as requirements in granting such requests.

The Commission's orders have never authorized BlackRock to engage in "any activity designed to … influence the day-to-day commercial conduct of [an FPA-covered utility's] business,"[16] or to "[s]eek to determine or influence whether generation, transmission, distribution or other physical assets of the Utility are made available or withheld from the marketplace; … or·[s]eek to participate in or influence any other operational decision of the Utility."[17] Because ownership by BlackRock over 5% requires either a 13G or a 13D filing with the SEC, these dual representations foreclose exercise of "influence" in either possible scenario. In fact, in 2022, the Commission specifically relied on the fact that BlackRock "provided assurances sufficient to demonstrate that they will not be able to influence control over U.S. Traded Utilities."[18]

BlackRock's representations to the Commission are clearly fundamental to the blanket authorizations the Commission has granted, and given the evidence presented in the Motion, the Commission must address whether BlackRock is in compliance with those representations. The Commission has stated clearly that it does not "delegate[] its responsibilities under FPA section 203 to" other agencies such as the SEC.[19] And the Commission has made clear that it "does not

[16] BlackRock, Inc., 131 FERC ¶ 61,063, 61307 at P 21 (2010) ("2010 BlackRock Order") (discussing BlackRock's representations of its actions when filing SEC Schedule 13G forms with the Commission).
[17] BlackRock, Inc., 155 FERC ¶ 62,051, at *2 (2016) ("2016 BlackRock Order") (discussing BlackRock's representations of its actions when filing SEC Schedule 13D forms with the Commission).
[18] 2022 BlackRock Order at P 19.
[19] *Mario J. Gabelli*, 175 FERC ¶ 61,004 at ¶31 (2021).

accept eligibility to file SEC forms, including Schedule 13G, as a definitive statement regarding control. ***Rather, the Commission relies on the terms and conditions committed to by a blanket authorization applicant to allow the Commission to conclude that the applicant does not have the right to manage or control the management, policies, and operations of a public utility, and therefore that the blanket authorization will be consistent with the public interest***. Furthermore, the Commission can and does review SEC filings that are submitted and can take action as appropriate."[20] In *Franklin Resources*, one of the key concessions by the applicant was that they would not "[s]eek[] to determine or influence whether generation, transmission, distribution, or other physical assets are made available or withheld from the marketplace."[21]

In *Entegra Power Group*, the Commission rejected the argument that a "21 percent" ownership was insufficient to influence control of a utility.[22] "The Commission has rejected the notion that mere minority ownership is insufficient to exert a degree of control sufficient to require authorization under section 203."[23] The Commission thus placed limits on the 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 Entegra's generating facilities, or directly or indirectly specifies how and when power generated by the facilities will be sold."[24]

BlackRock's representations in obtaining approval similarly center around the concept that BlackRock would not seek to influence or control the utilities in which it owns shares. But independently, and through its association with CA100+ and NZAM, BlackRock appears to be doing precisely the opposite—taking an activist position to force substantial changes in utility

[20] *Id.* at ¶ 32 (emphasis added).
[21] *Franklin Res., Inc.*, 126 FERC ¶ 61,250, 62,393 ¶18 (2009).
[22] *See Entegra Power Grp. LLC.*, 125 FERC ¶ 61,143, 61,718 ¶33 (2008).
[23] *Id.*
[24] *Id.* at 61,722 ¶40 (F).

operations based on the goal of achieving net zero greenhouse gas emissions by 2050. Forcing utility companies to change their operations is contrary to BlackRock's representations to the Commission that it would refrain from influencing operations.

For example, in BlackRock's answer to Public Citizen last year, it recognized that "[t]he Commission has based [its] determinations [that blanket authorizations for large asset managers such as BlackRock are consistent with the public interest], in part, on the conditions placed on Applicants and the other blanket authorization holders, which prevent such blanket authorization holders from exercising control over the utilities in which they acquire voting securities pursuant to the blanket authorization."[25] BlackRock expressly based its request as being "[c]onsistent with Commission precedent."[26] BlackRock further stated that it was seeking "an extension—without modification—of the blanket authorizations that the Commission has granted multiple times to Applicants and several other entities since at least 2010."[27] And it thus described Public Citizen's protest as "nothing more than a collateral attack on the Commission's prior orders granting such blanket authorizations."[28] BlackRock further represented "there have been no changes in material facts and circumstances that would alter the Commission's analysis since the Blanket Reauthorization Order [in 2019] and the Original Authorization Order [in 2010]."[29] It is necessary and appropriate for the Commission to determine whether BlackRock is in fact functioning in a way that does not influence utility operations—a consistent requirement of the authorization orders going back to 2010.

[25] BlackRock's Mtn. for Leave to Answer and Answer to Protest by Public Citizen, No. EC16-77-002 at 2 (filed 3/18/2022).
[26] *Id.*
[27] *Id.*
[28] *Id.* at 2.
[29] *Id.* at 2–3.

BlackRock's Answer to the States' Motion ignores its previous representations to the Commission, focusing on whether it is "exercis[ing] control" rather than its prior statements of "influenc[ing] control."[30] The only times that BlackRock mentions "influencing" are in discussing the SEC requirements for Section 13G and in a footnote describing the 2022 BlackRock Order.[31] But BlackRock's prior representation to the Commission regarding the circumstances when it would file a 13G was more limited, and is the operative statement for purposes of the Commission's analysis because "the Commission relies on the terms and conditions committed to by a blanket authorization applicant."[32] BlackRock said that if it filed a 13G, that would mean it was not engaging in "any activity designed to … influence the day-to-day commercial conduct of [an FPA-covered utility's] business,"[33] BlackRock also said in 2022 that it was seeking "an extension—without modification—of the blanket authorizations that the Commission has granted multiple times to Applicants and several other entities since at least 2010."[34] BlackRock cannot backtrack on those commitments to the Commission under *Mario J. Gabelli*.

BlackRock also surprisingly asserts in its Answer that it "does not coordinate its … engagements … for U.S. Traded Utilities with other asset managers, asset owners or external groups or organizations."[35] This statement is belied by BlackRock's own reports and voting patterns. BlackRock Investment Stewardship's 2020 report titled *Our approach to sustainability*, states, "[w]e have engaged companies on grounds similar to the strategy of Climate Action 100+,

[30] *See* BlackRock Answer at 4.
[31] *Id.* at 4 & 6 n.20.
[32] *Mario J. Gabelli*, 175 FERC ¶ 61,004 at ¶32 (2021).
[33] 2010 BlackRock Order at P 21.(discussing BlackRock's representations of its actions when filing S.E.C. Schedule 13G forms with the Commission).
[34] BlackRock's Mtn. for Leave to Answer at 6 and Answer to Protest by Public Citizen, No. EC16-77-002 at 2 (filed 3/18/2022).
[35] BlackRock Answer at 5.

which we joined in January of this year."[36] It further states, "BlackRock joined Climate Action 100+ (CA 100+) in January of this year, a natural progression in our work to advance corporate reporting aligned with TCFD. ***CA 100+ is a group of investors that engages with companies to*** improve climate disclosure and ***align business strategy with the goals of the Paris Agreement***."[37] CA100+'s press release when BlackRock joined stated that BlackRock would "bring even more heft to investor engagement" and had committed to "accelerating engagements with the largest corporate greenhouse gas emitters on climate change," which would "send[] a powerful signal to companies to reduce emissions."[38]

In 2018 and 2019 BlackRock supported around only 10% of climate-related shareholder resolutions.[39] In the second half of 2020, after joining CA100+, BlackRock supported 54% of all environmental and social proposals.[40] BlackRock also "voted against the election of 255 directors as a result of climate-related concerns."[41] BlackRock's memorandum to Climate Action 100+ does not say that it will not coordinate engagements or votes; it only says it will "independently exercise

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[36] BLACKROCK, 2020 BLACKROCK SUSTAINABILITY REPORT 17, *available at* https://www.blackrock.com/corporate/literature/publication/our-commitment-to-sustainability-full-report.pdf.

[37] *Id.* at 19 (emphasis added).

[38] Climate Action 100+, BlackRock Joins Climate Action 100+ to Ensure Largest Corporate Emitters Act on Climate Crisis (Jan. 9, 2000), *available at* https://www.climateaction100.org/news/blackrock-joins-climate-action-100-to-ensure-largest-corporate-emitters-act-on-climate-crisis/.

[39] Motion at 49 & n.160 (citing Sinead Cruise et al., BlackRock vows tougher stance on climate after activist heat, Reuters (Jan. 14, 2020), *available at* https://www.reuters.com/article/us-blackrock-fink/blackrock-vows-tougher-stance-on-climate-after-activist-heat-idUSKBN1ZD12B).

[40] *Id.* at 49–50 & n.162 (citing Cruise et al., supra note 32, and BlackRock, Net zero: a fiduciary approach ("Fink 2021 Client Letter") at p. 10, *available at* https://www.blackrock.com/corporate/investor-relations/2021-blackrock-client-letter).

[41] *Id.* at 50 & n.163 (citing 3 Cydney Posner, BlackRock Flexes its Muscles During 2020-21 Proxy Period, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 16, 2021), *available at* https://corpgov.law.harvard.edu/2021/08/16/blackrock-flexes-its-muscles-during-the-2020-21-proxy-period/).

its fiduciary duties to [its] clients in determining how [to] prioritize engagements and how [to] vote proxies."[42] This is a much narrower disclaimer than the disclaimer BlackRock made to the Commission regarding 13G and its statement it is making in its Answer.

Climate Action 100+'s 2020 Progress Report states, "Participants in Climate Action 100+ are required to join at least one engagement group and actively contribute to company engagement. Supporters of the initiative must be asset owners (asset managers can only join as participants) and are required to encourage their asset managers to join the initiative to engage on their behalf."[43] As an example of how engagement works, French oil company Total agreed in May 2020 to a net zero pledge. "The move followed similar net zero pledges in recent months from Shell, BP and Repsol and came after a months-long engagement process with institutional investors through global green investor group Climate Action 100+."[44] And, consistent with Climate Action 100+'s coordinated approach to engagement, BNP Paribas Asset Management was designated "engagement co-lead."[45] BlackRock's own 2020 report describes how it "intensified" its engagement with Total during the "same period" that other CA100+ members engaged with Total.[46] After reaching a resolution with Total, "BlackRock and many other members of CA 100+ declined to support a shareholder proposal seeking enhancements to the company's long-term targets, since the company, through its own actions (as reflected in the joint Total-CA 100+ statement), had already substantively met the request made in the proposal."[47]

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[42] BlackRock Answer at 5–6 & n.19

[43] Climate Action 100+, *2020 Progress Report* at p. 82, *available at* https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf.

[44] *See* Cecilia Keating, *"Totally insincere": Splits emerge over investor response to Total's net zero pledge*, GreenBiz (May 7, 2020), *available at* https://www.greenbiz.com/article/totally-insincere-splits-emerge-over-investor-response-totals-net-zero-pledge.

[45] *Id.*

[46] 2020 BlackRock Sustainability Report, *supra* note 31, at p. 20.

[47] *Id.*

BlackRock's coordination as part of NZAM is partially set forth in a formal "Initial Target Disclosure Report" dated May 2022, where BlackRock sets out its "policy on coal and other fossil fuel investments" for other asset managers that are part of NZAM.[48] This includes a policy on thermal coal, investment stewardship, and a heightened scrutiny framework for climate risk.

These activities by BlackRock are not limited to foreign oil companies. The Motion extensively laid out how BlackRock has taken actions to influence U.S. utilities, including FirstEnergy and Dominion, to change their business practices—transitioning to net zero 2050.[49] Contrary to BlackRock's argument in the Answer that it is merely carrying out its fiduciary obligations, these attempts at influencing control are much more specific and designed to make changes of the type that BlackRock had disclaimed to the Commission.[50] And in a closely related context, BlackRock's CEO has made clear that he is not shy about "asking companies" to "forc[e] behaviors."[51] This heavy-handed approach seems to be BlackRock's method of operation when it comes to its ESG agenda.

C. The Commission Must Investigate Whether CA100+ and NZAMI, Including Their Members, Are "Associations" or "Organized Groups" that Qualify as "Holding Companies."

BlackRock argues that whether CA100+ and/or NZAM are holding companies is outside the scope of the existing proceeding.[52] BlackRock Answer at 7-8. The States agree that BlackRock neither sought nor obtained Commission approval to engage in transactions covered by Section

[48] Net Zero Asset Managers Initiative, Initial Target Disclosure Report at p. 27 (May 2022), *available at* https://www.netzeroassetmanagers.org/media/2022/05/NZAM-Initial-Target-Disclosure-Report-May-2022-1.pdf.
[49] *See, e.g.*, Motion at 61–62; *see also id.* at 28–32.
[50] BlackRock Answer at 5.
[51] *See* Recording of NYT DealBook 2017 at 27:51 (discussing in the context of diversity), *available at* https://www.youtube.com/watch?v=-cCs9Kh2Q08.
[52] Public Citizen also appears to make this argument. *See* Public Citizen Answer at 2. The arguments herein respond to Public Citizen as well.

203(a)(2) of the FPA in connection with its and other asset managers' membership in the larger holding companies that include CA100+ and NZAM. However, BlackRock's failure to inform the Commission or request such approval is not a defense to the States' Motion. Rather, it compels the Commission to grant intervention and conduct proceedings under its ongoing authority to issue supplemental orders or, alternatively, to address the issue in the context of a complaint. *See* Part A, *supra*. This is because Commission approval is *required* under the plain language of Section 203(a)(2) if CA100+ or NZAM—including their members—qualify as holding companies.[53] It would be arbitrary and capricious to refuse to consider this important aspect of the problem as it relates to BlackRock's ongoing acquisition and holding of stock.[54]

In determining whether to grant approval, the Commission analyzes whether a "proposed transaction is 'consistent with the public interest' in light of its possible effects on competition, rates, and regulation."[55] The premises behind the Commission's blanket authorization for BlackRock to acquire stock in utilities beyond the limits in Section 203 is the combination of 1) the conclusion that ownership below 20% cannot generally influence control of utilities and 2) BlackRock's promises not to use its holdings to influence utility operations or control. *See* Part B. Given these premises, the Commission did not conduct any particularized economic analysis.[56] But neither of those premises can be relied on in the presence of larger holding companies whose

[53] If either association or organized group counts as a holding company, then their actions violate the prohibition that "***[n]o*** holding company" may take action absent Commission approval. 16 U.S.C. § 824b(a)(2) (emphasis added); *see generally United Food & Com. Workers Union, Loc. 1119, AFL-CIO v. United Markets, Inc.*, 784 F.2d 1413, 1415 (9th Cir. 1986) ("'No' means 'not any….'") (citing Webster's Third International Dictionary 1532 (16th ed. 1971)).
[54] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).
[55] Motion at 11 & n.21.
[56] *Cf.* 18 C.F.R. § 2.26(c)–(d) (envisioning consideration of data and potential for "substantial issues of relevant fact").

members collectively own greater than 20% in utilities and combine their ownership to exert greater control than any one member could exert individually.

In fact, CA100+ has stated that it "is now the largest ever investor engagement initiative on climate change."[57] CA100+ further stated with respect to utilities that "[i]nvestors are engaging with utilities to understand how investment decisions and transition plans align with the goals of the Paris Agreement, including investments to retire, maintain or expand fossil fuel infrastructure. ***They are also calling for ambitious emissions reduction targets.***"[58] CA100+ further stated that "[n]otable progress has occurred in the United States where six electric utilities have now committed to net-zero emissions by 2050…."[59] CA100+ has also stated "[b]oth coal and gas fired generation *must be phased out* to achieve global net-zero emissions by mid-century."[60]

NZAM similarly stated in its FAQ: "What is the reach of the Net Zero Asset Managers initiative? Our 273 signatories to date manage over USD 61.3 trillion of assets*. The transition to net zero will be the biggest transformation in economic history. The opportunities to allocate capital to this transition over the coming years cannot be underestimated. ***Our industry's ability to drive the transition to net zero is extremely powerful.*** Without our industry on board, the goals set out in the Paris Agreement will be difficult to meet."[61]

BlackRock does not dispute that it is a member of these organizations or that their express purpose is to influence utility operations, and the States' Motion showed that BlackRock both

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[57] Climate Action 100+, *2020 Progress Report* at 5, *available at* https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf
[58] *Id.* at 41 (emphasis added).
[59] *Id.*
[60] Climate Action 100+, *2020 Progress Report* at 44, *available at* https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf (emphasis added).
[61] *FAQ, NETZEROASSETMANAGERS* (2023), https://www.netzeroassetmanagers.org/faq/ (emphasis added).

engages and votes its shares in certain instances when a utility is not making sufficient "progress" on business practices related to climate change.[62]

The percentage of ownership collectively held by a larger holding company is thus directly relevant to whether BlackRock's ownership levels can influence utility operations or control. Because BlackRock is one of the members of larger holding companies that are engaging to influence utility operations through their collective holdings, BlackRock's acquisition of additional stock in utilities not only affects BlackRock's ability to impact competition and rates but also those larger holding companies' ability to impact competition and rates. This point is undisputed by CA100+, who expressly touts its impact resulting from its members' stock ownership. *See, e.g.*, Motion at 25-26 (collecting sources and statements).

Moreover, granting approval for BlackRock without even considering whether the overall ownership of shares by BlackRock and those with whom it is coordinating exceeds 20% would violate the Commission's established practice of limiting ownership by asset managers to the 20% level and aggregating ownership within an overall holding company absent strict controls.[63] It is not hard to conceive of situations where substantial ownership stakes in multiple utilities could result in utilities not competing as vigorously with each other in certain respects, particularly when the utilities are operating in the same wholesale markets. And Congress has mandated that the Commission carry out the duty of approving such transactions. Up to this point, the Commission

[62] *See, e.g.*, Motion at 16, 28.

[63] *See* Motion at p. 4 & n.10 (citing *Franklin Res., Inc.*, 126 FERC ¶ 61,250 at PP 39–40 (2009), *order on reh'g*, 127 FERC ¶ 61,224 (2009)); Motion at p. 59. As discussed above, in *Entegra Power Group*, the Commission rejected the argument that a "21 percent" ownership was insufficient to influence control of a utility and placed limits on the 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 Entegra's generating facilities, or *directly or indirectly* specifies how and when power generated by the facilities will be sold." *See Entegra Power Grp. LLC.*, 125 FERC ¶ 61,143, ¶61720 P 33,¶61722 P (F) (2008) (emphasis added).

has not done so. The Commission must therefore exercise its ongoing authority through granting intervention or considering a complaint. And if it decides to depart from its prior factual finding that requires a 20% limit on stock ownership by asset managers, it must provide a more detailed explanation for doing so.[64] The cases cited by BlackRock are inapposite because the existence of additional holding companies and coordination by BlackRock as part of those holding companies does directly bear on whether the transaction of BlackRock holding and acquiring additional utility stock will have an adverse effect on competition and rates.[65]

Second, BlackRock's argument on the merits of whether CA100+ and NZAM, including their members, are holding companies also fails. The States demonstrated that both qualify as "holding companies" under the FPA based on *either* of the definitions in 42 U.SC. § 16451(8)(A)(i)-(ii). Motion at 54-59. As to the first definition, contained in clause (i), the Motion demonstrated that the definition of "holding company," through the use of the defined term "company," expressly covers an unincorporated "association" or "organized group." Motion at 55-56 (citing 42 U.S.C. § 16541(4), (12)). The Motion cited Commission precedent that recognizes that an "organized group of persons" qualifies as a holding company in analogous circumstances.[66]

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

[65] *See* BlackRock Answer at 8 n.27. For example, in *Entergy Nuclear FitzPatrick, LLC Exelon Generation Co., LLC*, 157 FERC ¶ 61,183 (2016), the "ZEC Program" existed irrespective of the transaction, and Public Citizen did not identify any aspect of the transaction that changed "the potential effects of the ZEC Program on the NYISO market." BlackRock also cites *NRG Energy, Inc. GenOn Energy, Inc.*, 141 FERC ¶ 61,207, 62,023 (2012). The issue found outside of the scope in that case was an ongoing easement negotiation. Here, when BlackRock acquires more stock as part of the CA100+ or NZAM holding companies, those holding companies directly gain power to influence utility operations through the transaction. In other words, the transactions covered by the blanket authorizations *do* have an impact on rates and competition that is directly tied to the issues the Commission is supposed to consider when granting approval under Section 203 of the FPA.

[66] Motion at 56 n.185 (citing Midstates Oil Corp., 20 F.P.C. 70, 88 (1958)).

BlackRock does not even attempt to address the "very broad" statutory definition or the Midstates Oil Corp. decision.[67]

BlackRock limits its substantive response to the straw man that neither CA100+ nor NZAM themselves "owns, controls, or holds, with power to vote, 10 percent or more of the outstanding securities of BlackRock" or any other utility or holding company.[68] But that argument misses the mark because the States are not arguing that CA100+ by itself is a holding company under clause (i). They are arguing that CA100+ as well as its members (which indisputably includes BlackRock) constitutes an "association" or an "organized group" that qualifies as a holding company.[69] The States are making the same argument as to NZAM.[70] The States argue that since the definition of "company" expressly covers unincorporated associations or organized groups, "the acquisition of stock by any one of their members (such as BlackRock) is attributable to each of the other members for purposes of the definition of a 'holding company.'"[71] BlackRock never engages with how to apply "holding company" to an unincorporated "association" or "organized group" that through its various members directly or indirectly owns, controls, or holds, with power to vote, the requisite shares to meet the statutory definition. Given that the statute expressly includes these categories of organizations in the definition of "company," BlackRock's failure to address the States' argument is fatal to its position.[72]

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[67] *Compare* Motion at 56, *with* BlackRock Answer at 8.
[68] BlackRock Answer at 8.
[69] Motion at 56–57.
[70] Motion at 58.
[71] Motion at 57–58 & n.191 (collecting multiple authorities for this general proposition regarding associations or partnerships).
[72] The authority BlackRock cites similarly does not address an "association" or "organized group." *See* BlackRock Answer at 8 n.30. BlackRock relies on *The Goldman Sachs Group, Inc.*, 114 FERC 61,118, at P 13 (2006). There are important limitations built into that case. First, the Commission noted that it was "in the early stages of implementing EPAct 2005." *Id.* at P 27. And it predates

BlackRock also argues that applying the plain language of "company" would create the allegedly absurd result that other industry initiatives could similarly trigger the requirement for Commission approval.[73] But it is hardly absurd that industry initiatives in certain circumstances can run afoul of laws designed to protect competition. "[F]orming a trade association does not shield joint activities from antitrust scrutiny: Dealings among competitors that violate the law would still violate the law even if they were done through a trade association."[74] Far from being absurd, BlackRock admitted when it joined Climate Action 100+ that "[c]ertain types of collective action can have regulatory ramifications," and it is now backtracking from its own commonsense statement when faced with the States' Motion and the "very broad" statutory definitions incorporated into Section 203.[75] The issue here is that the association's activities are not limited to lobbying governmental bodies or pro-competitive standard setting, but rather aggregating the power of each member's holdings to influence utility company operations for a specific end—adoption of "ambitious emissions reduction targets"[76] and "driv[ing] the transition to net zero."[77]

Franklin Res., Inc., 126 FERC ¶ 61,250 at P 31, 39–41 (2009), which set forth a much more detailed analysis of when the Commission would or would not aggregate voting rights. Second, Goldman and its nonutility subsidiaries nonetheless sought blanket authorizations. 114 FERC 61,118 at ¶ 21. Third, there was no indication that the non-utility subsidiaries were coordinating their engagement or voting with each other or the parent. Therefore, there was no argument made to the Commission that the nonutility subsidiaries and the upstream parent were all one "holding company." In contrast, the States are arguing that CA100+, including its members, constitutes a single holding company for purposes of Section 203.

[73] BlackRock Answer at 8.

[74] FTC, *Spotlight on Trade Associations*, *available at* https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations

[75] Motion at 14 n.36 (citing BlackRock's CA100+ Sign-On Statement, *available at* https://www.blackrock.com/corporate/literature/publication/our-participation-in-climate-action-100.pdf).

[76] Climate Action 100+, *2020 Progress Report* at 41, *available at* https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf.

[77] *FAQ*, NETZEROASSETMANAGERS (2023) https://www.netzeroassetmanagers.org/faq/.

If the other industry groups that BlackRock identifies in its Answer are engaged in similar behavior, the Commission must investigate them as well. There is nothing absurd about this.

Finally, BlackRock does not even address the second definition, contained in clause (ii), thereby conceding that the Commission has additional authority to conclude after notice and opportunity for hearing that CA100+ and NZAM, including their members, are holding companies. 42 U.S.C. § 16451(8)(A)(ii). BlackRock provides no merits argument as to why the Commission can properly refuse to exercise that discretion, particularly given the extensive evidence cited in the States' Motion regarding these associations/groups' activities.

In sum, BlackRock's merits arguments do not refute the detailed merits analysis laid out in the States' Motion, and the Commission must grant intervention and exercise its ongoing powers or treat the Motion as a complaint and conduct further proceedings.

III. Conclusion

The Commission should grant leave to file the reply contained herein. The Commission should further grant the relief requested in the Motion. This is to permit intervention by the States and exercise the Commission's ongoing authority under the 2022 BlackRock Order to determine if BlackRock is complying with that order and also whether it is part of an undisclosed, larger holding company. In the alternative, the Commission should treat the Motion as a complaint under Rule 206 and proceed accordingly.

Dated June 9, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated June 9, 2023.

/s/ Melissa A. Holyoak