UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

FirstEnergy Transmission, LLC Docket Nos. EC22-33

FirstEnergy Corp. EC22-27

**Motion to Consolidate and Protest of Public Citizen, Inc.**

FirstEnergy Corp. operates franchised utilities with hundreds of thousands of captive customers, and, through its FirstEnergy Transmission affiliate, power transmission systems. On November 7, 2021, FirstEnergy issued a press release announcing the simultaneous, coordinated $3.4 billion equity investments with affiliates of the investment companies Blackstone Inc. and Brookfield Asset Management Inc.[[1]](#footnote-1) Because they were negotiated and announced simultaneously with the active participation of members of the FirstEnergy board of directors—which include employees of Icahn Enterprises—the Commission must consolidate both dockets and treat the transactions exactly the way FirstEnergy communicated them: as integrated and related transactions. Only by assigning the combined transactions can the Commission determine whether they are consistent with the public interest and will result in just and reasonable rates.

The investments in FirstEnergy by Blackstone and Brookfield were the result of non-public negotiations involving members of FirstEnergy’s Board of Directors, including Icahn Enterprises executives. Given the history of activist investor collusion to control public companies, the Commission must determine whether any formal or informal cooperation agreement exists between Icahn and Blackstone that would result in their combined interests exceeding 10% of FirstEnergy, resulting in both Icahn and Blackstone to be treated as affiliates, per 18 CFR § 35.36(a)(9)(iii).

**Motion to Consolidate**

The Commission can consolidate dockets to resolve common issues of law and fact in order to promote greater administrative efficiency, but typically does so only if a trial-type evidentiary hearing is required.[[2]](#footnote-2) It is important to note that an evidentiary hearing is not required for FERC to consider docket consolidation.

The Brookfield and Blackstone transactions were negotiated simultaneously by FirstEnergy’s Board of Directors as a central component of the company’s capital strategy. The unique nature of the coordinated negotiations that resulted in the concurrent agreements with both Brookfield and Blackstone requires the Commission to assess the proposed transactions in a consolidated docket. Both Brookfield and Blackstone own and control significant FERC-jurisdictional assets that necessitates a unified market power analysis to ensure that the combined transactions do not threaten competition, just and reasonable rates, captive customers, or the public interest.

**Public Citizen Protest**

Section 201 of the Federal Power Act states “that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest.”[[3]](#footnote-3) Section 203 of the FPA requires the Commission to only approve transactions that “will be consistent with the public interest”.[[4]](#footnote-4) FirstEnergy has hundreds of thousands of captive customers that rely upon the Commission’s effective enforcement of the FPA’s protections.

On November 7, 2021, FirstEnergy announced via press release a $3.4 billion equity investment consisting of a $1 billion private stock sale to Blackstone and the relinquishment of a 19.9% stake in FirstEnergy Transmission to Brookfield for $2.4 billion. In exchange, FirstEnergy is providing control over one seat on its board of directors to Blackstone, despite the fact that the private stock sale (known as a Private Investment in Public Equity, or PIPE) results in Blackstone controlling less than 10% of the company. The PIPE— J.P. Morgan Chase & Co. served as the placement agent—provided Blackstone with 25,588,535 shares at a price of $39.08 per share. With FirstEnergy’s stock closing yesterday (January 25, 2022) at $41.32, Blackstone has already earned more than $57 million on its privately negotiated deal with FirstEnergy.

The Finance Committee of FirstEnergy’s Board of Directors played a key role in recruiting both Blackstone and Brookfield, and in negotiating the deal. Andrew Teno, an executive for affiliates of Icahn Enterprises, serves as a voting member of that Committee, courtesy of a recent Commission order.[[5]](#footnote-5)

The role that activist investor Carl Icahn played in recruiting and negotiating a PIPE deal with Blackstone raise concerns about whether the two activists have conspired to control FirstEnergy. While Blackstone and Icahn individually control less than 10% of FirstEnergy’s voting shares, any collusive agreement between the two activist investors would result in combined control of over 10%, triggering the Commission’s affiliation threshold per 18 CFR § 35.36(a)(9)(iii). The Commission cannot approve the proposed Blackstone transaction until authorized representatives for both Icahn and Blackstone provide documentation of any formal or informal agreements that exist regarding their interests in FirstEnergy.

In calculating whether Blackstone and Icahn control 10% or more of FirstEnergy, it is essential that the Commission include the use of derivatives—such as total return swaps or funded equity collars —that activist investors frequently utilize to amplify their financial influence over a public utility in excess of actual stock ownership. Use of such derivative instruments by activist investors is widespread, and a successful means of exerting economic influence over a target company’s management without the hassle of regulatory compliance.

**Conclusion**

The Finance Committee of FirstEnergy’s Board of Directors, which includes an Icahn Enterprises executive as a voting member, helped negotiate simultaneous private investment deals with Blackstone and Brookfield. Both Blackstone and Brookfield secured voting rights on the boards of FirstEnergy companies as a condition of their privately-negotiated investments. Public Citizen has two asks:

* The dockets must be consolidated in order to accurately reflect that the two transactions were negotiated jointly as part of a coordinated financial plan assembled by the Board of Directors. Consolidation is necessary to properly assess whether the combined transactions are consistent with the public interest, or present threats to competition or captive customers, as both Brookfield and Blackstone own a vast array of FERC-jurisdictional assets.
* The request to convey voting rights for Blackstone’s seat on the Board cannot be granted until the Commission has determined whether a formal or informal collusive agreement exists between Blackstone and Icahn Enterprises. Should any such conspiracy exist, the Commission must classify both Blackstone and Icahn Enterprises as affiliates of FirstEnergy, per 18 CFR § 35.36(a)(9)(iii).

Respectfully submitted,

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1. www.firstenergycorp.com/newsroom/news\_articles/firstenergy-announces-transformative--3-4-billion-of-equity-fina.html [↑](#footnote-ref-1)
2. *Startrans IO, L.L.C.*, 122 FERC ¶ 61,253, at 25 (2008). [↑](#footnote-ref-2)
3. 16 U.S.C. § 824(a). [↑](#footnote-ref-3)
4. 16 USC § 824b(a)(4). [↑](#footnote-ref-4)
5. See Docket No. EC21-77. [↑](#footnote-ref-5)