UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

NextEra Energy, Inc.

American Electric Power Company, Inc.

Evergy, Inc. Docket No. EL21-14

Exelon Corporation

Xcel Energy Services Inc.

**Protest of Public Citizen, Inc.**

Established in 1971, Public Citizen is a national, not-for-profit, non-partisan, research and advocacy organization representing the interests of household consumers. Public Citizen is active before FERC promoting just and reasonable rates, and supporting efforts for utilities to be accountable to the public interest. Our financial details are located on our web site.[[1]](#footnote-1) We intervened November 12.

On October 30, a group of utilities submitted an *Expedited Petition for Declaratory Order* asking FERC to allow certain financial institutions to control as much as 20% of a utility’s voting shares without being deemed affiliates of the utility. The utilities seek the exemption for applications under Section 203 of the Federal Power Act (mergers and acquisitions) and for Section 205 applications (market-based rate authority).

The Commission must dismiss the petition. Allowing sophisticated asset management firms such as BlackRock, Vanguard and State Street to evade affiliation even when controlling 20% of public utilities will harm the public interest and result in unjust and unreasonable rates.

The rise of institutional investors operating investment funds that track market indexes traces its foray into U.S. markets in the 1970s, making these investment vehicles fairly recent entrants. But in this relatively short amount of time, index funds have come to dominate the financing the architecture of the U.S. economy. Today, index funds manage over $11 trillion in the U.S., exceeding the value of so-called active funds for the first time in history, with the organizational structure of these index funds highly concentrated in just three firms.[[2]](#footnote-2) BlackRock, Vanguard and State Street together control 82% of all assets flowing into all investment funds (both active and passive) over the last decade, and the three firms control as much as 80% of the global ETF market. While often erroneously described as “passive”, in actuality they play an active role influencing corporate governance and decision-making.

The American Antitrust Institute notes that investment funds frequently take controlling stakes in companies across an entire sector, directing millions of voting shares in numerous market competitors—and that this horizontal control across market rivals is harming and stifling competition.[[3]](#footnote-3)

It is probable that the utilities filed their *Petition for a Declaratory Order* in consultation with, or with the active consent of, some of these institutional investors. If institutional investors collaborated in any way with the Petition, it would raise additional concerns about the influence the funds have on the behavior of public utilities.

The Commission’s current reliance on blanket authorizations to grant institutional investors and public utilities relief from affiliation when the institution controls as much as 20% of the public utility is problematic, especially since the role of institutional investors’ role in public utilities has changed dramatically since the Commission began issuing such authorizations in the wake of the Energy Policy Act of 2005. The Petition here seeks to cement Commission policy in exactly the wrong direction where it ought to be headed, ignoring the dramatic structural changes that are occurring in the way that institutional investors interact with public utilities. The Commission must dismiss the petition in favor of hosting a technical conference or issuing a Notice of Inquiry in order to comprehensively assess the circumstances by which institutional investors have dramatically shifted investment trends in public utilities, and how institutional investors may be undermining competition and threatening just and reasonable rates. The public interest demands enhanced transparency of ownership and control of public utilities—not less, as the Petition advocates.

Furthermore, the Petition’s support of extending exemptions to institutional investors that control up to 20% of public utilities to Section 205 proceedings will significantly undermine the transparency of ownership of FERC-jurisdictional public utilities. An application for market-based rate authority under Section 205 is the cornerstone of the Commission’s administrative rate regulation in the post-Energy Policy Act of 1992 era. The Petition admits the outsized role institutional investors play in utilities, noting that “One financial institution’s recent quarterly filing listed over 50 public utilities where the institution held securities totaling 10 percent or more.”[[4]](#footnote-4) There are tangible risks to competition and just and reasonable rates to such horizontal control. The Commission should be working diligently to strengthen such reporting, not weaken it as proposed by the Petition.

Approving the Petition will harm the public interest by directly and negatively impacting just and reasonable rates, and by obscuring transparency of ownership and governance of public utilities. The role of index funds investing in public utilities has greatly expanded in recent years, with profound implications for the public interest and just and reasonable rates. The Petition asks the Commission to ignore these challenges and instead grant broader exemptions for institutional investors. The Commission should dismiss the Petition, and instead pursue a more appropriate forum to explore the complex issues of the role of institutional investors in public utilities, such as a technical conference or a Notice of Inquiry.

Respectfully submitted,

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1. [www.citizen.org/about/annual-report/](http://www.citizen.org/about/annual-report/) [↑](#footnote-ref-1)
2. We urge the Commission to read the highly relevant report by Public Citizen alumni Graham Steele: *The New Money Trust: How Large Money Managers Control Our Economy and What We Can Do About It*, November 23, 2020, www.economicliberties.us/our-work/new-money-trust/ [↑](#footnote-ref-2)
3. Diana L. Moss, *What Does Expanding Horizontal Control Mean for Antitrust Enforcement? A Look at Mergers, Partial Ownership, and Joint Ventures*, November 4, 2020, www.antitrustinstitute.org/wp-content/uploads/2020/11/Moss\_Horizontal-Control\_11.4.20.pdf [↑](#footnote-ref-3)
4. At page 8. [↑](#footnote-ref-4)