

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

NextEra Energy, Inc., *et al.* | Docket No. EL21-14-000

**COMMENTS OF THE
AMERICAN ANTITRUST INSTITUTE**

The American Antitrust Institute (AAI) submits these comments in response to the Expedited Petition for Declaratory Order (“Petition”) in Federal Energy Regulatory Commission (“FERC” or the “Commission”) Docket No. EL21-14-000.¹ Petitioners NextEra Energy, Inc., American Electric Power Company, Inc., Eversource Energy, Inc., Exelon Corporation, and Xcel Energy Services Inc. ask the Commission to resolve issues arising in the wake of Order No. 860 (*Data Collection for Analytics and Surveillance and Mkt.-Based Rate Purposes* (2019)) and Order No. 860-A, on rehearing.²

Petitioners seek two declarations from the Commission. First, “when a financial institution directly or indirectly acquires up to 20 percent of the voting securities of a public utility under an FPA section 203(a)(2) blanket-authorization order, and that order contains the Commission’s standard restrictions on the financial institution exercising control, (a) the public utility and the financial institution are not affiliates under section 35.36 of the Commission’s regulations, and (b) no “cross-affiliation” is created among public utilities by virtue of a financial institution holding securities in each utility.”³ Second, “while a public utility is free to seek Commission rulings addressing whether, or assuming that, particular ownership interests are passive in nature, the utility

¹ *NextEra Energy, Inc., et al.*, Expedited Petition For Declaratory Order, Docket No. EL21-14, Oct. 6, 2020.

² *Data Collection for Analytics and Surveillance and Mkt.-Based Rate Purposes*, Order No. 860, 168 FERC ¶ 61,039 (2019), order on reh’g and clarification, Order No. 860-A, 170 FERC ¶ 61,129 (2020).

³ *Supra* note 1, at 13.

also instead can apply its own judgment guided by *AES Creative*, the *Supplemental Policy Statement*, and other relevant Commission precedent.⁴

There is little basis for granting Petitioners' requests. If granted, they would work to essentially expand a "safe harbor" for "horizontal shareholding" from Section 203 (mergers and acquisitions) to Section 205 (market-based rates). Expansion of the safe harbor could potentially limit the reporting of important information that would allow the Commission to assess the competitive effects of horizontal shareholding, or financial institutions' ownership of securities in multiple, potentially competing, electric utilities. This could weaken Commission oversight of those competitive issues and potentially impede its ability to fulfill its statutory responsibilities to protect competition and ratepayers under the Federal Power Act. The AAI thus urges the Commission to deny Petitioner's request.

I. Interest of the American Antitrust Institute

The AAI is an independent, nonprofit organization.⁵ The AAI's mission is to promote competition that protects consumers, businesses, and society. We serve the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of competition policy. The AAI has provided legal and economic analysis, commentary, and testimony on mergers, market design, energy policy, and competition policy involving the energy industries since the organization's founding in 1998.

II. The Horizontal Shareholding Concerns at the Core of This Proceeding Are On the Rise, and Petitioners and Their Institutional Investors Benefit Directly From Deflecting Commission Attention From Them

Concerns surrounding rising concentration and the explosive growth in partial ownership in key U.S. sectors such as healthcare, energy, airlines, and banking should inform the Commission's

⁴ *Id.*

⁵ For more information, please visit www.antitrustinstitute.org.

decision in the instant matter.⁶ Horizontal shareholding is one of three major partial ownership scenarios that raise potential competitive concerns. Two others are an acquirer's stake: (1) in a firm against which it competes directly in a product and/or geographic market and (2) in multiple firms that compete in a product market, where the acquirer is an investor such as a private equity firm.

The antitrust agencies look to three major factors to determine how partial ownership transactions can potentially harm competition: incentives, influence, and information.⁷ Partial ownership in a rival(s) can blunt unilateral incentives to compete; result in greater influence over decision-making (through voting interests or governance rights) to compete less aggressively or to coordinate conduct; and facilitate the sharing of non-public, competitively sensitive information between rivals, leading to coordination or unilateral anticompetitive outcomes.

Horizontal shareholding occurs when financial institutions (e.g., mutual funds, insurance companies, hedge funds, etc.) that transact on behalf of individual investors own securities in companies that compete in the same product and/or geographic markets. Here, those rivals are entities that are subject to Commission jurisdiction, including electric utilities that participate in wholesale power markets. While members of the financial community have argued that horizontal shareholding does not raise competitive issues, both the FTC and DOJ acknowledge them and recognize a role for antitrust in addressing them.

For example, the FTC's 2018 hearings on Competition and Consumer Protection in the 21st Century took up the issue of competitive concerns surrounding horizontal shareholding.⁸ And in a

⁶ Diana L. Moss, *What Does Expanding Horizontal Control Mean for Antitrust Enforcement? A Look at Mergers, Partial Ownership, and Joint Ventures?* AM. ANTITRUST INST. Nov. 4, 2020, https://www.antitrustinstitute.org/wp-content/uploads/2020/11/Moss_Horizontal-Control_11.4.20.pdf.

⁷ See Laura A. Wilkinson and Jeff L. White, *Private Equity: Antitrust Concerns With Partial Acquisitions*, 29 ANTITRUST 28, at 29-20 (2007).

⁸ Fed. Trade Comm'n, *FTC Announces Agenda for the Eighth Session of its Hearings on Competition and Consumer Protection in the 21st Century; Session at New York University to Focus on "Common Ownership"*, Nov. 20, 2018. See "Public Comments" at <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century>.

2017 submission to the OECD Competition Committee hearing on horizontal ownership, the DOJ and FTC stated:

“...common ownership raises the possibility of active efforts to coordinate the decisions of competitors by or through common owners. If an institutional investor were to orchestrate an anticompetitive agreement between two direct competitors, both competitors and the investor could be liable for a per se violation of the antitrust law. Similarly, passing competitively sensitive information between competitors through an institutional investor could expose the companies and the investor to liability.”⁹

These concerns are buttressed by empirical support.¹⁰ For example, research indicates that even without violating their fiduciary obligations, asset managers can influence the decision-making of the firms in which they hold securities, through corporate governance rights, or executive compensation packages that reward industry performance in addition to individual firm performance.¹¹

Partial ownership at the economy and sectoral levels is on the rise. Sources estimate, for example, that the share of S&P firms holding at least 3% ownership stakes in firms that compete in the same product markets increased 20% to 90% from 2000-2010.¹² The initial wave of private equity buyouts in the mid-2000s corresponded to a significant upswing in partial ownership acquisitions and has continued on a steady expansion path since. Private equity deal values increased by over 350% between 2009 and 2018, while deal counts increased by 400% over the same period.¹³

⁹ See *Hearing on Common Ownership by Institutional Investors and Its Impact on Competition - Note by the United States*, OECD Directorate For Financial and Enterprise Affairs Competition Committee (DAF/COMP/WD(2017)8), Nov. 28, 2017, [https://one.oecd.org/document/DAF/COMP/WD\(2017\)86/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)86/en/pdf).

¹⁰ See e.g., Elhauge, Einer R., *How Horizontal Shareholding Harms Our Economy - And Why Antitrust Law Can Fix It*, HARV. BUS. L. REV. (FORTHCOMING); Fiona M. Scott Morton and Herbert Hovenkamp *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. (2018); and José Azar, Martin C. Schmalz, & Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, 73 J. OF FIN. (2018).

¹¹ José Azar, Martin C. Schmalz, & Isabel Tecu, *Why Common Ownership Creates Antitrust Risks*, CPI ANTITRUST CHRONICLE, Jun. 2017.

¹² Jose Azar, *Portfolio Diversification, Market Power, and the Theory of the Firm*, Aug. 23, 2017, <https://ssrn.com/abstract=2811221>.

¹³ PRIVATE MARKETS COME OF AGE: MCKINSEY GLOBAL PRIVATE MARKETS 2019, MCKINSEY & COMPANY (2019), https://www.mckinsey.com/~/_media/McKinsey/Industries/Private%20Equity%20and%20Principal%20Investors/Our%20Insights/Private%20markets%20come%20of%20age/Private-markets-come-of-age-McKinsey-Global-Private-Markets-Review-2019-vF.ashx. See also Press Release, *Private Equity-Backed Buyout Deal Flow in North America Reaches Post-Lehman High in 2012*, PREQIN, 2013, https://www.preqin.com/docs/press/Buyout_Q4_2012.pdf.

Petitioners' request comes as no surprise against the background of competition enforcement interest in partial ownership activity, and horizontal shareholding, in particular. Four of the five petitioners are in the top ten largest electric utilities in the U.S. For example, NextEra is the largest electric utility in the U.S., based on a market value of \$113 billion. Xcel is the seventh largest, valued at \$33 billion.¹⁴ Moreover, financial institutions own partial shares in more than one of Petitioner utilities.¹⁵

III. Petitioners' Proposal to Expand the Safe Harbor for Horizontal Shareholding Would Loosen Commission Oversight of an Important Issue

The Commission is no stranger to the debate over partial ownership. These issues have been raised in numerous contexts, including the Commission's Notice of Proposal Rulemaking in Docket No. RM16-9, *Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*.¹⁶ In those proceedings, the Commission received comments from numerous stakeholders, including AAI, urging scrutiny of the competitive effects of partial ownership acquisitions and any safe harbor proposals.¹⁷

Commission Staff also appear rightly focused on horizontal shareholding in that, according to Petitioners, they have recently "...contacted numerous public utilities to prompt FPA section 205 filings to report new affiliate relationships with financial institutions."¹⁸ As such, the Commission should be skeptical of any proposal that seeks to expand the safe harbor for horizontal shareholding,

¹⁴ *Largest electric utilities in the U.S. as of April 2020, based on market value*, STATISTA.COM, <https://www.statista.com/statistics/237773/the-largest-electric-utilities-in-the-us-based-on-market-value/>, last visited Nov. 29, 2020.

¹⁵ See e.g., CNNBusiness.com, listings for shareholdings involving Petitioner companies NextEra, AEP, Xcel, and Exelon.

¹⁶ Control and Affiliation for Purposes of the Docket. No. PL09-3-000 Commission's Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act, Docket No. PL09-3-000, 130 FERC ¶ 61,046 (Jan. 21, 2010).

¹⁷ Comments of the American Antitrust Institute in re: Control and Affiliation for Purposes of the Docket. No. PL09-3-000 Commission's Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act, Docket. No. PL09-3-000, AM. ANTITRUST INST., Jan. 16, 2009, https://www.antitrustinstitute.org/wp-content/uploads/2018/08/aaicrossownershipcomments_012020091152.pdf.

¹⁸ *Supra* note 1, at 3.

particularly one that is based on the notion that because affiliate relationships between financial institutions and the electric utilities in which they own voting securities are not “real,” they therefore need not be reported.¹⁹

Petitioners unfurl a “parade of horrors” that purports to illustrate why the Commission’s current approach creates uncertainty.²⁰ They also warn against “wasteful and burdensome” filing requirements.²¹ Indeed, Petitioners zero-in on eliminating the very information that would enable the Commission to monitor and address horizontal shareholding issues. They ask, for example, whether market-based rate sellers must (1) disclose affiliate relationships in their filings under Section 205 when a financial institution acquires securities under a blanket authorization or (2) list the relevant financial institutions in relational databases under Order Nos. 860 and 860-A.²² Petitioners conclude that such reporting “...is not a reasonable or practical reading of the Commission’s prior regulations and orders.”²³

Granting Petitioners’ request to expand the safe harbor for horizontal shareholding to cover both Section 203 and 205 could significantly limit the Commission’s ability to obtain important information regarding horizontal shareholding involving jurisdictional electric utilities. The effect of this would be to significantly decrease transparency, which would constrain the Commission’s ability to (1) monitor financial institutions’ ownership in multiple, potentially competing, jurisdictional entities; (2) evaluate competition issues in wholesale power markets that would flow from such monitoring and (3) fulfill its statutory responsibilities to protect competition and ratepayers under Sections 203 and 205 of the Federal Power Act.

¹⁹ *Id.*, at 2.

²⁰ *Id.*, at 9-10.

²¹ *Id.*, at 43.

²² *Id.*, at 27-28.

²³ *Id.*, at 28.

The Commission should preserve, to the maximum extent, pathways for how it determines which, and to what extent, financial institutions are common owners of jurisdictional electric utilities, especially those that compete in the same product and/or geographic markets. Petitioners' request asks the Commission to turn a blind eye to competition problems posed by horizontal shareholding. If the Commission declares anything, it should be the opposite, namely that it will maintain full transparency on horizontal shareholding.

Respectfully submitted,
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November 30, 2020