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Ratepayer Advocates Ask FERC to Modernize its Regulation of Utility Investments

April 1, 2024 | *Peter J. Hopkins, Scott H. Strauss, Samuel B. Whillans*

On Tuesday, March 26, the District of Columbia Office of the People's Counsel, Maryland Office of People's Counsel, and New Jersey Division of Rate Counsel filed joint comments responding to the Federal Energy Regulatory Commission's (FERC) Notice of Inquiry on the agency's policies and practices concerning investments in utility companies. The state ratepayer advocates argue that, given industry changes, FERC needs to toughen its regulations and more closely scrutinize utility investment activities to protect consumers from anti-competitive harms.

Section 203 of the Federal Power Act requires investors in utility companies to obtain approval from FERC for transactions valued at over $10 million. Since 2006, FERC has issued so-called blanket authorizations granting advance approval for transactions that it deems unlikely to result in investor control over the utility. The Notice of Inquiry asks whether changes to the agency's blanket authorizations policy are needed considering developments in the utility industry, including "consolidation in the public utility industry as well as the growth of large index funds and asset managers."

State ratepayer advocates responded with an emphatic "yes." Their comments describe how the involvement of financially powerful and influential institutional investors in utility governance matters threatens ratepayers with competitive harm and warrants heightened prophylactic measures, consistent with FERC's consumer protection mandate under the Federal Power Act. Of particular concern is the growth of horizontal ownership—the ownership of multiple competitor companies by a single investor—which reduces competitive incentives and undermines FERC's goal of promoting well-functioning markets. To prevent harms to consumers and the public interest, the state ratepayer advocates recommend that FERC modernize its blanket authorizations policy and impose stricter conditions on such investors to ensure they lack the ability to influence utilities towards anti-competitive ends.

The three consumer advocates offices are represented in this matter by Spiegel partners Scott Strauss and Peter Hopkins and associate Sam Whillans.

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