

ESG Daily, ESG NEWS—Is FERC becoming a new battle ground over ESG investing?, (May 12, 2023)

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A seemingly routine filing by BlackRock with FERC prompted a group of state attorneys general to seek to intervene in the FERC matter with Public Citizen filing its own motion in opposition to the state attorneys general.

A group of 17 state attorneys general filed a motion to intervene in a proceeding before the Federal Energy Regulatory Commission (FERC) involving BlackRock, Inc.'s blanket reauthorization from FERC to acquire the voting securities of utility companies, something that is required by law for certain types of acquisitions. The state attorneys general are not challenging FERC's grant of such authority to BlackRock, but rather they are contesting whether certain "horizontal" environmental groups to which BlackRock is a signatory or a member are previously undisclosed "holding companies" for purposes of FERC's reauthorization process. The interest group Public Citizen today filed an [opposition](#) brief asking FERC to deny the motion of the state attorneys general (*BlackRock, Inc.*, [Docket No. EC16-77-002](#), May 10, 2023).

A little context. Readers of *Securities Regulation Daily* may recognize FERC as a regulator of interstate transmission of natural gas, oil, and electricity that sometimes appears in the publication because of its overlapping jurisdiction with the CFTC. FERC and CFTC have divvied up their jurisdiction via several memoranda of understanding and the CFTC component of energy market oversight is not directly at issue in the filing by the state attorneys general (See MOUs of January 2, 2014 regarding [jurisdiction](#) and [information sharing](#)). Likewise, the SEC is not directly implicated by the state attorneys general filing, although the motion to intervene and the relevant FERC process indirectly relates to certain public filings made on the SEC's EDGAR database and portions of the argument made by the state attorneys general relate to the SEC's shareholder proposal framework.

By way of additional background, Section 203(a)(2) of the Federal Power Act (FPA) (16 U.S.C. §824b(a)(2)) and Part 33 of FERC's regulations (18 C.F.R. pt. 33) provide for FERC to grant blanket authorizations to entities to acquire the voting securities of utility companies. Blanket authorizations typically must be reauthorized periodically by FERC. As a condition of receiving a blanket authorization, an entity must file with FERC any relevant Schedules 13D-G that are filed with the SEC and at the same time such schedules are filed with the SEC.

In April 2022, FERC granted BlackRock a blanket reauthorization for an additional three-year period allowing BlackRock to acquire the voting securities of utility companies. BlackRock represented to FERC that it is solely an investor and does not directly own physical utility assets in the U.S. FERC first granted BlackRock a blanket authorization in 2010.

Public Citizen, the same group that today filed an opposition to the motion to intervene regarding BlackRock's Schedule 13D-G filings that was filed by the state attorneys general, filed a [protest](#) at the time of BlackRock's most recent blanket reauthorization. According to Public Citizen, BlackRock is so large that it cannot function as a passive investor if, under the terms and conditions of the reauthorization, it can acquire up to 20 percent a utility's voting securities.

"BlackRock's gargantuan role as a manager of voting securities is unparalleled in the history of modern capitalism," said Public Citizen. "Not only is it impossible for a fund manager of BlackRock's size and scope to remain a passive investor, scholarly research demonstrates that BlackRock's accumulation of voting securities constitutes control over utilities, and its horizontal power over competing utilities harms competition."

BlackRock countered Public Citizen by stating that it had complied with the terms and conditions of numerous prior blanket reauthorizations. FERC, however, denied Public Citizen's protest because BlackRock had given adequate

assurances that it was unable to influence control over U.S.-traded utilities.

FERC went on to conclude that BlackRock's blanket reauthorization would not deleteriously impact competition, rates, or regulations. As a result, FERC [granted](#) BlackRock's blanket reauthorization application.

FERC Commissioner Allison Clements concurred in FERC's order, stating that she had "growing concerns" that FERC's standards for evaluating reauthorization applications may be inadequate to ensure that reauthorization is in the public interest, especially in wholesale rates.

FERC Commissioner Mark C. Christie, noting Public Citizen's protest about BlackRock's power, also concurred in the order. Said Christie: "The point is not whether one agrees with BlackRock's public policy positions, or those of Vanguard, State Street or others. You can even agree with their policy positions and still be deeply concerned about the use of their unprecedented financial power in this way. The central issue is whether these asset managers use their huge financial power to promote the interests of their beneficiaries or the political and ideological beliefs of their owners and top managers. You can also be legitimately concerned whether any small group of asset managers should wield this degree of financial power for these ends."

BlackRock's latest 13D-G filings. BlackRock most recently filed with FERC two sets of Schedules 13D-G. On [April 6, 2023](#), BlackRock filed schedules for MetLife, Inc., Apollo Global Management, Inc., Packaging Corporation of America, POSCO Holdings Inc., Via Renewables, Inc. and WestRock Company. On [May 5, 2023](#), BlackRock filed schedules for United States Steel Corporation and FuelCell Energy, Inc.

These latest BlackRock filings may not have been the immediate impetus (but the underlying reauthorization was) for the state attorneys general to challenge whether certain environmental groups to which BlackRock belongs should be counted as "holding companies" for purposes of FERC's blanket reauthorizations, but they do offer examples of the types of companies in which BlackRock may be investing and, thus, the potential for exerting influence on climate change and other ESG matters.

According to the state attorneys general, BlackRock is a signatory to Climate Action 100+ (CA100+) and the Net Zero Asset Managers Initiative (NZAM), both of which the state attorneys general characterize as "horizontal" entities that function like holding companies and which seek to influence corporate behavior, especially regarding the operations of fossil fuel companies. Neither CA100+ nor NZAM, said the state attorneys general, have obtained approvals from FERC.

One group, CA100+ seeks for its members to adhere to its "[Three Asks](#):" (1) strong corporate governance on climate change; (2) adherence to the goals of the Paris Agreement; and (3) adherence to the Task Force on Climate-related Financial Disclosures (TCFD) and sector-specific Global Investor Coalition on Climate Change (GIC) Investor Expectations on Climate Change guidelines.

The other group singled out by the state attorneys general, NZAM, seeks for its members to adhere to the "[The Net Zero Asset Managers Commitment](#)," which borrows, in part, from the Paris Agreement, but adds some additional commitments regarding asset management. Thus, the commitment encompasses striving to reach the goal of net zero greenhouse gas emissions by 2050, if not sooner, plus support for investments that are aligned with the net zero emissions goal.

The state attorneys general argued that BlackRock's support for environmental and social shareholder proposals has significantly increased in the time since BlackRock joined CA100+ and NZAM. "Maybe BlackRock was a passive investor ten years ago, but today it's an environmental activist," said the state attorneys general. The implication of what the state attorneys general allege is that BlackRock may be acting in a manner beyond passive investing and, instead, allegedly influencing the day-to-day operations of utilities, including what power output is brought to market.

The state attorneys general also noted that BlackRock's power may affect shareholder proposals. Even if shareholder proposals are ultimately withdrawn, the state attorneys general said, BlackRock's alignment with other groups can result in BlackRock obtaining concessions from companies. This possibility, said the state attorneys general, means that companies have to mull the "downside" risks of shareholder proposals that fail to get majority support because company executives may be pressured by proxy advisory firms if those executives do not respond sufficiently even in the case of a failed proposal.

Moreover, the state attorneys general argued that even if BlackRock alone does not exceed the ownership percentage threshold set by FERC, the firm's ownership of utility companies nevertheless should be considered in the context of the overall influence of BlackRock and various aligned environmental groups. As a result, the state attorneys general posited that BlackRock, CA100+, and NZAM collectively may hold voting securities at utility companies that would exceed FERC's threshold for blanket reauthorizations.

The state attorney generals assert "standing" to intervene in BlackRock's FERC blanket reauthorization based on their interests in consumer protection, competition, and utility rates affecting state citizens and residents. In the Article III context, where a federal regulation is challenged in federal court via petition for review, standing for states can be fraught. For example, in the securities law context, a Second Circuit panel upheld the SEC's Regulation Best Interest, but only after finding that a private plaintiff—not the state plaintiffs—had Article III standing (See, [XY Planning Network, LLC v. SEC](#) (state petitioners had argued that standing existed because of the potential for reduced tax revenues from investment income)).

The state attorneys general want FERC to audit whether BlackRock has complied with the representations it made regarding its blanket reauthorization and/or order BlackRock to stop coordinating with other asset managers and instead function solely as a passive investor. The state attorneys general also seek an evidentiary hearing but, if FERC denies any of their requests for relief, the state attorneys general want their motion to intervene treated as a complaint under FERC's rules.

Public Citizen opposition. Public Citizen filed an opposition to the motion to intervene filed by the state attorneys general asserting that the intervention was unjustifiably late. "The States and Attorneys General claim that their 14-month late intervention is justified because BlackRock has not 'withdrawn' from its association with 'CA100+ and NZAM', among other claims," said Public Citizen. "But their tardy motion comes *after* the Commission issued an order more than a year ago approving BlackRock's Section 203 application" (emphasis in original; footnote omitted).

The state attorneys general, by contrast, argued that good cause existed for their late intervention. They recalled that a similar coalition of state attorneys general had sought to intervene in a reauthorization proceeding for Vanguard in late 2022, which they said prompted Vanguard to withdraw from NZAM (they also noted that Vanguard never joined CA100+). "At bottom, the States have brought this motion now because it is clear (as of March 15, 2023) that BlackRock will not voluntarily withdraw from CA100+ and NZAM, but instead will stay the course of horizontal agreements to influence utility companies," said the state attorneys general.

Public Citizen, in its opposition, also argued that FERC should deny the motion to intervene because it would be disruptive and would burden Public Citizen.

The matter is [No. EC16-77-002](#).

Companies: BlackRock, Inc.; Public Citizen; Apollo Global Management, Inc.; FuelCell Energy, Inc.; MetLife, Inc.; Packaging Corporation of America; POSCO Holdings Inc.; United States Steel Corporation; Via Renewables, Inc.; WestRock Company

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