UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Federal Power Act Section 203 Blanket Authorizations for Investment Companies	)))	**Docket No. AD24-6-000**

REPLY COMMENTS OF THE ENERGY TRADE ASSOCIATIONS

The Electric Power Supply Association ("EPSA"),[1] the Edison Electric Institute ("EEI"), and the American Council on Renewable Energy ("ACORE" and collectively with EPSA and EEI, the "Energy Trade Associations") respectfully submit these reply comments ("Reply Comments") on the December 19, 2023 notice of inquiry in the above-captioned proceeding.[2] As discussed herein and in the initial comments of the Energy Trade Associations[3] and others, the Federal Energy Regulatory Commission ("FERC" or the "Commission") should retain its existing policies with respect to blanket authorizations under Section 203(a)(2) of the Federal Power Act (the "FPA")[4] for investment companies. Critically, none of the commenters urging radical changes to these policies offers any example, much less concrete evidence, of cognizable harm or abuse under these

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1 EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

2 *Federal Power Act Section 203 Blanket Authorizations for Investment Cos.*, Notice of Inquiry, 185 FERC ¶ 61,192 (2023) (the "NOI").

3 *See* Comments of the Electric Power Supply Association, Docket No. AD24-6-000 (filed Mar. 25, 2024) ("EPSA Comments"); Comments of the Edison Electric Institute, Docket No. AD24-6-000 (filed Mar. 26, 2024) ("EEI Comments"); Comments of the American Council on Renewable Energy, Docket No. AD24-6-000 (filed Mar. 26, 2024) ("ACORE Comments").

4 16 U.S.C. § 824b(a)(2) (2018).

policies. At the same time, the record contains substantial evidence showing how such policy changes could deter much-needed investment in the electric sector. This is the very opposite of what is required at a time when new investment is critically needed to meet demand and maintain reliability. Accordingly, the Commission should find that no changes are needed to the existing policies at this time.

I. REPLY COMMENTS

This proceeding has provided a useful opportunity to reexamine the Commission's existing policies with respect to blanket authorizations under Section 203(a)(2) of the FPA.[5] As explained in their initial comments on the NOI, the Energy Trade Associations do not believe that any changes to the Commission's existing policies are currently warranted. These policies have benefitted the consuming public by removing unnecessary obstacles to investment, and re-imposing these obstacles or imposing new obstacles of the sort advocated by certain commenters would be a step in exactly the wrong direction at a time when investment is desperately needed. The responses to the NOI confirm that no changes to the Commission's existing rules are necessary or appropriate at this time. Those responses fail to provide evidence of any abuse the existing rules or concrete harm and are instead focused on political and social issues that have little to do with the Commission's responsibilities under the FPA.

A. Comments on the NOI Fail to Demonstrate Cognizable Harm from the Current Section 203(a)(2) Blanket Authorization Policies

While a number of commenters have urged the Commission to change its policies on blanket FPA Section 203(a)(2) authorizations, they have not backed up their

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[5] 16 U.S.C. § 824b(a)(2) (2018).

arguments with concrete evidence of cognizable harm resulting from the Commission's current policies. On the other hand, commenters supporting the existing policies document the numerous safeguards that prevent investors from exercising control over the public utilities in which they hold interests pursuant to these blanket authorizations.[6] In addition, the Investment Company Institute further explains that the Securities and Exchange Commission ("SEC") has rules and filing requirements that further "demonstrate that the investment company is a 'passive investor' and is not investing with an intent to obtain control or influence a US public utility company."[7] Vanguard Group, Inc. (together with its affiliates, "Vanguard") also provides a detailed description of the way in which each Vanguard-advised fund makes voting decisions, making clear that "Vanguard has not, and would not, submit a shareholder proposal, nominate a director, or seek to influence the corporate strategy or operations of an issuer."[8] As EEI explained, "the types of utility control concerns raised by the Commission are not caused by investment companies whose interests are held pursuant to FPA section 203(a)(2) blanket authorization orders," and "[i]t is non-blanket holder investors who are more likely to attempt to directly influence utility management or operations through active investment that provides them the opportunity to participate in utility decision-making."[9]

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[6] *See, e.g.*, EEI Comments at 6-8; Comments of the Asset Management Group of the Securities Industry and Financial Markets Association at 6, Docket No. AD24-6-000 (filed Mar. 26, 2024); Comments of BlackRock, Inc. at 3, Docket No. AD24-6-000 (filed Mar. 26, 2024) ("BlackRock Comments"); Comments of Capital Research and Management Company at 4, Docket No. AD24-6-000 (filed Mar. 27, 2024).

[7] Comments of the Investment Company Institute at 8, Docket No. AD24-6-000 (filed Mar. 26, 2024).

[8] Comments of Vanguard Group, Inc. at 6, Docket No. AD24-6-000 (filed Mar. 22, 2024).

[9] EEI Comments at 4.

Notwithstanding the NOI's specific request for comments on how investors holding interests pursuant to blanket FPA Section 203(a)(2) authorizations are allegedly able to exert control, none of those advocating changes to the current policies demonstrates any actual abuse or offers concrete evidence of harm cognizable under the FPA. Instead, these commenters point to the magnitude of interests held by certain investors, as if that alone were evidence of control. Indeed, one set of comments opines that "[t]he rising power of institutional investors has profound consequences for competition across the utility sector, if not the U.S. economy as a whole," simply because "[a]cademic research posits that such 'horizontal ownership' of ostensibly competing companies can generate powerful anti-competitive incentives."[10] But that is not evidence of any actual anti-competitive effect.

Commenters pushing for changes to the existing rules also make much of the participation of investment firms in certain organizations.[11] For example, one commenter

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[10] Comments of State Ratepayer Advocates at 7-8, Docket No. AD24-6-000 (filed Mar. 26, 2024) ("State Ratepayer Advocates Comments"). *See also, e.g.*, Comments of Transmission Access Policy Study Group at 4, Docket No. AD24-6-000 (filed Mar. 26, 2024) ("TAPS Comments") ("Increasingly, utilities that are ostensibly competitors of each other are thus owned in significant part by the same few large investors. This degree of common ownership stifles utilities' incentives to robustly compete and exposes the public to potential anticompetitive conduct."); Comments of Boyden Gray PLLC on behalf of James Copland, Senior Fellow and Director of Legal Policy at the Manhattan Institute at 8, Docket No. AD24-6-000 (filed Mar. 27, 2024) ("Copland Comments") ("Even if the asset managers promised not to seek to actively control public utilities, they would exercise control. The sheer size of the holdings of these investment companies creates pressure on the public utilities to buy into the schemes of these investors.").

[11] *See, e.g.*, Copland Comments at 8 ("Asset managers also exert passive control through participation in various membership organizations which coordinate action among shareholders and companies. BlackRock and State Street, for example, are members of The Net Zero Asset Managers initiative ('NZAM')."); Comments of Consumers' Research at 2, Docket No. AD24-6-000 (filed Mar. 26, 2024) ("Consumers' Research Comments") (claiming that "asset managers also have exerted substantial control through powerful horizontal organizations—including [NZAM] and Climate Action 100+ ('CA100+')").

asserts that BlackRock, Inc. (together with its affiliates, "BlackRock") has "taken an activist position to force substantial changes in utility operations in order to advance the goal of achieving net zero carbon emissions by 2050."[12] As BlackRock explains, however, "BlackRock's fiduciary responsibilities to our clients include voting shares where clients have authorized us to do so,"[13] and Blackrock's "[p]roxy voting and company engagement activities focus on the drivers of long-term financial value creation in companies' business models – primarily corporate governance topics, and other material risks and opportunities as relevant – and do not implicate control over the day-to-day management or operations of a public utility."[14] Moreover, in response to similar arguments in a separate proceeding involving BlackRock's blanket authorization, BlackRock also explained that its 2030 Net Zero Statement:

> explicitly states that "[its] role is to help [clients] navigate investment risks and opportunities, not to engineer a specific decarbonization outcome in the real economy." BlackRock's participation in initiatives such as CA100+ and NZAM[] allows it to join in dialogue with governments, companies and financial institutions on matters that BlackRock believes could impact the long-term economic value of its clients' portfolios. Participating in these dialogues does not require BlackRock to make any commitments or pledges that may interfere with its fiduciary duties to its clients. Nor does it conflict with BlackRock's compliance with the terms and conditions of the Commission's blanket authorization orders.[15]

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[12] Consumers' Research Comments at 11. *See also* Comments of the State of Utah, *et al.* at 4, Docket No. AD24-6-000 (filed Mar. 27, 2024).

[13] BlackRock Comments at 3.

[14] *Id.*

[15] BlackRock Inc. Answer to Motion to Intervene and Motion for Relief at 6, Docket No. EC16-77-002 (filed May 25, 2023) (footnotes omitted). *See also id.* at 5-6 (explaining that, when BlackRock joined CA100+, it submitted a memorandum to CA100+ "explicitly stating that it 'must independently exercise its fiduciary duties to [its] clients in determining how [to] prioritize engagements and how [to] vote proxies,' and that its membership does not constitute an informal

B. The Commission Should Decline to Get Involved in Politicized Disputes and Instead Focus on Ensuring Continued Investment

Many of the comments urging the Commission to modify its rules express concern about positions taken by investment firms, with one commenter repeatedly complaining about the "radical climate agenda"[16] supposedly taken by the so-called "Big Three" (*i.e.*, BlackRock, Vanguard, and State Street) and other investors. But, as discussed above, there is no evidence that any of these firms is violating the Commission's blanket authorization rules, including the limitations imposed to ensure that investors do not exercise control, or otherwise directly influencing utilities in any way that should be of concern to the Commission. Moreover, as EEI explained, "decision making within public utilities is focused on meeting customer needs while complying with policy mandates and goals established by the state and federal commissions that oversee and regulate the utilities."[17] Similarly, ACORE observed that while numerous investor-owned utilities have established clean energy goals, these utilities "are regulated by their state public service commissions and therefore, subject to reliability obligations and rate regulations, which cannot be overridden by 'asset managers pushing policy decisions.'"[18]

Even assuming *arguendo* that it were appropriate for the Commission to abandon its longstanding policy of remaining "fuel-neutral"[19] and to concern itself with how certain technologies have fared in recent years, there is simply no basis for attributing the

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or formal agreement to (i) buy, sell, hold, or vote its shares together with any other CA100+ signatory, or (ii) act in concert with any other signatory to acquire or consolidate control over any company or its board." (footnote omitted)).

[16] Consumers' Research Comments at 1, 2, 20.

[17] EEI Comments at 5.

[18] ACORE Comments at 6.

[19] *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 26 (2018).

retirement of certain fossil-fueled resources or the increased development of renewable resources to the Commission's blanket FPA Section 203(a)(2) authorization policies. Indeed, Commissioner Christie previously observed that:

> Now the . . . thing that's happened in the last 15 years [,] as a matter of policy[,] some of *the states* moved away from the goal of least cost power and decided to pursue environmental goals, and so they enacted mandatory portfolio standards and other policies . . . that were intended to change the resource mix in the capacity markets, and change the generation supply mix.[20]

To be sure, like states, many investors have preferences about what types of resources they will invest in. But those preferences are expressed most powerfully through their willingness or unwillingness to invest, and in any event, are far removed from the day-to-day operation of generation and transmission facilities and wholesale sales on which the Commission's control analysis has been properly focused.[21]

Under Section 203 of the FPA, the Commission "shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest . . . ."[22] As a "creature of statute," the Commission's authority is limited,[23] and its consideration of the "public interest" under

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[20] *PJM Interconnection, L.L.C.*, Statement of Commissioner Christie at P 14, Docket No. ER21-2582-000 (Oct. 19, 2021) (unreported) (emphasis added) (quoting March 2021 Resource Adequacy Technical Conference, Transcript at 25:17-26:15).

[21] *See FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 at PP 50-54 (2007).

[22] 16 U.S.C. § 824b(a)(4) (2018).

[23] *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'") (citation omitted); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

the FPA "is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates."[24] Here, the comments on the NOI have made clear that revising the Commission's blanket authorization policies will make it more difficult and expensive to invest in the electric industry, which is antithetical to the Commission's statutory duty.

Eliminating or drastically restricting blanket authorizations and relying on individual Section 203 requests to purchase public utility stocks will create substantial barriers to investment in this sector. Importantly, while some utilities may have obligations to serve, no investor has an obligation to invest in the electric sector. That being the case, there is little reason for an investor to go through the delay and expense of seeking Commission approval for an investment,[25] or to incur the costs of complying with the numerous and onerous requirements suggested by commenters[26] when it is free to invest in other industries where such obstacles are not present. And if it is going to take on these burdens, it is going to demand a higher return for doing so. Unnecessarily deterring or raising the costs of investment in the electric industry works directly counter to the Commission's statutory mission to promote "plentiful supplies of electric energy . . . at just and reasonable rates."[27] In keeping with that mission, the Commission should weigh the

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24 *NAACP v. FPC*, 425 U.S. 662, 670 (1976) ("*NAACP*").

25 *See* EEI Comments at 8-10 (discussing costs associated with seeking Commission approval for investments).

26 *See, e.g.*, Consumers' Research Comments at 19 (arguing that the Commission should, among other things, "require asset managers that receive blanket authorizations to conduct economic analyses for any shareholder proposals they support that are not also supported by management, retain those economic analyses and make them available to the Commission upon request").

27 *NAACP*, 425 U.S. at 670.

lack of concrete evidence of harm resulting from the Commission's existing blanket authorization policy against potential costs and harm to consumers and find that no changes to its policies are necessary or appropriate at this time.[28]

C. The Commission Should Reject Requests to Implement a Five Percent Affiliation Threshold

The District of Columbia Office of the People's Counsel, the Maryland Office of People's Counsel and the New Jersey Division of Rate Counsel (collectively, the "State Ratepayer Advocates") ask the Commission to reduce the ownership threshold for affiliation from 10 percent of a company's voting securities to five percent on the theory that doing so would be consistent with the definition of "affiliate" in Section 1262 of the Public Utility Holding Company Act of 2005 ("PUHCA 2005")[29] and definition of an "affiliate" of an exempt wholesale generator ("EWG") in Section 35.43(a)(1)(ii)(A) of the Commission's regulations.[30] This proposal makes no sense and finds no support in PUHCA 2005 or the cited Commission regulations.

The term "affiliate" is narrowly defined and has limited purposes under PUHCA 2005. As the Commission observed in Order No. 667, PUHCA 2005 is "primarily a 'books and records access' statute" that "does not give the Commission any new substantive

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[28] To the extent the Commission has lingering concerns, despite the lack of concrete evidence that institutional investors exercise control, there are existing mechanisms available to assuage those concerns instead of taking the drastic measure of eliminating blanket FPA Section 203(a)(2) authorizations. For instance, the Commission could direct its audit staff to review compliance with the conditions imposed when granting blanket authorization. In addition to verifying compliance with conditions, the Commission could also gain valuable information about how institutional investors engage (or not) with public utility management.

[29] 42 U.S.C. § 16451(1) (2018).

[30] *See* State Ratepayer Advocates Comments at 2-3 & n. 9 (citing 18 C.F.R. § 35.43(a)(1)(ii)(A) (2023)).

authorities."[31] As such, the only consequence of being deemed an "affiliate" of a holding company under PUHCA 2005 is that FERC and state regulatory agencies can access to the affiliate's books and records in certain circumstances.[32] By contrast, Section 203 of the FPA requires the Commission to determine whether transactions involving jurisdictional public utilities should be authorized as consistent with the public interest. Accordingly, the Commission noted that its "primary means of protecting customers served by jurisdictional companies that are members of holding company systems continues to be the FPA and [Natural Gas Act]."[33] There is simply no rational basis for importing the PUHCA 2005 definition of "affiliate" in the FPA setting when one recognizes the fundamentally different purposes of the two statutes.

Moreover, the PUHCA 2005 definition is not what the State Ratepayer Advocates presumably believe it to be, and use of that definition would dramatically narrow the universe of a typical entity's deemed affiliates. PUHCA 2005 and the Commission's implementing regulations define an "affiliate" of a company as "any company, 5 percent or more of the outstanding voting securities of which are owned, controlled, or held with power to vote, directly or indirectly, by such company."[34] Unlike the definition of "affiliate" in Section 35.36(a)(9) of the Commission's regulations and other common definitions of

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[31] *Repeal of the Pub. Util. Holding Co. Act of 1935 and Enactment of the Pub. Util. Holding Co. Act of 2005*, Order No. 667, 113 FERC ¶ 61,248 at P 4 (2005) ("Order No. 667"), *on reh'g*, Order No. 667-A, 115 FERC ¶ 61,096, *on reh'g*, Order No. 667-B, 116 FERC ¶ 61,073 (2006), *reh'g denied*, Order No. 667-C, 118 FERC ¶ 61,133 (2007).

[32] *See* 42 U.S.C. § 16452 (2018) (federal access to books and records); 42 U.S.C. § 16453 (state access to books and records).

[33] Order No. 667, 113 FERC ¶ 61,248 at P 5.

[34] 42 U.S.C. § 16451(1) (2018). *See also* 18 C.F.R. § 366.1 (2023) ("The term 'affiliate' of a company means any company, 5 percent or more of the outstanding voting securities of which are owned, controlled, or held with power to vote, directly or indirectly, by such company.").

the term,[35] the PUHCA 2005 definition captures only entities downstream of a given entity and excludes entities upstream of, or under common ownership with, that entity. For example, if company A owns 10 percent of the voting securities of company B and company C, all three companies would be considered affiliates of each other under the Section 35.36(a)(9) definition of "affiliate." Under the PUHCA 2005 definition, company B and company C would still be affiliates of company A. At the same time, however, company A would not be an affiliate of company B or company C, and company B and company C would not be affiliates of each other. Importing such a definition would thus exclude any number of relevant entities from the competitive analysis and would otherwise be irrational. To the extent that PUHCA 2005 definitions are appropriate, the more applicable definitions would be those for a "holding company,"[36] a "subsidiary company,"[37] and an "associate company,"[38] all of which use a 10 percent ownership threshold, and the last of which properly looks upstream, downstream and across to capture entities that control, are controlled by, and are under common control with a given entity.

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[35] *See, e.g.*, 18 C.F.R. § 385.3(a) (2023) (definition of "affiliate" for purposes of the standards of conduct for transmission providers).

[36] 42 U.S.C. § 16451(8)(A)(i) (2018) (defining a "holding company" to include "any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company").

[37] 42 U.S.C. § 16451(16)(A) (2018) (defining a "subsidiary company" of a holding company to include "any company, 10 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company").

[38] 42 U.S.C. § 16451(2) (2018) (defining an "associate company" of a company as "any company in the same holding company system with such company"); 42 U.S.C. § 16451(9) (2018) (defining a "holding company system" as "a holding company, together with its subsidiary companies").

To be sure, the State Ratepayer Advocates also point to the more fulsome definition of "affiliate" set forth in Section 35.43(a)(1)(ii) of the Commission's regulations,[39] which is applied for purposes of cross-subsidization involving an EWG, and which does use a five percent threshold.[40] But they do not even acknowledge, much less grapple with, the reason the Commission adopted this special definition for EWGs, rather than using the default definition set forth in Section 35.43(a)(1)(i) of the Commission's regulations[41] and applied to all other entities. In fact, the Commission did not select this definition, which is the definition of "affiliate" from the repealed Public Utility Company Act of 1935 ("PUHCA 1935"), on the merits but instead did so "[b]ecause FPA section 214[[42]] directs the Commission to use the definition of affiliate that appears in PUHCA 1935 with respect to certain affiliate preferences affecting rates or charges of EWGs . . . ."[43] Importantly, it later recognized that Section 214 of the FPA "does **not** require the Commission to use a five percent threshold affiliate test for EWGs for all purposes under Part II of the FPA, and in particular for purposes of analyzing market concentration and market power."[44]

In fact, the Commission has expressly rejected the use of a five percent threshold in the FPA Section 203 context. In the Energy Policy Act of 2005, Congress modified

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[39] 18 C.F.R. § 35.43(a)(1)(ii) (2023).

[40] *See* State Ratepayer Advocates Comments at 2-3 & n. 9 (citing 18 C.F.R. § 35.43(a)(1)(ii)(A) (2023)).

[41] 18 C.F.R. § 35.43(a)(1)(i) (2023).

[42] 16 U.S.C. § 824m (2018).

[43] *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 122 FERC ¶ 61,155 at P 55, *on reh'g*, Order No. 707-A, 124 FERC ¶ 61,047 (2008).

[44] *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, 124 FERC ¶ 61,213 at P 11 (2008) (emphasis in original; footnote omitted).

Section 203 of the FPA and required the Commission to promulgate its own rules for determining blanket authorizations under Section 203.[45] In so doing, the Commission reasonably found that blanket authorization to purchase less than 10 percent of outstanding voting securities "is consistent with the public interest and Congressional intent in repealing the restrictions of PUHCA 1935 and encouraging incentives for additional investment."[46] On rehearing, the Commission specifically rejected a request that the ceiling for blanket authorization under the Commission's regulations be set at five percent, finding that the 10 percent threshold "reflects a reasonable balance in determining what is consistent with the public interest under section 203, taking into account Congress' intent in EPAct 2005."[47]

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[45] *See* 16 U.S.C. §824b(a)(5) (2018) ("The Commission shall, by rule, adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions, under this section. Such rules shall identify classes of transactions, or specify criteria for transactions, that normally meet the standards established in paragraph (4). The Commission shall provide expedited review for such transactions.").

[46] *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315 at P 145 (2005), *on reh'g*, Order No. 669-A, 115 FERC ¶ 61,097 ("Order No. 669-A"), *on reh'g*, Order No. 669-B, 116 FERC ¶ 61,076 (2006).

[47] Order No. 669-A, 115 FERC ¶ 61,097 at P 102.

II. CONCLUSION

Wherefore, the Energy Trade Associations respectfully request that the Commission consider these reply comments in acting on the NOI.

Respectfully submitted,

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