UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Implementation of Amended Section 203(a)(1)(B) of the Federal Power Act	Docket No. RM19-4-000

COMMENTS OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

In the notice of proposed rulemaking (NOPR) in this docket, 83 Fed. Reg. 61,338 (Nov. 29, 2018), the Commission proposes to revise part 33 of its regulations, 18 C.F.R. part 33 (2018), relating to mergers or consolidations of jurisdictional facilities by a public utility. The revisions are intended to conform the regulations with amendments to section 203(a) of the Federal Power Act, 16 U.S.C. § 824b(a), made by Public Law No. 115-247, An Act To Amend Section 203 of the Federal Power Act (Sept. 28, 2018). While largely straightforward, the Commission's proposal could be improved as explained below.

As amended, section 203(a)(1)(B) of the Act requires a public utility to secure Commission authorization to merge or consolidate any of its jurisdictional facilities with those of another person if their value exceeds $10 million. The 2018 amendment adds this $10 million threshold, and the Commission's proposed revision of 18 C.F.R. § 33.1(a)(1)(ii) tracks the amended authorization requirement.

New section 203(a)(7) of the Act directs the Commission to adopt rules requiring a public utility to notify the Commission of a merger or consolidation of its jurisdictional facilities with those of another person if their value exceeds $1 million but Commission authorization under section 203(a)(1)(B) is not required. The Commission's proposed notification requirement, to be codified at 18 C.F.R. § 33.12(b), would be improved by

requiring the public utility to (1) identify its energy affiliates and energy subsidiaries and provide a corporate organizational chart and (2) describe the tariffs on file with the Commission relating to the jurisdictional facilities involved in the transaction. This additional information would assist the Commission and the public in monitoring these mergers or consolidations of jurisdictional facilities and their effect on competition, rates, and regulation.

INTEREST OF NRECA

The National Rural Electric Cooperative Association (NRECA) is the national service organization for America's electric cooperatives. NRECA represents the interests of the nation's more than 900 member-owned, not-for-profit rural electric utilities responsible for keeping the lights on for more than 42 million people across 47 states. America's electric cooperatives serve 12 percent of the nation's electric customers, while accounting for approximately 11 percent of all electric energy sold in the United States. NRECA's member cooperatives include 63 generation and transmission (G&T) cooperatives and 834 distribution cooperatives. Distribution cooperatives provide power directly to their end-of-the-line member-consumers. The G&Ts are owned by the distribution cooperatives they serve. The G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. NRECA members account for about five percent of national generation and, on net, generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. Both distribution and G&T cooperatives share an

obligation to serve their members by providing safe, reliable, and affordable electric service.

NRECA supports Commission policies to ensure just and reasonable rates for jurisdictional wholesale sales and transmission service and to foster competitive wholesale electricity markets. NRECA has filed comments in the major Commission rulemakings implementing the requirements of section 203 of the Federal Power Act.[1]

COMMENTS

A. Amended authorization requirement (18 C.F.R. § 33.1(a)(1)(iii))

As amended, section 203(a)(1)(B) of the Act provides that, absent Commission authorization, no public utility may

> merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of $10,000,000, by any means whatsoever.

The principal effect of the 2018 amendment is to add the $10 million threshold on transactions requiring Commission authorization. The Commission proposes to revise section 33.1(a)(1)(ii) of its regulations to track the amended statutory text. *See* NOPR, P 3. This proposed change is straightforward, and NRECA supports the proposal.

[1] *See, e.g.,* Comments of the National Rural Electric Cooperative Association, Modifications to Commission Requirements for Review of Transactions Under Section 203 of the Federal Power Act and Market-Based Rate Applications Under Section 205 of the Federal Power Act, Docket No. RM16-21-000 (filed Nov. 28, 2016); Joint Comments of American Public Power Association and National Rural Electric Cooperative Association, Analysis of Horizontal Market Power Under the Federal Power Act, Docket No. RM11-14-000 (filed May 23, 2011); Comments of American Public Power Association and National Rural Electric Cooperative Association, 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, Docket No. RM09-16-000 (filed Mar. 29, 2010).

B. New notification requirement (18 C.F.R. § 33.12)

Subparagraph (A) of new section 203(a)(7) of the Act requires the Commission to

> promulgate a rule requiring any public utility that is seeking to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with those of any other person, to notify the Commission of such transactions not later than 30 days after the date on which the transaction is consummated if—
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> (i) the facilities, or any part thereof, to be acquired are of a value in excess of $1,000,000; and
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> (ii) such public utility is not required to secure a Commission order under paragraph (1)(B).

Subparagraph (B) states that "[i]n establishing any notification requirement under subparagraph (A), the Commission shall, to the maximum extent practicable, minimize the paperwork burden resulting from the collection of information."

The Commission proposes to codify the notification requirement in a new section 33.12 in its regulations. Proposed subsection 33.12(a) tracks the statutory language and accurately describes the mergers and consolidations subject to the new notification requirement.[2]

The 2018 amendment does not prescribe the contents of the public utility's notice. The Commission's proposed subsection 33.12(b) states that "[s]uch notification shall consist of the following information":

> (1) The exact name of the public utility and its principal business address; and

[2] If the Commission adopts its proposal to codify the new notification requirement in section 33.12 of its regulations, the Commission should consider making a conforming amendment to section 33.1(a) to refer to the notification requirement. Section 33.1(a) now states that "the requirements of this part" apply to transactions requiring Commission authorization under sections 203(a)(1) and 203(a)(2) of the Act. Proposed section 33.12 would apply to transactions that do not require authorization under section 203(a)(1)(B) but instead require notification under section 203(a)(7).

> (2) A narrative description of the transaction, including the identity of all parties involved in the transaction and all jurisdictional facilities associated with or affected by the transaction, the location of such jurisdictional facilities involved in the transaction, the date on which the transaction was consummated, the consideration for the transaction, and the effect of the transaction on the ownership and control of such jurisdictional facilities.

Proposed 18 C.F.R. § 33.12(b). *See also* NOPR, P 5.

This information—the name and address of the public utility and a narrative description of the transaction—is clearly necessary for a meaningful notice of a transaction that no longer requires Commission authorization.[3] The Commission must obtain information allowing it "to monitor the merger or consolidation of facilities subject to its jurisdiction" and "to collect information about the transaction should a question arise related to the underlying facilities and the Commission's oversight under the Federal Power Act." *Id.*, P 7.

These statutory purposes would be better served, however, if the notification contained two additional sets of information. First, the public utility should list its post-transaction energy affiliates and energy subsidiaries, as is required for part 33 applications by 18 C.F.R. § 33.2(c)(2), and provide a post-transaction corporate organizational chart, as is required by 18 C.F.R. § 33.2(c)(3).[4] The Commission has repeatedly noted the increasing complexity of corporate structures, ownership, and affiliate relationships in the electric utility industry.[5] Given this complexity, the identities

[3] Amended section 203(a), together with the Commission's administrative powers under section 309 of the Act, 16 U.S.C. § 825*h*, authorize the collection of such information in the required transaction notices.

[4] To minimize the paperwork burden, the Commission could provide that a public utility would not need to provide the affiliate information and organizational chart with a transaction notice if it has provided this information in a previous notice and no update is required; it could simply refer to the prior notice.

[5] *See* Interlocking Officers and Directors; Requirements for Applicants and Holders, 83 Fed. Reg. 37,450 at P 11 (Aug. 1, 2018) (notice of proposed rulemaking) (noting "the growing complexity of corporate

of the public utility providing the notice and the parties to the transaction may not be sufficient information to enable the Commission and the public to monitor these mergers and consolidations of jurisdictional facilities. The complexity of ownership structures and affiliate relationships makes it more difficult to determine whether a transaction—alone or cumulatively with other transactions—will adversely affect competition or complicate regulation, e.g., by increasing market concentration; enabling control of essential facilities; creating partial or overlapping ownership of facilities by rivals; creating new affiliate relationships; or otherwise creating opportunities for the exercise of horizontal or vertical market power or undue discrimination.[6] The Commission rightly proposes that the narrative description must include "the effect of the transaction on the ownership and control of such jurisdictional facilities." But a description of the public utility's post-transaction energy affiliates and energy subsidiaries and a post-transaction corporate organization chart are arguably necessary to make this description complete.[7]

Second, the narrative description of the transaction would be improved by identifying the wholesale and transmission tariffs on file with the Commission that are related to the jurisdictional facilities involved in the transaction. This information would

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structures"); Data Collection for Analytics and Surveillance and Market-Based Rate Purposes, 81 Fed. Reg. 51,726 (Aug. 4, 2016) (notice of proposed rulemaking); Ownership Information in Market-Based Rate Filings, 80 Fed. Reg. 30,302, at P 6 (Dec. 24, 2015) (2015) (notice of proposed rulemaking) (noting "corporate families, structures, and ownership in the energy industry have become increasingly complex"); Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators, 80 Fed. Reg. 58,382, at P 6 (Sept. 29, 2015) (notice of proposed rulemaking). *See also Consumers Energy Co. v. International Transmission Co.*, 165 FERC ¶ 61,021, at PP 67-73 (2018) (noting reduced level of independence of transmission company due to upstream owners).

[6] *See* Joint Comments of American Public Power Association and National Rural Electric Cooperative Association at 23–25, Analysis of Horizontal Market Power Under the Federal Power Act, Docket No. RM11-14-000 (May 23, 2011) (explaining multiple ways that partial ownership structures can adversely affect competition).

[7] Indeed, the 2018 amendment requires the Commission to report to Congress in two years on the effect of the amended authorization requirement, which means the notifications over the next two years must provide the Commission with a complete picture of these transactions for which part 33 authorization applications are no longer required.

enable the Commission and the public to determine such important matters as whether the merged or consolidated facilities would be owned or controlled by a public utility with cost-based or market-based wholesale rate authority; what conditions or limitations would be in place on any market-based rate authority; what affiliate transactions would be allowed or prohibited; what tariff or tariffs would establish the rates and terms for service over jurisdictional transmission facilities; and how wholesale or transmission rates might change as a result of the transaction. Thus, this information would enable the Commission to monitor the effect of these transactions on competition, rates, and regulation—the familiar elements of the public-interest analysis under section 203.[8]

Neither the statute nor the proposed regulation prescribes the manner of notifying the Commission. In the NOPR, the Commission proposes that all public utilities would file the notifications in a single Commission docket each fiscal year, e.g., Docket No. EC19-1-000 for fiscal year 2019. *Id.*, P 8. This is a reasonable approach, at least as a starting point, although the Commission may want to revisit it after gaining some experience.[9] In any case, the notifications should be public, as the Commission proposes.

CONCLUSION

The Commission should modify and clarify its proposed rule as described above.

[8] *See* Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act, Order No. 592, 61 Fed. Reg. 68,595 (1996), *reconsid. denied*, 62 Fed. Reg. 33,341 (1997) (Merger Policy Statement); FPA Section 203 Supplemental Policy Statement, 72 Fed. Reg. 42,277 (2007), *reconsid. denied and clarified*, 122 FERC ¶ 61,157 (2008).

[9] The Commission could reduce the paperwork burden of the notification requirement and improve the monitoring function by establishing a relational database of public utilities that identifies their energy affiliates and energy subsidiaries and their wholesale and transmission tariffs on file with the Commission. Notification filings could refer to the information in the database and provide updated information as necessary.

Respectfully submitted,

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December 31, 2018