

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 TRANSMISSION ACCESS  
POLICY STUDY GROUP**

In its Notice of Proposed Rulemaking (“NOPR”),<sup>1</sup> the Commission proposes two changes to part 33 of its regulations. The NOPR explains that these changes are to bring the Commission’s regulations into conformance with “An Act to amend section 203 of the Federal Power Act”<sup>2</sup> (“Section 203 Amendment”), which was signed into law on September 28, 2018. Section 1 of Section 203 Amendment amends Federal Power Act (“FPA”) Section 203(a)(1)(B) to include a \$10 million threshold for mergers and consolidations subject to Commission review and authorization. Section 2 of the Section 203 Amendment requires the Commission to promulgate a notice requirement for mergers and consolidations valued below that \$10 million threshold but above \$1 million.

The Transmission Access Policy Study Group (“TAPS”) generally supports the proposed changes to the Commission’s regulations to incorporate the Section 203 Amendment’s \$10 million threshold. While we recognize that the NOPR’s proposed notice requirement seeks to implement the streamlining directive included in the Section 203 Amendment, its omission of any affiliation information goes too far in that direction.

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<sup>1</sup> Implementation of Amended Section 203(a)(1)(B) of the Federal Power Act, 83 Fed. Reg. 61,338 (proposed Nov. 29, 2018), 165 FERC ¶ 61,091 (2018).

<sup>2</sup> Pub. L. No. 115-247, 142 Stat. 3152 (2018).

Particularly if the Commission fails to require affiliation information in the required notice, the Commission should move forward on a relational database of market-based rate (“MBR”) information and Connected Entity Information, like the proposal pending in Data Collection for Analytics and Surveillance and Market-Based Rate Purposes, 81 Fed. Reg. 51,726 (proposed Aug. 4, 2016), FERC Stats. & Regs. ¶ 32,717 (2016) (“Data Collection NOPR”). A relational database is necessary to ensure that the limited information to be submitted under the NOPR’s propose notice requirement is sufficient for the Commission and the public to adequately understand the future impacts of these transactions.

## **I. INTEREST OF TAPS**

TAPS is an association of transmission-dependent utilities in more than thirty-five states.<sup>3</sup> Because TAPS members rely on transmission facilities owned and controlled by others, TAPS has a vital interest in the proper competitive functioning of wholesale power markets, including the prevention of the exercise of market power in wholesale capacity, energy, and ancillary markets. TAPS members have long been concerned about structural changes in the electric industries that could adversely affect competition, rates or regulation, or could expose consumers to harm from unmitigated market power. TAPS has commented on nearly all major Commission rulemakings, including those pertaining to market-based rates and mergers.

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<sup>3</sup> David Geschwind, Southern Minnesota Municipal Power Agency, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

## II. COMMUNICATIONS

Communications regarding these proceedings should be directed to:

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## III. COMMENTS

The proposed amendments to 18 C.F.R. § 33.1(a)(1)(ii) appropriately incorporate the Section 203 Amendment's \$10 million threshold.

As required by Section 2 of the Section 203 Amendment, the proposed addition of Section 33.12 to the Commission's regulations would establish a notice requirement for "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," if "(1) the facilities, or any part thereof, to be acquired are of a value in excess of \$1 million; and (2) such public utility is not required to secure an order of the Commission under section 203(a)(1)(B)." NOPR, P 4. The NOPR proposes that notice be submitted to the Commission "not later than 30 days after the date on which the transaction is consummated," which also reflects Congress's direction in Section 2 of the Section 203 Amendment. *Id.* The Section 203 Amendment does not specify what

information should be included in these notices. The NOPR proposes to require that they include (*id.* P 5):

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

This proposed notice requirement includes significantly less information than what was previously required to be submitted for these transactions, and what is still required for transactions subject to FPA Section 203 review, such as a list of all energy affiliates and pre- and post-transaction organizational charts. 18 C.F.R. § 33.2(c)(2), (3). Although the Section 203 Amendment instructs the Commission to minimize the burdens of the notice requirement, which the NOPR does, Congress required the submission of after-the-fact notice for transactions between \$1 million and \$10 million for a reason. The information included in the Section 203 Amendment's notice requirement cannot be so streamlined that it undermines the consumer protection purposes of the FPA. In addition, Section 4 of the Section 203 Amendment requires the Commission to report to Congress on the effects of the new \$10 million threshold in FPA Section 203(a)(1)(B). Because the proposed notice requirement will be the Commission's source of information for transactions that no longer require approval, the information collected through the notice must be sufficient to enable the Commission to assess, and produce a meaningful report on, the impact of the threshold change.

In light of the increasingly complex and opaque applicant corporate structures, the Commission should consider expanding the proposed notice to include affiliation information to address this gap. And doing so would be consistent with the Section 203 Amendment's streamlining directive because the revised proposed notice requirements would still omit other elements now required of Section 203 applicants.

If, however, the final rule does not expand the proposed notice to include affiliation information, a relational database,<sup>4</sup> like the proposal pending in the Data Collection NOPR, is needed to ensure that the Commission and public can evaluate future impacts of these transactions. Although TAPS identified certain concerns with the specifics of the relational database proposed in the Data Collection NOPR and cautioned against abandoning other reporting requirements during the time in which a new relational database is first rolled out, TAPS generally supports implementation of a relational database.<sup>5</sup> As described in the Data Collection NOPR, a relational database would "render information collected for [the Commission's] MBR and analytics and surveillance purposes more usable and accessible to the Commission and its staff." Data Collection NOPR, P 2.

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<sup>4</sup> The Data Collection NOPR (P 2, n.7) describes relational databases as:

a database model whereby multiple data tables relate to one another via unique identifiers. A relational database contains a table for each subject (*e.g.*, generation assets) with every row in the table representing information regarding a single variable of that subject (*e.g.*, a particular generation unit) and each column containing a particular quality of that variable (*e.g.*, a generation unit's capacity rating). Relational databases are structured to allow for easy data retrieval while avoiding inconsistencies and redundancies.

<sup>5</sup> TAPS, Comments, *Data Collection for Analytics & Surveillance & Market-Based Rate Purposes*, Docket No. RM16-17-000 (Sept. 19, 2016), eLibrary No. 20160919-5115.

Here, a properly functioning relational database is needed to allow the Commission to use the limited information required under the proposed notice rule to draw more comprehensive connections between various entities and their assets. Although in general transactions below the \$10 million threshold are likely to have minimal impacts on market power, adequate notice is important because certain transactions could raise case-specific concerns, such as serial transactions valued just under \$10 million or transactions within load pockets or involving essential facilities that could give rise to market power concerns.<sup>6</sup>

In addition, unlike sales or purchases of jurisdictional facilities, the transactions covered by the notice requirement involve mergers or consolidations and could create ongoing relationships between competitors due to post-transaction corporate structures resulting in common ownership, shared board membership, or associated contractual arrangements. This raises potential concerns that these new relationships could create opportunities for, undue influence, lessening of competition through shared or aligned interests, or improper information sharing.<sup>7</sup> Without a relational database, the information proposed to be required for such notice may not be enough to allow the Commission and the public to effectively evaluate and monitor the future impacts of the transaction.

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<sup>6</sup> Possible concerns about serial *de minimis* transactions were included in the Commission's pending Notice of Inquiry regarding revisions to the Commission's approach to identifying and assessing market power. 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, 81 Fed. Reg. 66,649, P 19 (proposed Sept. 28, 2016), FERC Stats & Regs. ¶ 35,578, P 19 (2016).

<sup>7</sup> See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §13, at 33-34 (Aug. 19, 2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

Thus, particularly if the Commission does not supplement the proposed notice to include additional affiliation information, the Commission should move forward on the pending Data Collection NOPR, in light of TAPS comments in that proceeding, and otherwise work towards developing a properly functioning relational database to ensure the overarching consumer protection purposes of the FPA are achieved.

Respectfully submitted,

*/s/ Cynthia S. Bogorad*

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Dated: December 31, 2018