I. INTRODUCTION

The Edison Electric Institute (“EEI”) submits these comments in response to a notice of proposed rulemaking (“NOPR”) in this docket by the Federal Energy Regulatory Commission (“FERC” or “the Commission”), which has invited comments by December 31, 2018.\(^1\) In the NOPR, the Commission proposes to update its 18 C.F.R. Part 33 regulations to reflect recent amendments to Federal Power Act (“FPA”) section 203.\(^2\) Specifically, the Commission proposes: (1) to recognize that its approval is required under FPA section 203(a)(1)(B) only for acquisitions of jurisdictional facilities with a value of more than $10 million; and (2) to require notice to FERC by public utilities within 30 days of an acquisition of jurisdictional facilities with a value in excess of $1 million that does not require Commission approval.\(^3\) The Commission also includes a statement in the NOPR that its approval is required if a public utility is acquiring

---


\(^{3}\) NOPR at PP 3-4.
assets that “will be subject to the Commission’s jurisdiction after the transaction is consummated,” citing Duke Power.5

EEI is the association that represents all U.S. investor-owned electric companies. EEI members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States. Safe, reliable, affordable, and clean energy powers the economy and enhances the lives of all Americans. EEI members largely are the public utilities to which FPA section 203 applies. Thus, EEI’s members are directly affected by the recent legislation and the Commission’s proposals in the NOPR, and EEI can provide a broad-based perspective on those proposals.

As discussed more fully in these comments, the proposed Part 33 regulatory text changes are appropriate. However, the Commission should clarify its notice requirement by specifying that simple electronic filings in the appropriate docket suffice without service to other filers or intervenors in those dockets. The Commission should also clarify the facilities that can trigger the approval and notice requirements.

II. BACKGROUND

On September 28, 2018, the President signed Pub. L. No. 115-247,6 which amended FPA sub-paragraph 203(a)(1)(B) to add an explicit $10 million threshold for Commission approval of public utility acquisitions and mergers. This amendment is consistent with the explicit $10 million thresholds under sections 203(a)(1)(A), (C), and (D) for Commission approval of: (1)

4 Id. at P 9.
6 Amendment Act.
public utility sales, leases, and other dispositions of some or all of their jurisdictional facilities, purchases, and other acquisitions of other public utility securities, and (2) purchases, leases, and other acquisitions of existing generating facilities “used for interstate wholesale sales and over which the Commission has jurisdiction.” As amended, sub-paragraph 203(a)(1)(B) now reads:

SEC. 203. (a)(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so–

…

(B) 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.7

In addition, the new legislation added new section 203(a)(7), to require notice by public utilities acquiring jurisdictional facilities with a value of more than $1 million, but less than or equal to the $10 million threshold for Commission approval. As amended, section 203(a)(7) reads:

(7)(A) Not later than 180 days after the date of enactment of this paragraph, the Commission shall 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 transaction not later than 30 days after the date on which the transaction is consummated if–

(i) the facilities, or any part thereof, to be acquired are of a value in excess of $1,000,000; and

(ii) such public utility is not required to secure an order of the Commission under paragraph (1)(B).

(B) In 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.8

Further, the new legislation states that “the amendment made by section 1 shall take effect 180 days after the date of enactment of this Act.”9

7 Id., sec. 1.
8 Id., sec. 2.
9 Id., sec. 3.
The Commission proposed to specify the contents of the paragraph 203(a)(7) notice by adding a new 18 C.F.R. § 33.12 as follows:

§ 33.12 Notification requirement for certain transactions

(a) 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, shall notify the Commission of such transaction not later than 30 days after the date on which the transaction is consummated 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) of the Federal Power Act.

(b) Such notification shall consist of the following information:

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 jurisdical facilities associated with or affected by the transaction, the location of such jurisdical 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 jurisdical facilities.10

III. COMMENTS

A. The Commission’s Proposed Changes to 18 C.F.R. § 33.12 Appropriately Reflect the $10 Million Threshold.

Prior to the Energy Policy Act of 2005 (“EPAct”),11 FPA section 203(a) read largely the same as it did prior to the recent legislation, except that sections 203(a)(1)(A), (C), and (D) contained a $50,000 threshold for Commission approval. Before the recent legislation, the Commission interpreted this threshold as applying to all of paragraph 203(a)(1), including sub-paragraph 203(a)(1)(B). However, when Congress raised the threshold from $50,000 to $10

10 83 Fed. Reg. 61,342.
million in sections 203(a)(1)(A), (C), and (D), the Commission determined that the increased threshold did not apply to section 203(a)(1)(B), which would require approval of acquisitions and mergers without a threshold.

This inconsistency triggered the need for utilities to make a section 203 filing, regardless whether the transaction was valued at $1 or $1 million, diverting Commission and utility resources away from more significant matters that may actually affect the public interest. As a result, EEI informally encouraged the Commission to reinstate the same threshold for section 203(a)(1)(B) as for the other sections. However, the Commission concluded that Congress had not explicitly authorized that step. The recent legislation provides that explicit authority and “[t]he Commission anticipates that the revisions, once effective, would reduce regulatory burdens.”

In the NOPR, the Commission proposes to reflect amended FPA section 203(a)(1)(B) by revising 18 C.F.R. § 33.1 to read:

§ 33.1 Applicability, definitions, and blanket authorizations.
   (a) Applicability.
      (1) The requirements of this part will apply to any public utility seeking authorization under section 203 of the Federal Power Act to:
         …
         (ii) 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 million, by any means whatsoever;”

This change is appropriate because it reflects the statutory language increasing to $10 million the threshold for Commission approval of acquisitions and mergers under section 203(a)(1)(B) recently passed by Congress. Once this change takes effect, public utilities will not

---

12 NOPR at P 11.
be required to seek authorization under FPA section 203 for mergers and consolidations of jurisdictional facilities with a value of $10 million or less. Instead, for transactions with a value in excess of $1 million but at or below $10 million, public utilities will file a simple notification as discussed in the next subsection of these comments. As the Commission has recognized, the contemplated notification “represents only a small fraction” of the information that would otherwise be required, thus facilitating the acquisition of such assets by public utilities.\textsuperscript{14} This change also will conserve Commission and staff resources while still permitting the monitoring of such acquisitions should a question arise.\textsuperscript{15}

**B. The Commission’s Proposed Addition of 18 C.F.R. § 33.12 to Address the Notification Requirement Satisfies the Legislative Mandate, With Certain Clarifications.**

In the NOPR, the Commission proposes to reflect new FPA sub-paragraph 203(a)(7), by adding a new 18 C.F.R. § 33.12 that would read:

\textbf{§ 33.12 Notification requirement for certain transactions.}

(a) 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, shall notify the Commission of such transaction not later than 30 days after the date on which the transaction is consummated 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) of the Federal Power Act.

(b) Such notification shall consist of the following information:

(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

\textsuperscript{14} NOPR at P 6.

\textsuperscript{15} Id. at P 7.
transaction was consummated, the consideration for the transaction, and the effect of the transaction on the ownership and control of such jurisdictional facilities.

The Commission’s proposal regarding the notification requirement strikes an appropriate balance and is consistent with the legislative goals of reducing the regulatory burden while still providing transparency. Keeping the content of and process for filing of the notice simple, as proposed by the Commission, is consistent with the directive in the legislation to minimize the paperwork burden resulting from the collection of information. Specifically, the Commission’s proposal to file the notice in pre-arranged dockets, is consistent with the legislation. In the NOPR preamble, the Commission proposes that “the notification filing should be filed in the first docket for section 203 filings of the fiscal year (FY). For example, all notification filings made in FY2019 would be filed in Docket No. EC19-1-000; all notification filings for FY2020 would be filed in Docket No. EC20-1-000, etc.”\textsuperscript{16} This will allow for simplified filing and tracking of such notifications.

While EEI supports the process as outlined by the Commission, additional clarifications can help further advance the objective of minimizing the burden of the notification requirement. For this reason, EEI requests that the Commission provide the following clarifications, which will ensure that the notice process is both clear and simple. First, the Commission should specify that the notices can be filed in standard word-document formats via eFiling.

Second, the Commission should specify that these filings are purely informational, and as such, among other matters: (1) the Commission will not notice these proceedings for public comment; (2) other persons are not entitled to file responsive comments; and (3) the Commission

\textsuperscript{16} Id. at P 8.
will not take any action on the filings. Without such clarifications, the inclusion of these filings may inadvertently signal that such dockets are subject to a full rulemaking process.

Third, in a similar vein, the Commission should clarify that persons are not obligated to serve copies of these informational filings under Commission Rule 2010. The Commission generally requires that a participant filing a document in a proceeding serve a copy of that document on the official service list or that proceeding and any other person required to be served under Commission rule or order or under law.\(^{17}\) The Commission’s guidelines explicitly excuse service only in rulemaking, administrative, and policy proceedings in RM, PL, and AD dockets.\(^ {18}\) These proceedings are more general in nature and informational in nature. Despite the similarity with the instant filings which will also be docketed in a general docket, Rule 2010(a) and these guidelines appear to require service of the informational filings required by the NOPR. Since these filings are informational in nature and to be submitted in a single docket for an entire calendar year, they should also be exempt from the service requirements. Accordingly, EEI requests that the Commission clarify that service is excused for these informational filings.

\section*{C. The Commission Should Clarify its Statement Relating to Jurisdictional Facilities at Paragraph 9 of the NOPR.}

In paragraph 9 of the NOPR preamble, the Commission says:

Lastly, the Commission clarifies that, except for mergers or consolidations that are valued at $10 million or less, the Commission will not change its interpretation of the transactions that are subject to the jurisdiction of the Commission under the “merge or consolidate” clause of section 203(a)(1)(B). That is, the Commission interprets the amendment by Congress to section 203(a)(1)(B) as establishing a $10 million threshold, but not removing the

\(^{17}\) 18 C.F.R. § 385.2010(a) (2018).

Commission’s jurisdiction to review transactions with a higher value that involve a public utility’s acquisition of facilities from non-public utilities if those facilities will be subject to the Commission’s jurisdiction after the transaction is consummated.\footnote{NOPR at P 9 (citing \textit{Duke Power}, 401 F.2d 930, 941).}

As noted above, FPA section 203(a)(1)(B) now applies to a merger or consolidation “by a public utility of its facilities subject to the jurisdiction of the Commission” with the facilities of any other person “that are subject to the jurisdiction of the Commission.” The language of FPA section 203(a)(1)(B), as amended, states that Commission approval is required only if the facilities being acquired by the public utility are subject to Commission jurisdiction, which is plainly read to mean that the facilities are jurisdictional before consummation of the proposed transaction. However, paragraph 9 appears to raise the question of whether Commission approval will be required if the facility becomes jurisdictional solely because the relevant facilities are acquired by a public utility from a non-public utility. The Commission should recognize that, as recently amended, the language of section 203(a)(1)(B) has materially changed from the language that preceded the recent amendment. Accordingly, the \textit{Duke Power} case cited in the NOPR does not squarely address the question raised by the amendments to section 203(a)(1)(B) and the Commission’s statement in NOPR paragraph 9. Thus, the Commission should reconsider and clarify its interpretation of the types of facilities to which the section as amended will apply. This clarification is necessary to provide regulatory certainty to the electric industry and to the parties to transactions.

IV. \textbf{CONCLUSION}

EEI appreciates the opportunity to provide these comments in support of the Commission’s proposed changes to the 18 C.F.R. Part 33 regulations, with certain clarifications,
and encourages the Commission to clarify its statement at NOPR paragraph 9 as to jurisdictional facilities. If the Commission has any questions about the comments or needs additional information, please contact the undersigned.

Respectfully submitted,

/s/ Lopa Parikh

Lopa Parikh
Senior Director, Federal Regulatory Affairs

Megan E. Vetula
Associate General Counsel,
Energy Regulation

Henri D. Bartholomot
Associate General Counsel,
Regulatory and Litigation

Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, DC 20004

Phone: (202) 508-5098
Email: lparikh@eei.org

Phone: (202) 508-5039
Email: mvetula@eei.org

December 28, 2018