

121 FERC ¶ 61,006
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Sharyland Utilities, L.P.

Docket No. EL07-93-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER DISCLAIMING
JURISDICTION

(Issued October 1, 2007)

1. In this order, the Commission grants a request by Sharyland Utilities, L.P. (Sharyland) to determine that Sharyland, the Electricity Reliability Council of Texas (ERCOT) and ERCOT Market Participants¹ that are not currently subject to the Commission's plenary jurisdiction will not become subject to Commission jurisdiction as public utilities as a result of Sharyland's ownership and operation of a transmission interconnection between ERCOT and Commission Federal de Electricidad (CFE).

I. Background

2. On August 24, 2007, Sharyland filed a petition for a declaratory order finding that Sharyland, ERCOT, and other ERCOT electric utilities and Market Participants that are not currently subject to the Commission's jurisdiction as public utilities, will not become public utilities under the Federal Power Act (FPA) as a result of a new high voltage direct current (HVDC) interconnection between ERCOT and CFE.²

¹ Market Participants are entities that participate in the ERCOT electrical market, including generators, retail electric providers, and transmission and distribution service providers.

²Sharyland Petition at 1.

3. Sharyland is seeking this ruling with respect to its proposal to own and operate a new HVDC interconnection between ERCOT and CFE (Sharyland DC Tie). It is also seeking this ruling with respect to the scheduling of commercial electric energy transactions by Market Participants over the Sharyland DC Tie.³

A. Sharyland

4. Sharyland states that it is an investor-owned, Texas-based transmission and distribution electric utility regulated by the Public Utility Commission of Texas (Texas Commission).⁴ Sharyland further states that it has no interest in or affiliation with retail electric service providers in the Texas power market, or with electric generation in Texas, and that neither it nor any of its affiliates sells electric energy at retail or wholesale in Texas.⁵ According to Sharyland, it owns and operates only transmission and distribution facilities used to deliver electric energy from generators to the entities that use the electric energy.⁶ Sharyland explains that its service territory is located adjacent to the international border with Mexico, between the Texas cities of Mission and McAllen.⁷ Sharyland further explains that it is directly interconnected with AEP Texas Central Company in ERCOT; other than the Sharyland DC Tie with CFE, Sharyland operates solely within ERCOT and has no direct interconnections with any utility outside of ERCOT.⁸

B. The Sharyland DC Tie

5. Sharyland states that the Sharyland DC Tie will, when completed, be a 138-kV transmission line that will be about one mile in length and cross the Rio Grande River (the boundary between Mexico and the United States) in Hidalgo County, near Mission, Texas, where it will interconnect with a new transmission line, about four miles in length,

³ *Id.* Sharyland states that ERCOT will not allow Market Participants to schedule commercial transactions over the Sharyland DC Tie until Sharyland obtains a ruling from the Commission that such scheduling will not cause either ERCOT or Market Participants to become public utilities under the FPA. *Id.* at 1-2, 7-8.

⁴ *Id.* at 2.

⁵ *Id.* See also Sharyland's website at <http://www.su-power.com/>

⁶ Sharyland describes itself as a "wires only" company. Petition at 2.

⁷ *Id.* at 3.

⁸ *Id.*

that CFE is constructing. Sharyland explains that the Sharyland DC Tie will operate asynchronously with CFE, and that an HVDC Converter Station will make it possible to transfer electric energy over the Sharyland DC Tie.⁹

6. Sharyland states that the Sharyland DC Tie will be the first large-scale, open-access asynchronous interconnection suitable for the purchase and sale of electric energy between ERCOT and CFE. Sharyland further states that the U.S. Department of Energy authorized the Sharyland DC Tie under Presidential Permit Order No. PP-285, issued January 21, 2005; the PUCT granted a Certificate of Convenience and Necessity to construct and operate the facility. Sharyland predicts that the new interconnection will increase reliability within the ERCOT and CFE electrical grids, allow for emergency assistance, provide opportunities for new supplies of electric energy to serve loads on both sides of the border, and promote free trade between the United States and Mexico.¹⁰

C. ERCOT

7. The transmission grid that the ERCOT independent system operator administers is located solely within the state of Texas and is not synchronously interconnected to the rest of the United States. Rather, the ERCOT grid is asynchronously interconnected through HVDC interconnections with the grid that the Southwest Power Pool, Inc. (SPP) operates. Because these interconnections were established as a result of Commission orders issued under sections 210 and 211 of the Federal Power Act (FPA),¹¹ these interconnections do not cause electric utilities or other entities that are not otherwise

⁹ *Id.* at 3. Sharyland states that the HVDC Converter Station is a 150-MW back-to-back station comprising a device to convert 138-kV alternating current (AC) power operating synchronously with the grid from which power is being exported to direct current (DC) power, and a separate device to convert the DC power to 138-kV AC power operating synchronously with the grid to which power is being imported. The HVDC Converter Station is expandable to 300 MW. *Id.* at 3.

¹⁰ *Id.* at 3-4.

¹¹ 16 U.S.C §§ 824i, 824j (2000). *See Central Power and Light Co.*, 17 FERC ¶ 61,078 (1981), *order on reh'g*, 18 FERC ¶ 61,100 (1982). *See also Central Power and Light Co.*, 40 FERC ¶ 61,077 (1987) (*Central Power and Light*).

public utilities to become subject to Commission jurisdiction as public utilities.¹² Thus, the transmission of electric energy occurring wholly within ERCOT or flowing over the HVDC ties to SPP is not subject to the Commission's jurisdiction under sections 203, 205, or 206 of the FPA.¹³

D. Interconnections Between the United States and CFE Electrical Grids

8. Sharyland states that there are several interconnections between the United States and CFE.¹⁴ These interconnections include: (a) two 230 kV interconnections between the CFE Baja California system and the Western Electricity Coordinating Council (WECC); (b) two 115 kV interconnections between the El Paso Electric Company (El Paso) and the national CFE grid; and (c) several interconnections between the national CFE grid and ERCOT, at Eagle Pass-Piedras Negras, Laredo-Nuevo Laredo, Falcon-Falcon, and Brownsville-Matamoros.¹⁵

¹² FPA section 201(b)(2), 16 U.S.C. § 824(b)(2) (2000), *amended by* the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1295(a)(1), 119 Stat. 594 (2005) provides that compliance with an order under section 210 or 211 will not cause an entity to become subject to Commission jurisdiction for any other purpose. In other words, compliance with the Commission's order will not, among other things, cause the entity to become a "public utility" subject to the Commission's plenary authority under Parts II and III of the FPA. *See American Electric Power Service Corporation*, 117 FERC ¶ 61,359, at P 16 (2006) (*American Electric Power*). *See also, Brazos Electric Power Cooperative, Inc.*, 118 FERC ¶ 61,199 at P 3 & n.4 (2007) (*Brazos*) (interconnections approved under FPA sections 210 and 211 do not make electric utilities in ERCOT public utilities under Part II of the FPA).

¹³ *See Cottonwood Energy Company, LP (Cottonwood)*, 118 FERC ¶ 61,198, at P 5, 17 (2007) (facilities located solely within ERCOT and not electrically connected to the transmission facilities of electric utilities outside of ERCOT are not within the Commission's jurisdiction under section 201 of the FPA); *American Electric Power*, 117 FERC ¶ 61,359, at P 15-17 (Commission's authority under sections 203, 205, and 206 of the FPA does not apply to electric contracts for transactions that take place solely within ERCOT); *TXU Energy Trading Co.*, 91 FERC ¶ 61,242, at 61,874 n.17 (2000) (sales of electric energy solely within ERCOT are not subject to the Commission's jurisdiction); *Destec Power Services, Inc.* 72 FERC ¶ 61,277, at 62,204-05 (1995) (same).

¹⁴ Petition at 9.

¹⁵ *Id.* at 9-10.

1. The CFE Baja California-WECC Interconnection

9. Sharyland states that it is not physically possible for electric energy generated within ERCOT and transmitted across the Sharyland DC Tie to flow into the WECC interconnection. According to Sharyland, the CFE Baja California system is synchronously interconnected with WECC and is not interconnected with the CFE national grid; therefore, electric energy cannot flow between the CFE Baja California system and the CFE national grid.¹⁶

2. Transmission of electric energy from ERCOT to CFE

10. Sharyland states that currently the only possibility for electric energy exported into CFE from ERCOT over the Sharyland DC Tie to be subsequently transmitted to another state involves one of the two interconnections between CFE and El Paso. Sharyland explains that El Paso and CFE have entered into electric interchange agreements that allow for the exchange of energy, emergency assistance, and blackstart service over the two interconnections between the two systems. One line runs from CFE's Riverena substation to El Paso's Ascarate substation in El Paso, Texas (Ascarate Interconnection). The other line runs from CFE's Riverena substation to El Paso's Diablo substation in Sunland Park, New Mexico (Diablo Interconnection).¹⁷ Sharyland states that, because the El Paso and CFE systems are not synchronous, service between CFE and El Paso can only occur by disconnecting the El Paso load that is receiving service from CFE from the rest of the El Paso system for the duration of the service from CFE. Thus, during the service, the El Paso load receiving service from CFE would be electrically isolated from the rest of El Paso's system and from WECC.

11. Sharyland states that, if CFE were providing service to El Paso over the Ascarate Interconnection, electric energy could not flow into a state other than Texas.¹⁸ However, according to Sharyland, if CFE were providing service to El Paso over the Diablo Interconnection, electric energy could flow into that portion of New Mexico in which El Paso's load is located.¹⁹

¹⁶ *Id.* at 10.

¹⁷ Petition at 10-11.

¹⁸ The Ascarate Interconnection connects CFE's transmission system with El Paso's Ascarate substation in El Paso, Texas.

¹⁹ *Id.* at 11.

3. Transmission of electric energy from CFE to ERCOT

12. Sharyland explains that, while it is physically possible for electric energy generated in ERCOT and exported to CFE to flow back into ERCOT through ERCOT-CFE interconnections, such a flow of energy would not enter another state in the United States except through the North and East HVDC interconnections. Sharyland contends that, for the purposes under consideration here, the electric energy flowing over those interconnections would not subject ERCOT, or the entities within ERCOT selling and transmitting such electric energy, to the Commission's jurisdiction as public utilities.²⁰

13. Sharyland states that it is currently not possible for electric energy transmitted from another state into CFE to subsequently flow into ERCOT. Sharyland explains that, although El Paso sells electric energy to CFE over the Ascarate and Diablo Interconnections, for service to occur, CFE must first disconnect the load that El Paso will be serving from the rest of the CFE grid, and then re-connect the load once El Paso has completed providing service. Therefore, any electric energy that El Paso transmits to CFE over the two interconnections cannot move from CFE to ERCOT.²¹

II. Notice of filing and responsive pleadings

14. Notice of Sharyland's filing was published in the Federal Register, 72 Fed. Reg. 51,222 (2007), with interventions and protests due on or before September, 10, 2007. CenterPoint Energy Houston Electric, LLC (CenterPoint) filed a timely motion to intervene.

²⁰ *Id.* at 5-10.

²¹ *Id.* at 12. Sharyland references Presidential Permit Order No. PP-92 at 2 (Diablo Interconnection) (1992). That order states that, whenever El Paso exchanges electric energy with Mexico, the two systems can only remain in synchrony either by separating CFE's Ciudad Juarez electrical system from CFE's national electric grid or by separating El Paso's electric system from the Western Systems Coordinating Council system. The order notes that this arrangement causes the exporting system to "see" the importing system as a radial load. The order further notes that, when there is no energy scheduled for delivery across the U.S.-Mexican border, El Paso maintains its line-disconnect switches open, thus electrically disconnecting the El Paso and Ciudad Juarez electrical systems. *See also* Presidential Permit Order No. PP-48-3 at 3 (Ascarate Interconnection) (1990).

III. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), CenterPoint's timely unopposed motion to intervene serves to make it a party to this proceeding.

B. Statutory Criteria

16. Section 201(e) of the FPA defines a public utility as any person who owns or operates facilities used for the transmission of electric energy in interstate commerce or for the sale of electric energy at wholesale in interstate commerce, other than facilities subject to the jurisdiction of the Commission solely by reason of certain enumerated sections of the FPA, including sections 210, 211, and 212.²² Section 201(c) of the FPA states that, for purposes of that section, "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof: but only insofar as such transmission takes place within the United States."²³ Section 202(f) states that "[t]he ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is: (a) generated within a State and transmitted from that State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this part."²⁴

C. Commission Determination

17. There is no clear precedent concerning whether electric energy generated in ERCOT and transmitted to CFE, or flowing in the other direction, gives rise to Commission jurisdiction solely because of the potential commingling of electric energy from one state in the United States with electric energy on the CFE system and CFE's subsequent transmission of electric energy into another state in the United States. The

²² 16 U.S.C. § 824(b)(1) (2006); *see Cottonwood*, 118 FERC ¶ 61,198 at P 14 & n.5 (2007); *Jersey Central Power & Light Company*, 319 U.S. 61 (1943); *Connecticut Light & Power Company v. FPC*, 324 U.S. 515 (1945); *FPC v. Florida Power & Light Company*, 404 U.S. 453 (1972).

²³ 16 U.S.C. § 824(c) (2006).

²⁴ 16 U.S.C. § 824a(f) (2006).

definitions and statutory provisions in the FPA regarding interstate commerce and the transmission of electric energy across international boundaries, quoted above, do not clearly address this situation.

18. Accordingly, the Commission believes that it is reasonable to base our decision on whether the use of an ERCOT-CFE intertie causes an entity to become a public utility under the FPA on an examination of the specific circumstances surrounding the use of the interconnection. In this case we have taken into account: (a) the nature of the transactions that will occur over the Sharyland-CFE interconnection; (b) a recognition that Congress has made special exceptions for ERCOT utilities so that, among other things, Commission orders under sections 210 and 211 of the FPA do not make an ERCOT entity a public utility subject to the Commission's general jurisdiction; and (c) the scope of interstate transactions that the Commission has permitted in the previous section 210 and 211 orders directing interconnection and transmission, involving ERCOT facilities.

19. Regarding the nature of the transactions, the Sharyland DC Tie will facilitate the interchange of electric energy between ERCOT and CFE to increase reliability, allow for emergency assistance, and provide new supply opportunities. The transactions will allow ERCOT and CFE to support each other's electrical system and encourage more commercial transactions between the United States and Mexico. We note that, absent a Commission order disclaiming jurisdiction, neither Sharyland nor the Market Participants will transact across the Sharyland DC Tie.²⁵ This would impede trade with Mexico and would make it more difficult for the two countries to support the reliability of each other's electrical systems.

20. Turning to the actual power flows, the only situation in which electric energy could flow across the Sharyland DC Tie from ERCOT to CFE and then from CFE to a state other than Texas is when El Paso imports electric energy from CFE over the Diablo Interconnection. Sharyland has represented that such flows of electric energy from CFE to El Paso have not occurred on a planned or frequent basis; CFE has not exported any electric energy to El Paso since 1995.²⁶ To effect the transfer of electric energy from CFE to El Paso, El Paso must connect a portion of its system to the CFE grid; for the duration of the service, El Paso must, at the same time, disconnect the portion of its system receiving service from the rest of its system. So, even if such flows of electric energy do occur in the future, the electric energy could only flow to that portion of El

²⁵ Petition at 17.

²⁶ Id.

Paso's electrical system that CFE serves. Any such imported electric energy could not flow into the rest of El Paso's system or into the Western Interconnection.²⁷

21. Further, there is no basis on which to assert jurisdiction over flows of electric energy from CFE into ERCOT. The only two interconnections that are capable of transmitting electric energy from a state other than Texas to the CFE national grid are El Paso's Diablo and Ascarate Interconnections. However, since El Paso's electrical system and the CFE transmission grid operate asynchronously, CFE must disconnect the portion of its grid receiving service from El Paso from the rest of the CFE transmission grid for the duration of the service.²⁸ There is, therefore, no physical possibility of electric energy flowing from a state other than Texas into CFE and then flowing across the Sharyland DC Tie into Texas.

22. With respect to the possibility of any electric energy flowing into ERCOT from CFE across the Sharyland DC Tie and subsequently flowing into SPP, this would not raise jurisdictional concerns because such energy could reach other states only over the HVDC ties, which we directed to be established pursuant to sections 210 and 211 of the FPA. As discussed above, the transmission of electric energy across the HVDC ties would not subject Sharyland, ERCOT, or the Market Participants to Commission jurisdiction as public utilities.²⁹

23. Based on the specific facts presented, we will grant Sharyland's petition for declaratory order. Although, as a technical matter, parties may use the line to transmit electric energy generated in Texas that is eventually consumed in another state in the United States, and electric energy will at times flow from one state across an international boundary and will thereafter flow into another state in the United States, this will be solely as a result of the commingling of electric energy generated in the United States with electric energy on the CFE transmission grid and will occur on an unplanned and infrequent basis. There will be no contractual arrangements between utilities in more than one state in the United States involving the use of the line. And, to the extent that any commingled electric energy flows into ERCOT, it will flow into the rest of the United States only over the HVDC interties. As noted above, the transmission of electric energy over the HVDC interties does not cause an entity to become a public utility under the FPA.

²⁷ *Id.*

²⁸ *Id.* at 18.

²⁹ See *Brazos*, 118 FERC ¶ 61,199 at P 2, 3 & nn. 3&4; *Central Power & Light*, 40 FERC ¶ 61,077 at 61,221-23.

24. We find that, based on the facts and circumstances represented in Sharyland's pleading, the described interconnection will not result in Sharyland becoming a public utility under the FPA and will not affect the current jurisdictional status of ERCOT, or ERCOT electric utilities and Market Participants that are not currently public utilities. Therefore, with the exception of our jurisdiction under sections 210, 211, and 212 of the FPA, our reliability jurisdiction under section 215 of the FPA, and our authority under any other FPA provisions that provide for limited jurisdiction over Sharyland and/or its facilities, the Commission disclaims jurisdiction over: (a) Sharyland; (b) the Sharyland DC Tie; (c) ERCOT; and (d) other ERCOT electric utilities and Market Participants that are not currently public utilities.

25. Our determination is based on all of the circumstances before us here, including the current configuration and operation of Sharyland's and CFE's facilities.³⁰ Should the configuration or operation change, or should Sharyland own or operate additional facilities that interconnect with CFE or with another State, our determination of lack of jurisdiction may no longer apply. Accordingly, should Sharyland, ERCOT, or other utilities and Market Participants who are not currently public utilities seek assurance that they will retain their non-public utility status under the FPA, they may obtain a jurisdictional determination from the Commission.

The Commission orders:

The petition for declaratory order is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

³⁰ While Sharyland will not be a public utility for purposes of Part II of the FPA, Sharyland and its facilities are subject to the Commission's jurisdiction for certain purposes under various provisions of the FPA, including the Commission's reliability jurisdiction under section 215 of the FPA. 16 U.S.C. § 824o (West Supp. 2006).