

130 FERC 61,205  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Tres Amigas LLC

Docket No. EL10-22-000

ORDER ON PETITION FOR DISCLAIMER OF JURISDICTION

(Issued March 18, 2010)

1. On December 8, 2009, Tres Amigas LLC (Petitioner) filed a petition requesting that the Commission issue a declaratory order disclaiming jurisdiction over prospective transmission facilities that would interconnect the Electric Reliability Council of Texas (ERCOT) grid with the proposed Tres Amigas Superstation (Project). While the Commission finds that Petitioner has not proffered information warranting such a blanket disclaimer, as discussed below, the Commission notes that other procedural mechanisms are available to Petitioner to proceed with the Project without conferring Commission jurisdiction over ERCOT.

**I. Background**

2. Petitioner proposes to construct the Project, a three-way alternating current (AC)/direct current (DC) transmission interconnection station that would interconnect the Eastern Interconnection, ERCOT, and the Western Electricity Coordinating Council (WECC), in Clovis, New Mexico. As proposed, the Project will consist of three interconnection points, or terminals,<sup>1</sup> that will be connected by approximately two miles of underground DC transmission cable. Each terminal will consist of an AC/DC voltage source converter, which will convert AC electricity from the connected external grid, such as WECC, to DC electricity, which would then flow to another terminal, and then be converted back to AC electricity to flow onto another grid, such as the Eastern Interconnection. Petitioner states that this system will operate as an approved separate

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<sup>1</sup> Each terminal will be equipped with a battery system, which will be used to supply energy in the form of ancillary services and provide firming energy services to others.

Balancing Authority Area and will be electrically equivalent to its own interconnection because the DC electricity within the Project will not be synchronized with any of the three existing AC interconnections.

3. Petitioner contends that construction and operation of the Project will advance the public interest, primarily by enhancing opportunities to sell renewable wind, solar, and geothermal power, which would in turn encourage development of these renewable resources and related transmission. Moreover, Petitioner asserts that the Project will improve electric system reliability in the area by connecting the three asynchronous grids and providing back-up power and voltage source converter technology that will provide reactive power.

4. Regarding the interconnection between ERCOT and the Project, Petitioner states that numerous parties have approached it to discuss interconnecting their transmission facilities and renewable generation facilities to the Project. Petitioner notes that the Public Utility Commission of Texas (Texas Commission) has identified Competitive Renewable Energy Zones (CREZs) that are considered optimal for wind generation and provided for construction of Extra High Voltage (EHV) transmission facilities between the CREZs and the ERCOT grid. Petitioner states that interconnection with the CREZ transmission system will enhance the value of the new transmission in ERCOT, including the connecting wind generation. Petitioner also states that transmission and renewable generation developers have expressed the necessity for a Commission order disclaiming jurisdiction over ERCOT, as well as any transactions and facilities operating in ERCOT and any AC transmission lines from ERCOT to the Project, if the prospective transmission lines are constructed.

5. Petitioner requests that the Commission issue an order finding that any transmission owner that constructs transmission facilities interconnecting ERCOT to the Project will not be subject to Commission jurisdiction as a public utility under the Federal Power Act (FPA) by virtue of such interconnection, that transmission services over the AC lines from ERCOT to the Project and synchronized with ERCOT will not be subject to Commission jurisdiction, and that establishing a new AC to DC interconnection between ERCOT and the Project will not change the jurisdictional status of any other ERCOT utilities or ERCOT transactions.<sup>2</sup> Petitioner contends that such relief was requested and granted in several petitions for disclaimer of jurisdiction filed by entities operating in ERCOT.<sup>3</sup> Petitioner states that its requested relief is essential for the Project

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<sup>2</sup> Tres Amigas Petition at 1.

<sup>3</sup> *Id.* at 1 n.1 (citing *Cottonwood Energy Co., LP*, 118 FERC ¶ 61,198 (2007) (*Cottonwood Energy*); *Sharyland Utilities, LP*, 121 FERC ¶ 61,006 (2007) (*Sharyland*); *Cross Texas Transmission, LLC*, 129 FERC ¶ 61,106 (2009) (*Cross Texas*)).

to move forward because, as noted above, the ERCOT parties with whom Petitioner has discussed interconnecting with the Project have made clear that they will not obtain approvals in Texas to build the interconnecting transmission lines to the Project without this jurisdictional disclaimer,<sup>4</sup> and that, without an ERCOT interconnection, the benefits of the Project will be lost. Petitioner requests that the Commission grant its requested relief on any one of three alternative grounds.

6. Petitioner contends that the Commission has historically recognized the jurisdictional separation between ERCOT and the interstate grid and should continue to do so.<sup>5</sup> Specifically, Petitioner requests that the Commission should rule that the jurisdictional status quo will be maintained as long as ERCOT operates asynchronously with the two interstate grids. In support, Petitioner notes that the Supreme Court found in *Federal Power Commission v. Florida Power & Light Co.* that the Commission had jurisdiction over an intrastate utility due to the “commingling” of interstate electricity in a bus.<sup>6</sup> Petitioner states that the Court based its holding on the factual question of whether electricity produced in one state “commingles” with electricity in interstate commerce. Petitioner distinguishes *FP&L* from the instant situation on the basis that here the voltage source converter technology prevents the electricity from commingling between the asynchronous grids.<sup>7</sup> Petitioner further cites the Commission’s decision in *Central Power & Light Company*<sup>8</sup> as supporting the proposition that the Commission has avoided the factual commingling question by issuing orders under sections 210 and 211,<sup>9</sup> and argues that, in fact, the Commission has specifically declined to decide whether Commission jurisdiction would necessarily attach in the absence of an order under

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<sup>4</sup> Although Petitioner does not identify the parties with whom it has discussed interconnecting with the Project in the Petition, it does provide additional information in its companion filing related to negotiated rate authority. In the application, Petitioner provides a copy of a letter from Sharyland Utilities expressing interest in connecting to the Project, and it states that other ERCOT transmission developers and wind developers in Texas have also expressed interest in participating in the Project. *See Tres Amigas LLC*, Application, ER10-396-000, at 13-14 (filed December 8, 2009).

<sup>5</sup> Petition at 8-9.

<sup>6</sup> *Id.* at 9-11 (citing *Federal Power Comm’n v. Florida Power & Light Co.*, 404 U.S. 453 (1972) (*FP&L*)).

<sup>7</sup> *Id.* at 9-11 and citing Affidavit of Phillip G. Harris (Attachment B).

<sup>8</sup> *Id.* at 11-13 (citing *Central Power & Light Co.*, 17 FERC ¶ 61,078 (1981)).

<sup>9</sup> 16 USC § 824i; 16 USC § 824j (2006).

section 210 or 211.<sup>10</sup> According to Petitioner, the Commission has continued to disclaim jurisdiction over ERCOT by allowing interconnections through orders under sections 210 and 211, and thus avoided the question of whether the interconnection of non-synchronized grids via AC/DC conversion would result in “commingling” as discussed by the Supreme Court in *FP&L*, and would therefore put the ERCOT grid in interstate commerce.<sup>11</sup> Petitioner further cites recent decisions in which the Commission found that the use of “disconnect” switches that allowed a generator to connect to either ERCOT or the Eastern Interconnection, but that would not allow the commingling of energy between the two grids, did not confer jurisdiction.<sup>12</sup> Petitioner also cites *Sharyland* for the proposition that the Supreme Court’s “commingling” test relates to the nature of a scheduled transaction rather than physical electricity flows, noting that the Commission relied on the fact that energy flowing from Texas through Mexico to another state was unlikely and would be unplanned.<sup>13</sup>

7. Expanding on this background, Petitioner argues that the Commission has provided a “fairly straightforward route for parties proposing to interconnect ERCOT and the interstate grid via an AC/DC tie without affecting the jurisdictional status of ERCOT entities.” Specifically, parties may apply for an interconnection order under section 210 and a wheeling order under section 211.<sup>14</sup> However, Petitioner contends that this route is not available because, under section 210(a)(1)(A), only an “electric utility” can apply for the Commission to direct the interconnection of the transmission facilities of any “electric utility” with those of the applicant.<sup>15</sup> Petitioner states that “the entities located in Texas who propose to build transmission lines to interconnect the ERCOT grid with [the Project] apparently cannot be electric utilities, because Texas law expressly prohibits a

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<sup>10</sup> Petition at 11-13 (citing *Central Power & Light Co.*, 40 FERC ¶ 61,077, at 61,223 (1987)).

<sup>11</sup> *Id.* at 13 (citing *Brazos Electric Power Coop., Inc.*, 118 FERC ¶ 61,199, at P 12 (2007) (*Brazos*); *Kiowa Power Partners, LLC*, 99 FERC ¶ 61,251, at P 9 (2002) (*Kiowa*)).

<sup>12</sup> *Id.* at 14 (citing *Cottonwood Energy*, 118 FERC ¶ 61,198; *Cross Texas*, 129 FERC ¶ 61,106).

<sup>13</sup> 121 FERC ¶ 61,006 at P 23.

<sup>14</sup> Petition at 15.

<sup>15</sup> An electric utility is defined by section 3(22) of the FPA as a “person ... that sells electric energy.” 16 USC § 796(22). Petitioner contends that it will be an electric utility because it intends to operate battery storage facilities at the Project, which will be used to supply energy in the form of ancillary services, as well as provide firming energy services to others.

transmission utility from selling electric energy.”<sup>16</sup> According to Petitioner, because Texas has chosen to unbundle its electric services, the “straightforward route” used by the Commission in the past to approve interconnections between ERCOT and the interstate grid will only be available in limited circumstances.<sup>17</sup>

8. For these reasons, Petitioner asserts that the Commission should issue an order preserving the jurisdictional status quo, consistent with the Supreme Court’s reasoning in *FP&L*, and “do away with the need to address this jurisdictional issue every time a new party wants to build an AC/DC interconnection” between ERCOT and interstate grids subject to the Commission’s jurisdiction.<sup>18</sup> Petitioner argues that such connections have become “a settled practice,” and so should be allowed without additional applications. In support of this argument, Petitioner contends that Congress has amended the FPA several times since ERCOT was established and has accepted that ERCOT is interconnected with other grids but not subject to the Commission’s jurisdiction. Moreover, Petitioner contends that the Commission could find that, even where there are interconnections among the grids, there is no “commingling” because the three grids operate asynchronously and electric energy must be subject to an AC/DC conversion process to flow between the interconnections; thus, electric energy flowing in interstate commerce would not commingle with energy sourced in ERCOT. Also, Petitioner argues that the FPA characterizes “interstate commerce” in terms of transactions, so it would be redundant for the Commission to continue to disclaim jurisdiction over transactions that take place wholly within ERCOT. Petitioner states that, by granting its requested relief, the Commission would not be altering its jurisdiction, but would affirm the existing jurisdictional status of ERCOT where a new AC/DC interconnection between ERCOT and the interstate grid is proposed. Petitioner further states that, by granting its requested relief, the Commission would uphold settled expectations and “overcome an unintended statutory problem created by changes in public utility law in Texas.”<sup>19</sup>

9. In an alternative, but related, argument, Petitioner contends that the Commission could preserve the jurisdictional status quo because of the Project’s unique design and operational features. Petitioner states that any transmission owner that interconnects with the Project from ERCOT will own facilities only on the AC side of the AC/DC terminal at the Project and that any electric energy that it transmits will be synchronized only with the ERCOT grid. Moreover, the Project will be a NERC-approved Balancing Authority Area and will not be a grid in the traditional sense. According to Petitioner, the Project’s

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<sup>16</sup> Petition at 16 (citing Tex. Util. Code Ann. § 39.105 (Vernon 2007)).

<sup>17</sup> *Id.* at 17 (citing to *Brazos*, 118 FERC ¶ 61,199).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 22-23.

voltage source converters prevent commingling of AC power and in fact any commingling would be technically disruptive to the entire grid. Finally, Petitioner contends that the benefits of the project provide a sufficient basis to preserve the jurisdictional status quo.<sup>20</sup>

10. In another alternative argument, Petitioner states that “because an order under section 210 is not obtainable,” for the reasons discussed above, the Commission should disclaim jurisdiction if an entity obtains an order under section 211 directing an ERCOT interconnecting party to transmit power to the Project.<sup>21</sup> Petitioner argues that a section 211 order without a complementary section 210 order is enough to allow interconnection and trigger the jurisdictional bar under section 201(b)(2). First, Petitioner interprets section 201(b)(2) to mean that compliance with any order of the Commission under the provisions of either sections 210 or 211 will be sufficient to keep an entity outside of Commission jurisdiction, indicating that an entity does not need an order under both sections 210 and 211.<sup>22</sup> Moreover, Petitioner contends that, because no ERCOT party will interconnect with the transmission line interconnecting with the Project without an order under section 211 that triggers a disclaimer of jurisdiction, an order under section 210 would be superfluous.<sup>23</sup> Petitioner contends that this reasoning comports with that in earlier Commission decisions, in which entities voluntarily submitted applications for orders under sections 210 and 211, because they would not interconnect and wheel over the AC/DC interconnections without the jurisdictional protection afforded by section 201(b)(2) of the FPA.

11. Petitioner further states that, “in order for section 211 to apply, the Commission would have to find that the ERCOT interconnecting entity would be operating transmission facilities in interstate commerce after it interconnects with the [Project].”<sup>24</sup> Petitioner states that the Commission should find that the Project is eligible as an electric utility to apply for an order under section 211 that would require an ERCOT interconnecting party to wheel power over its interconnecting transmission line since that

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<sup>20</sup> *Id.* at 29-31.

<sup>21</sup> *Id.* at 23.

<sup>22</sup> *Id.* at 24-25.

<sup>23</sup> *Id.* at 25.

<sup>24</sup> *Id.* at 24 (citing *Brazos*, 118 FERC ¶ 61,199 at P 30; *Sharyland*, 121 FERC ¶ 61,006 at P 20-22; *TexMex Energy, L.L.C.*, 124 FERC ¶ 61,129, at P 12-13 (2008)).

party would be a transmitting utility under the FPA.<sup>25</sup> Petitioner argues that any transmission interconnecting the Project to ERCOT will: (1) meet the section 211 requirement of being in the public interest; (2) not impair reliability (relying on certain assumptions); and (3) meet the rates requirements under section 212, assuming the Texas Commission has jurisdiction over the applicant.<sup>26</sup> Petitioner requests that the Commission find that, if Petitioner submits an application under section 211 that meets these criteria, Petitioner “would be entitled to receive a favorable section 211 order, thereby triggering a jurisdictional disclaimer under section 201(b)(2).”<sup>27</sup>

## **II. Notice of Filing and Responsive Comments**

12. Notice of Petitioner’s filing was published in the *Federal Register*, 74 Fed. Reg. 66,635 (2009), with interventions and protests due on or before December 29, 2009. On December 18, 2009, the Electric Power Supply Association (EPSA) filed a motion for leave to intervene and for a two-week extension of the comment date to January 12, 2009. On December 22, 2009, Petitioner filed an answer to EPSA’s Petition. On December 22, 2009, the Commission granted the extension for comments to January 12, 2009.

13. The following parties filed timely motions to intervene: Bonneville Power Administration; Shell Energy North America (U.S.), L.P.; Texas-New Mexico Power Company; ERCOT; Texas Industrial Energy Consumers (Industrial Consumers); Occidental Chemical Corporation, Occidental Permian Ltd., Occidental Power Marketing L.P. (Occidental); Oncor Electric Delivery Company (Oncor); South Texas Electric Cooperative; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; Southern California Edison Company; New Mexico Cooperatives; Iberdrola Renewables, Inc.; Pattern Transmission LP; National Rural Electric Cooperative Association; PSEG Energy Resources & Trade LLC, PSEG Power LLC, Public Service Electric and Gas Company; Arkansas Electric Cooperative Corporation; Public Service Company of New Mexico; Scandia Wind Southwest, LLC; Xcel Energy

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<sup>25</sup> We note that, in the Commission’s order on Tres Amigas’ Application for Authorization to Sell Transmission Services at Negotiated Rates, in Docket No. ER10-396-000, issued concurrently with this order, we find that, to sell power, Tres Amigas must make an additional section 205 filing seeking authorization and explaining its proposed rates, terms, and conditions for doing so. *Tres Amigas LLC*, 130 FERC ¶ 61,207, at P 46 (2010). Thus, Petitioner will not be considered an “electric utility” until it receives approval of that subsequent section 205 filing.

<sup>26</sup> *Id.* at 27-29.

<sup>27</sup> *Id.* at 27.

Services Inc.; Golden Spread Electric Cooperative, Inc.; and CenterPoint Energy Houston Electric, LLC (CenterPoint). The Texas Commission filed a notice of intervention.

14. On January 20, 2010, Southwest Power Pool, Inc. (SPP) filed an untimely motion to intervene. On February 3, the Texas Office of the Public Utility Counsel (Texas Counsel) filed an untimely motion to intervene.

15. The following parties filed general comments, outlining the benefits of the Project: U.S. Representative Randy Neugebauer; New Mexico Governor Bill Richardson; New Mexico State Senator Clinton Harden; New Mexico State Representative Anna Crook; Tubin International, Inc.; Greater Sedan Area Energy Resources, LLC; Blackline Energy; Hereford Economic Development Corp. and City of Hereford, TX; Fort Sumner Community Development Corporation; Yeso Renewable Energy Association LLC; Coalition of Renewable Energy Landowner Associations, Inc.; Wave Wind LLC; Wilson & Company, Inc., Engineers & Architects; Class 4 Winds, Inc.; Tri Global Energy, LLC; Eastern Plains Council of Governments; Forrest/Ragland Energy Association, LLC; Curry County, Manager Lance A. Pyle; Greater Tucumari Economic Development Corporation; City of Tucumari, New Mexico; Eastern New Mexico Economic Development Alliance; Mr. Tom M. Phelps; New Mexico Rural Alliance, Mr. Gene Hendrick; New Mexico Rural Alliance, Curry County Commissioner Caleb Chandler; Clovis Industrial Development Corporation, Charles Lee Malloy; Frio Ridge Energy Development Association, LLC, Paul Stout; Ima Wind Energy Association; Dr. John Neibling; New Mexico Renewable Energy Transmission Authority; Lakeview Wind Farms, LLC; Cottonwood Farms, LLC; Crosby County Wind Farm, LLC; Big Five Renewable Energy Project, LLC; Farwell Wind Farm, LLC; Eastern New Mexico Energy, LLC; and Field Community Wind Farm, LLC. Additional parties filed comments or protests on the specifics of the Petition for disclaimer of jurisdiction, as discussed below.

### **Texas Commission**

16. The Texas Commission states that application of sections 210 and 211 of the FPA will require more information about the transmission lines from ERCOT that would connect to the Project and that the Petition does not clearly explain how such interconnections would avoid impairing the Texas Commission's jurisdiction over ERCOT transmission. The Texas Commission states that ERCOT, subject only to regulation by the Texas Commission, has served as a laboratory for energy policy, resulting in a competitive wholesale and retail market. The Texas Commission believes that the Commission may need more legal and factual information to issue the declaration of disclaimer requested by Petitioner, and notes that as Texas transitioned from regulated to competitive wholesale and retail sales inside ERCOT, many electric companies restructured. As a result, separate retail electric providers, power-generation companies, and transmission-and-distribution companies were created. The Texas Commission further states that:

In some cases, companies may continue to own transmission-and-distribution utilities, a retail electric provider, and a power-generation company. But municipally owned utilities and electric cooperatives were merely allowed to unbundle, and to date, none have chosen to do so. Companies that operate as transmission-and-distribution utilities in ERCOT appear not to be electric utilities under the FPA. ... A number of entities in ERCOT qualify as electric utilities under the FPA, however.<sup>28</sup>

17. The Texas Commission also cites *Brazos* and *Kiowa*, stating that those decisions suggest that entities exist or may be created in ERCOT that would allow use of sections 210 and 211 under certain factual situations to build interconnections with the Project that will not remove the Texas Commission's jurisdiction over wholesale transmission and sales within ERCOT. However, the Texas Commission reiterates that additional information must be provided about "what or where those connections [with the Project] will be or who will construct them," especially because the Commission will need such information to consider how sections 210 and 211 apply to interconnection between the Project and ERCOT.<sup>29</sup>

### **Industrial Consumers**

18. Industrial Consumers state that the Commission should carefully consider the Petition to avoid issuance of an order that could disrupt the current regulatory scheme. Industrial Consumers also request that the Commission confirm that any transmission line in ERCOT that connects to the Project is subject to the Texas Commission's licensing requirements. Industrial Consumers state that Petitioner has failed to present sufficient facts to support the disclaimer of Commission jurisdiction, and that the Commission should establish procedures to develop facts and evidence necessary to determine whether Petitioner's project would upset the jurisdictional relationship between the Commission and ERCOT.<sup>30</sup> Industrial Customers note that Petitioner states that its commingling argument is fact-based, but Petitioner does not identify the type and nature of the interconnecting AC line that would cross from Texas to New Mexico. Industrial Consumers point out that, "to the extent this ERCOT line would cross out of Texas and into New Mexico, it would raise additional interstate commerce issues."<sup>31</sup>

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<sup>28</sup> Texas Commission Comments at 8.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> Industrial Consumers Protest at 2.

<sup>31</sup> *Id.* at 4.

Industrial Consumers further state that Petitioner's arguments regarding section 211 rely on many assumptions, and it would be difficult to analyze whether an application under section 211 would be in the public interest in the absence of more facts. Further, Industrial Customers assert that Petitioner's claim that "unique facts" warrant its requested relief should be closely examined, and the witnesses supporting those "unique facts" should be subject to discovery and cross-examination. Industrial Customers note that their member companies have made substantial investments in Texas based on the current regulatory and market framework, and that the Commission should carefully consider the Petition and set it for hearing.<sup>32</sup>

### **CenterPoint**

19. CenterPoint states that it does not oppose Petitioner's proposed project, but argues that the Petition does not provide adequate support for a finding that Petitioner's proposed interconnection with ERCOT will not have any impact on the jurisdictional status of ERCOT or CenterPoint.<sup>33</sup> CenterPoint states that Petitioner's argument that Commission jurisdiction will attach to power transactions sourced from ERCOT but not to interconnecting utilities and facilities transmitting that power to the Project appear to conflict with the FPA and is not one that has been recognized by the Commission in previous cases.<sup>34</sup> CenterPoint notes that section 201(b)(1) provides that Commission jurisdiction attaches to facilities used for transmission in interstate commerce, and states that Petitioner does not explain how the conversion process will avoid "commingling" or how transmitting the power to another state does not result in ERCOT power reaching a state other than Texas.<sup>35</sup>

20. CenterPoint notes that the Commission has granted petitions for disclaimer of jurisdiction over transmitting utilities within ERCOT that transmit power that is either sourced or sunk in a state outside ERCOT, but only after directing interconnection under section 210 or transmission under section 211, and that Petitioner does not seek to rely on such an order.<sup>36</sup> CenterPoint further questions whether Petitioner's argument that an order under section 211 would be sufficient to disclaim jurisdiction in the absence of an order under section 210. Such a decision would be a departure from precedent, which CenterPoint argues should not be made in the absence of sound legal reasoning. Finally,

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<sup>32</sup> *Id.* at 7.

<sup>33</sup> CenterPoint Comments at 1.

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.* at 7.

<sup>36</sup> *Id.* at 8.

CenterPoint questions whether the proposed conversion process at the Project will prevent commingling under the Supreme Court standard set forth in *FP&L*, and allow the Commission to disclaim jurisdiction.<sup>37</sup>

### **EPSA**

21. EPSA states that it does not oppose the Project but is concerned that the Petition does not provide a sound legal basis for the requested disclaimer of jurisdiction. EPSA urges the Commission to focus on the legal merits of the Petition. EPSA notes Petitioner's arguments regarding commingling and contends that whether ERCOT is connected asynchronously is not dispositive as to whether commingling can occur. EPSA asserts that, notwithstanding any required conversion process, the Project will facilitate the import and export of power into and out of ERCOT, which could lead to commingling, and that the Petition does not include sufficient technical and operation information to support its arguments. EPSA characterizes prior Commission decisions under sections 210 and 211 as approving localized projects in which a generator located near ERCOT sought to interconnect with ERCOT or a wholesale customer was interconnecting remotely located resources to serve its load; EPSA states that those decisions did not involve a project like the Project, whose "very purpose" is to break down the barriers between ERCOT and the grid subject to Commission jurisdiction.<sup>38</sup>

22. EPSA further questions whether the Project would qualify as an "electric utility" able to request wheeling under section 211 of the FPA, because it is unclear whether the Project would sell electric energy. EPSA also contends that section 211 was designed and intended to provide limited relief for certain entities, such as stranded generators or electrically isolated municipalities, and not to facilitate wide-scale economic transactions between ERCOT, WECC, and the Eastern Interconnection. EPSA states that the Commission's jurisdiction is a matter of statute, not discretion, and that the Commission can only legally disclaim jurisdiction if it finds that this project does not result in ERCOT utilities or transactions associated with the Project being deemed to occur in interstate commerce.<sup>39</sup> EPSA notes that, absent exemption, transmission lines interconnecting ERCOT and the Project would be operating in interstate commerce by moving electricity between Texas and New Mexico, regardless of whether a synchronous and asynchronous interconnection was created between ERCOT and one or both of the other interconnections. More broadly, EPSA expresses concern that Petitioner has stated that the "very purpose of [the Project] is to eliminate the barrier created by the current

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<sup>37</sup> *Id.* at 10.

<sup>38</sup> EPSA Comments at 12.

<sup>39</sup> *Id.* at 15.

separation of the U.S. transmission system into three asynchronous grids,” while at the same time attempting to preserve the jurisdictional status quo.<sup>40</sup> EPSA contends that the Project should not be allowed to trigger any dramatic changes to the Commission’s jurisdiction over ERCOT.

### **Golden Spread**

23. Golden Spread supports preservation of the current jurisdictional status of ERCOT and also supports the objective of establishing interconnections to increase energy transfers among the three grids. But Golden Spread notes that such interconnections with ERCOT have only been made pursuant to orders under sections 210 and 211 of the FPA and that the Commission has never granted the type of blanket exemption sought by Petitioner. Golden Spread states that the jurisdictional arguments advanced by Petitioner seeking a blanket disclaimer of jurisdiction are wrong as a matter of law, and that the Commission’s disclaimer of jurisdiction over ERCOT is based on orders issued under sections 210 and 211, not upon a lack of synchronicity. Golden Spread further states that the Commission has exercised jurisdiction over some utilities, whose activities occur both inside and outside ERCOT, even with regard to activities within ERCOT.<sup>41</sup> Golden Spread expresses the concern that granting the blanket exemption requested by Petitioner would diminish the Commission’s current authority to issue interconnection and wheeling orders pursuant to sections 210 and 211, and to require compliance by ERCOT utilities with mandatory reliability standards pursuant to section 215. Golden Spread also contends that Petitioner’s theory, that electrical separation between the grids demonstrates that Petitioner is entitled to a disclaimer of jurisdiction, cannot avoid the fact that the Project will permit electricity transmitted from other states to be consumed in ERCOT and vice versa. Golden Spread recommends that the Commission continue to rely on sections 210 and 211 to preserve the ERCOT jurisdictional status quo while also considering issues ranging from reliability to market power.

### **Oncor**

24. Oncor states that it does not support or oppose construction of the Project but is concerned with the possible effect on the Commission’s jurisdiction over ERCOT and

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<sup>40</sup> *Id.* at 16 (quoting Tres Amigas Application for Negotiated Transmission Rates at 2). EPSA also argues that the Commission should consider how the Project will impact system impact studies performed by affected markets under Order No. 890.

<sup>41</sup> Golden Spread Comments at 7-8 (citing *American Electric Power Service Corp.*, 98 FERC ¶ 61,030 (2002); *American Electric Power Service Corp.*, 130 FERC ¶ 61,013 (2010)).

any possible change in regulation of Oncor's transmission facilities.<sup>42</sup> Oncor states that it would prefer to continue operating under the jurisdiction of the Texas Commission and ERCOT and not subject to the Commission's jurisdiction. Oncor further states that, if the Commission finds that an interconnection between the Project and ERCOT would subject Oncor's facilities to Commission jurisdiction, Oncor would oppose construction of the Project. To that end, Oncor requests that any Commission decision on the Petition fully explain the boundaries of the Commission's jurisdiction and provide guidance as to the circumstances that could lead to an assertion of jurisdiction.<sup>43</sup>

### **Occidental**

25. Occidental states that the Petition should be summarily denied or, in the alternative, set for an evidentiary hearing. Occidental further states that granting the Petition would result in a disclaimer of jurisdiction over massive quantities of electric energy that is sourced in one interconnection and delivered to another. Occidental notes that electric energy will flow from ERCOT to the Project for delivery to grids subject to Commission jurisdiction for consumption in another state; that electric energy will flow from Commission-jurisdictional grids to interconnection facilities that connect with ERCOT via the Project; and that ERCOT parties that interconnect to the Project must build transmission lines that exit Texas and connect with the Project in New Mexico. Occidental states that this shows the electric energy will be transmitted from one state and consumed in another, the essence of transmission in interstate commerce under the FPA.

26. Occidental disputes Petitioner's arguments that ERCOT electric energy will not "commingle" with electric energy from the other interconnections and contends that transmission and commingling of ERCOT electric energy in interstate commerce will occur. Occidental characterizes the Project as facilitating the flow of electric energy between ERCOT and the interstate grids, eliminating "the 'isolation' of the ERCOT system upon which ERCOT's unique jurisdictional status has been based," and resulting in "vast quantities of electric energy flowing from and to ERCOT to the interstate grid."<sup>44</sup> Occidental notes the Petitioner admits that transactions transmitted across its facilities will be Commission-jurisdictional, but Occidental contends that Petitioner ignores the express language of the FPA which would also make the entities that engage in the transactions or that own or operate the facilities used for the transmission and sale of electric energy pursuant to those transactions "public utilities" under the FPA.

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<sup>42</sup> Oncor Comments at 2.

<sup>43</sup> *Id.* at 3.

<sup>44</sup> Occidental January 12 Protest at 13, 12-16.

Occidental further disputes Petitioner's commingling argument and states that Commission jurisdiction follows the flow of energy; the AC/DC conversion process does not "stop" electric energy from commingling, as asserted by Petitioner, but is simply a physical change in the means of transmitting electric energy and does not mean that the ERCOT electric energy is not being transmitted, or is changed from ERCOT-sourced electric energy to something else. Occidental notes that the Project can only transmit what it receives, and the Project does not create energy anew. Occidental further contends that the Project states that it has plans to sell "firming energy" stored in its onsite battery facilities, but makes no provision for separating "firming energy" that was sourced in ERCOT from that which was sourced from the other grids.

27. Occidental further takes issue with Petitioner's arguments regarding disclaimer under sections 210 and 211. Occidental states the Petitioner is inconsistent when it requests that the Commission find that ERCOT electric energy is not in interstate commerce but that, to obtain a section 211 order, the Commission would have to find that the ERCOT interconnecting entity would be operating transmission facilities in interstate commerce after it interconnects with the Project.<sup>45</sup> Occidental also questions whether Petitioner would be entitled to a section 211 order, because it is not clear that the ERCOT utility would qualify as a "transmitting utility" under the FPA, at least until after the section 211 order is issued. Occidental disputes that Petitioner is eligible for a section 211 order, considering the intent and purpose of section 211; Occidental asserts that the Commission must consider the public interest, including whether the new transmission service increases power supply options and improves competition, and that an application by Petitioner under section 211 would not necessarily support that finding.<sup>46</sup> Occidental further contends that Petitioner is wrong in its assertion that an order under section 210 is not also necessary, and maintains that the Commission could only disclaim jurisdiction over the physical connection of facilities made pursuant to an order under section 210. Finally, Occidental states that Petitioner has not met the legal requisites that would allow the Commission to issue orders under sections 210 and 211 that would require the ERCOT utilities to interconnect and transmit and exempt the ERCOT utilities from Commission jurisdiction under section 201(b)(2). Occidental states that the Commission does not have discretion to disclaim jurisdiction over otherwise jurisdictional activity absent specific statutory authority and satisfaction of all of the requisites of the controlling statutes and precedent, no matter what the alleged benefits.

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<sup>45</sup> *Id.* at 25 (quoting Petition at 24).

<sup>46</sup> *Id.* at 27 (citing *Florida Municipal Power Agency v. Florida Power & Light Co.*, 65 FERC ¶ 61,125 (1993), *reh'g dismissed*, 65 FERC ¶ 61,372 (1993), *final order*, 67 FERC ¶ 61,167 (1994), *order on reh'g* 74 FERC ¶ 61,006 (1996), *reh'g dismissed and denied*, 96 FERC ¶ 61,130 (2001) (*Florida Municipal Power*)).

### Petitioner's Answer

28. On January 20, 2010, Petitioner filed an answer to the comments in opposition to its Petition. Petitioner maintains that no intervenor will suffer direct injury if the Commission grants the Petition because none of the intervenors has requested that the Commission assert jurisdiction over ERCOT when Petitioner enters service or contends that they would be adversely affected if the Commission does in fact assert jurisdiction.<sup>47</sup> Petitioner further argues that the Commission should not pre-judge the question of whether any of the intervenors would have standing to appeal an order approving the Petition.<sup>48</sup>

29. Additionally, Petitioner responds that ERCOT is not in interstate commerce because it is operated asynchronously and is therefore electrically separated from the interstate grid. Therefore, Petitioner asserts, it is irrelevant to the Petition that the Project will enable more transactions to occur between ERCOT and the interstate grids. Petitioner concedes that the Commission has jurisdiction over transactions where an ERCOT supplier sells power that is delivered through the Project for delivery to another state, or vice versa, and that the only issue in this proceeding is whether the jurisdictional status quo will continue as to wholesale power and transmission service transactions that occur entirely within ERCOT. Petitioner notes that it has asked the Commission to disclaim jurisdiction over the ERCOT transmission line that interconnects with the Project by finding that it is entirely inside ERCOT, but acknowledges that the Project is one mile inside the New Mexico border. Petitioner states that, if crossing the New Mexico border makes the entire line subject to Commission jurisdiction, Petitioner will enter into a commercial arrangement under which ownership of the line changes at the Texas/ New Mexico border to avoid subjecting the owner of the line to Commission jurisdiction.<sup>49</sup>

30. Petitioner also disputes Occidental's arguments regarding commingling and argues that "commingling," as intended by the Supreme Court in *FP&L* and discussed in *New York v. FERC*,<sup>50</sup> means that electric energy becomes mixed or blended "in a vast pool" on the grid. Petitioner contends that the Supreme Court must have considered the effect of ERCOT's interconnection through existing AC/DC converters in its discussion of "commingling," and found that ERCOT was not subject to Commission jurisdiction because it was asynchronously tied to the interstate grids, and not due to prior

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<sup>47</sup> Tres Amigas January 20 Answer at 2.

<sup>48</sup> *Id.* at 2 n.2.

<sup>49</sup> *Id.* at 7 n.7.

<sup>50</sup> 535 U.S. 1 (2002).

Commission orders under section 201(b)(2). Petitioner disputes Occidental's arguments, arguing that ERCOT is not non-jurisdictional because there is a low volume of transactions across the existing AC/DC ties, but rather because ERCOT is electrically separated from the interstate "pool" of electric energy. Petitioner further contests Occidental's contention that commingling occurs whenever a transaction across state lines is possible, even across an AC/DC interconnection between asynchronous systems; Petitioner asserts that the Commission has avoided that question by relying on decisions under section 201(b)(2) and that such an assumption would conflict with the Supreme Court's decision in *New York v. FERC*.

31. Regarding Occidental's arguments related to section 211, Petitioner contends that the definition of a "transmitting utility" may apply to those who have not yet constructed transmission facilities in interstate commerce, and that the Commission should reject Occidental's narrow reading of the definition of "transmitting utility." Further, Petitioner counters Occidental's arguments that the Project should not be able to apply for a section 211 order, asserting that the Project could apply for an order under section 211 that would not be limited to transmission for its own sales, that such an order could also allow the Project to request delivery of energy, and that the section 211 public interest test can be satisfied by grounds other than an analysis of the sale of the applicant's energy; that is, it can be satisfied by arguments such as the benefit of moving renewable energy from Texas to the interstate grids. Petitioner reiterates its arguments that an order under section 210 would be superfluous if Petitioner will not interconnect voluntarily to the line interconnected with ERCOT in the absence of an order under section 211. Petitioner also counters EPSA's arguments that section 201(b)(2) is not available in circumstances where the interconnection is designed to expand the volume of transactions between ERCOT and the interstate grids. Petitioner argues that this Petition is simply an extension of earlier efforts to expand transactions between ERCOT and one of the other interstate grids. Petitioner also states that the Project will be an "electric utility," that "sells electric energy," and thus eligible to apply for an order under section 210, and argues that the phrase should not be read as narrowly as argued by EPSA.

32. Finally, Petitioner argues that the Commission could also rely on the separation between ERCOT and the interstate grids by the Project in finding that interconnection between ERCOT and the Project does not put ERCOT in interstate commerce based on the facts of this case.

### **Occidental's Motion and Answer**

33. On January 27, 2010, Occidental filed a motion to accept its answer to Petitioner's January 20 Answer. Occidental asserts that Petitioner, in that Answer, changed the facts and request for relief, and requests that the Commission direct Petitioner to file an amended Petition and permit additional comment. Occidental states that Petitioner initially requested that the Commission disclaim jurisdiction as to transmission service over the AC ties from ERCOT to the Project and the transmission owner constructing

transmission facilities from ERCOT to the Project, but that, in its Answer, Petitioner only requested disclaimer over transactions exclusively within ERCOT. Occidental further points to Petitioner's offer to "enter into a commercial arrangement under which ownership of the [transmission] line changes at the Texas/New Mexico border" as a change in the facts presented by the initial Petition.<sup>51</sup> Occidental notes that the Texas Commission commented that Petitioner provided "little concrete information," and argues that Petitioner continues to offer few details regarding its changing Petition. Occidental also states that there is a conflict between Petitioner's stated reliance on *Cottonwood Energy, Sharyland*, and *Cross Texas*, in which the Petitioners sought rulings that no market participants or utilities in ERCOT would become "public utilities" under the FPA by virtue of the interconnection and transmission outside ERCOT, and Petitioner's statement that entities in ERCOT that buy and sell power through the Project will be subject to Commission jurisdiction. Occidental argues that Petitioner should be required to file an amended Petition and the Commission should allow additional comments on the amended Petition.

34. Additionally, Occidental answers that the fact that the ERCOT grid is asynchronous with the Eastern Interconnection and WECC does not mean that electric energy delivered through the Project is not "commingling" in interstate commerce. Occidental also contests Petitioner's interpretation of *New York v. FERC* as providing that ERCOT is not subject to the Commission's jurisdiction as long as it is asynchronous with the Eastern Interconnection and WECC. Occidental states that the Court's statements regarding ERCOT in *New York v. FERC* were *dicta* and did not address the AC/DC interconnections between ERCOT and the interstate grids. Occidental also states that Petitioner would have the Commission overturn its decision in *Sharyland*, that electric energy sourced in ERCOT, even after flowing through an HVDC converter, would "commingle" with non-ERCOT electric energy and, if consumed in another state, would be subject to Commission jurisdiction due to the commingling with other electric energy. Occidental states that *New York v. FERC* is instructive in its discussion of the technological evolution of electric power systems, and points out that the Commission's brief in that case noted that this evolution was capturing more transactions and entities under the Commission's jurisdiction. The Commission's brief stated that, "when a utility attempts to have its operations 'quarantine[d] from the interstate grid,' 'such a quarantine from the interstate grid must be complete to be effective for jurisdictional purposes.'"<sup>52</sup> Occidental contends that the Project will result in substantial, frequent, and continuous

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<sup>51</sup> Occidental January 27 Answer at 3-4 (quoting Tres Amigas January 20 Answer at 7 n.7).

<sup>52</sup> *Id.* at 15 (quoting *New York v. FERC*, Nos. 00-568, 00-809, Brief for the Federal Energy Regulatory Commission, 2001 WL 716903 at 16 (U.S. May 31, 2009)).

flow of electric energy from the interstate grids to ERCOT and vice versa, breaching the “quarantine” of ERCOT and resulting in commingling of electric energy within ERCOT. Occidental states that ERCOT market participants that sell power on the Project for delivery to another state, or vice versa, would be “public utilities” under the FPA, because they would be engaged in the wholesale sale of electric energy in interstate commerce.

35. Regarding arguments relating to section 210, Occidental takes issue with the Texas Commission’s citation to the Commission’s decision in *Kiowa* for the proposition that entities exist or may be created in ERCOT that would allow use of sections 210, 211, and 212 to build interconnections with the Project that would not disrupt the jurisdictional status quo. Occidental notes that the Commission approved an uncontested settlement in *Kiowa*, thus that decision has no precedential value in a contested proceeding. Occidental states that it does not believe that *Kiowa* would allow the Commission to grant a section 210 order to direct interconnections between ERCOT utilities that are not “electric utilities” and the Project.<sup>53</sup> Occidental further argues that interconnection is a Commission-jurisdictional activity, and an exemption from jurisdiction for interconnection is not available unless covered by an order issued under section 210; a section 211 wheeling order will not provide an exemption for an activity outside the scope of that wheeling order.

36. Occidental also responds to Petitioner’s arguments regarding the “standing” of any intervenor to appeal an order, asserting that Occidental has met the requisites necessary to be granted status as an intervenor in this proceeding. Occidental further states that, as a large consumer, market generator, and market participant in ERCOT, SPP, and other markets, it would be aggrieved by an order granting the Petition.

### **Petitioner’s Brief Answer**

37. On January 28, 2010, Petitioner filed a Brief Answer, responding that it has not changed its position in this proceeding, and that the issue is whether facilities and services occurring exclusively inside of the ERCOT interconnection (including transmission lines interconnecting with the Project) will remain subject to the Texas Commission’s jurisdiction after ERCOT is interconnected with the Project.<sup>54</sup>

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<sup>53</sup> *Id.* at 18 n.63.

<sup>54</sup> Tres Amigas Brief Answer at 3.

### **Occidental's Answer**

38. On February 1, 2010, Occidental responded to the Brief Answer. Occidental reiterates Petitioner amended its Petition by restating the issue to be whether wholesale power and transmission service transactions that occur entirely within ERCOT will remain, as they are today, subject to the jurisdiction of the Texas Commission and not this Commission, because they do not occur in interstate commerce. However, Occidental states that Petitioner has presented facts where electric energy will flow out of ERCOT to the Eastern Interconnection and WECC, and vice versa. Occidental also contends that the Project raises significant issues regarding reliability and just and reasonable rates to ratepayers and competitive markets.

### **III. Discussion**

#### **Procedural Matters**

39. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2009), the Commission will grant SPP's and the Texas Counsel's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

#### **Substantive Matters**

##### **A. General Commission Jurisdiction**

40. Section 201(b)(1) of the FPA states that the Commission has jurisdiction over:

the transmission of electric energy in interstate commerce and  
[] the sale of electric energy at wholesale in interstate  
commerce. ... The Commission shall have jurisdiction over  
all facilities for such transmission or sale of electric energy,  
but shall not have jurisdiction ... over facilities used for the  
generation of electric energy or over facilities used in local  
distribution or only for the transmission of electric energy in  
intrastate commerce.

Section 201(c) states that “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.”

41. ERCOT utilities are not generally subject to Commission jurisdiction under the FPA because their facilities are not used for transmission and sales of electric energy in interstate commerce (except as a result of interconnection and wheeling service provided pursuant to prior orders under sections 210 and 211 of the FPA).<sup>55</sup> Here, an interconnection between ERCOT (located in Texas) and the Project (located in New Mexico) has been proposed for the express purpose of facilitating the transfer of energy between ERCOT, the Eastern Interconnection, and WECC. This means that energy would be generated in one state and transmitted to another state for consumption in that other state, and would necessarily involve the “transmission of electric energy in interstate commerce.” Independent of whether “commingling” occurs at the Project, power transmitted to and from the Project crosses the Texas/New Mexico border.<sup>56</sup> Without the benefit of an exemption under the FPA, as discussed further below, the interconnection proposed would result in ERCOT and ERCOT utilities becoming subject to the Commission’s jurisdiction as public utilities. Accordingly, we do not believe Petitioner has demonstrated that the Commission should grant a blanket disclaimer under existing law over prospective transmission facilities that would interconnect the ERCOT grid with the Project.

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<sup>55</sup> The courts and the Commission have commonly referred to only three states whose electric energy transmission systems meet the intrastate commerce exception to Commission jurisdiction under the FPA: Hawaii, Alaska, and the “Texas Interconnect.” *See, e.g., New York v. FERC*, 535 U.S. 1, at 7; *Transactions Subject to FPA Section 203*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, at P 58, *order on reh’g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006); *Central Electric Cooperative, Inc.*, 77 FERC ¶ 61,076, at 61,316 n.34 (1996).

<sup>56</sup> While Petitioner argues that a commingling analysis supports its request, we note that a commingling analysis is used to determine whether electric energy has been transmitted in interstate commerce when that electric energy has not been scheduled across state borders. *FPC v. Florida Power & Light*, 404 U.S. 453, 467-69 (1972). And that is not the case here, where electric energy would admittedly be transmitted across a state border (between Texas and New Mexico), and thus subject to Commission regulation as transmission in interstate commerce. *E.g., New York v. FERC*, 535 U.S. 1, 5-7 (2002); *cf. Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

42. The FPA does provide for an exemption from Commission jurisdiction. Section 201(b)(2) provides that certain sections, including sections 210 and 211, “shall apply to the entities described in such provisions,” but such compliance “shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.” Section 210 of the FPA allows the Commission, upon application of, among others, any electric utility, to issue an order requiring the physical connection of the transmission facilities of any electric utility with the facilities of such applicant.<sup>57</sup> Section 211 of the FPA allows the Commission, upon application of, among others, any electric utility, to issue an order requiring that a transmitting utility provide transmission services to such applicant.<sup>58</sup> In keeping with this statutory scheme, until now, the only interconnections between ERCOT and facilities outside Texas, and the transmission of power over those interconnections, have been made pursuant to Commission orders under sections 210 and 211 of the FPA.<sup>59</sup>

43. If an application is filed pursuant to section 211 that meets the requirements of that section, the Commission may grant the application. However, given the limited facts before us, we cannot now state that *any* application under section 211 submitted by the Petitioner, even an application that meets the assumptions set forth in the Petition,<sup>60</sup> would meet the section 211 criteria. Stating as much would essentially provide a blanket section 211 authorization to Petitioner. The Commission has rejected requests for a blanket section 211 order, stating that it may only order a transmitting utility to provide transmission service to an actual applicant.<sup>61</sup> The requirements of sections 210 and 211 of the FPA make it necessary to know the parties and circumstances of such an application.<sup>62</sup> Petitioner asks the Commission to make certain assumptions about its

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<sup>57</sup> An electric utility is defined as “a person or Federal or State agency ... that sells electric energy.” 16 U.S.C. § 796(22).

<sup>58</sup> A transmitting utility is defined as “an entity ... that owns, operates, or controls facilities used for the transmission of electric energy – (A) in interstate commerce; (B) for the sale of electric energy at wholesale.” *Id.* § 796(23).

<sup>59</sup> *Brazos*, 118 FERC ¶ 61,199, at P 12; *Kiowa*, 99 FERC ¶ 61,251, at P 9; *Central Power & Light Co.*, 40 FERC ¶ 61,077 (1987); *Central Power & Light Co.*, 17 FERC ¶ 61,078 (1981).

<sup>60</sup> Petition at 24, 27-29.

<sup>61</sup> *Nevada Power Co.*, 108 FERC ¶ 61,137, at P 13-14 (2004), *order on reh’g*, 110 FERC ¶ 61,029 (2005) (*Nevada Power*).

<sup>62</sup> *See, e.g., Suffolk County Electrical Agency*, 110 FERC ¶ 61,067, at P 6 (2005); *Nevada Power*, 108 FERC ¶ 61,137 at P 13.

future section 211 application, but, as noted by the Texas Commission, Industrial Consumers, and Occidental, Petitioner does not provide sufficient facts to support its assumptions. In addition, Petitioner contends that electric energy can flow from ERCOT to the Project without the benefit of an order issued pursuant to section 210 directing an interconnection between the two, but Commission precedent expressly states that sections 210 and 211 of the FPA are distinct provisions,<sup>63</sup> and it is unclear how an ERCOT utility could voluntarily interconnect its facilities in order to transmit electric energy from ERCOT (in Texas) to the Project (in New Mexico) for consumption in the Eastern Interconnection or WECC (i.e., outside Texas), without jeopardizing the jurisdictional *status quo*.

### **B. Sections 210 and 211**

44. That being said, upon receipt of valid applications under sections 210 and 211 of the FPA, the Commission could issue orders pursuant to those sections of the FPA allowing interconnection and transmission of energy between ERCOT and the Project while retaining the jurisdictional *status quo*. As noted above, section 210 of the FPA allows the Commission, upon application of, among others, any electric utility, to issue an order requiring the physical connection of *the transmission facilities of any electric utility* to the applicant's facilities. Although not every transmission provider within ERCOT would meet the definition of an "electric utility"<sup>64</sup> and thus be entitled to seek an interconnection pursuant to section 210 or eligible to be the subject of a Commission order directing interconnection pursuant to section 210, there may still be ways to achieve interconnection under section 210 using the existing legal framework. For instance, in *Brazos*, a Rural Utilities Service-financed cooperative in Texas that was a transmission utility also generated and sold power, thereby qualifying as an electric utility eligible to seek an order directing interconnection pursuant to section 210 of the FPA.<sup>65</sup> In addition,

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<sup>63</sup> In *Laguna Irrigation District*, the Commission explained that "[n]othing in our [section 210] interconnection order requires transmission service. Rather, transmission service will be obtained by Laguna pursuant to other transmission tariffs or agreements." 95 FERC ¶ 61,305, at 62,038 (2001), *aff'd sub. nom.*, *Pacific Gas & Electric Co. v. FERC*, 44 Fed. Appx. 170 (9<sup>th</sup> Cir. 2002) (unpublished) (*Laguna*); *see also City of Corona, California v. Southern California Edison Co.*, 104 FERC ¶ 61,085, at P 7-10 (2003) (Corona's application under section 210 did not constitute a request for transmission under section 211).

<sup>64</sup> Texas required its electric utilities to separate their business activities into three units: a power generation company, retail electric provider, and a transmission and distribution utility. Tex. Util. Code Ann. § 39.051 (Vernon 2007).

<sup>65</sup> *Brazos*, 118 FERC ¶ 61,199 at P 29.

as noted above, the Texas Commission states that, even after unbundling, some companies may continue to own transmission and distribution utilities, a retail electric provider, and a power-generation company.<sup>66</sup> The Texas Commission also states that no municipally-owned utility or electric cooperative has chosen to unbundle its operations,<sup>67</sup> and therefore they may potentially be eligible applicants or eligible to be the subject of a Commission order issued under section 210. While Petitioner asserts that “the entities located in Texas who propose to build transmission lines to interconnect the ERCOT grid with [the Project] apparently cannot be electric utilities,” Petitioner does not identify those entities, nor does Petitioner indicate whether some other entity that does qualify as an electric utility could build the transmission lines.

45. Likewise, section 211 of the FPA allows the Commission, upon application, to issue an order requiring that a transmitting utility provide transmission services to any electric utility or person generating electric energy for sale for resale. An arrangement could possibly be structured so that a transmitting utility transmits electric energy pursuant to section 211 from Texas into New Mexico. In fact, the Commission has found that the entities that own and operate the existing facilities used to transmit power into and out of ERCOT (albeit directed pursuant to sections 210 and 211) meet the definition of transmitting utilities for the purpose of issuing new orders under section 211 of the FPA.<sup>68</sup>

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<sup>66</sup> In both *Kiowa* and *Brazos*, the Commission acknowledged that the transmitting utilities to which the applicants sought to interconnect no longer sell electric energy, but found that, as the transmission and distribution successors of electric utilities that were previously ordered to interconnect and wheel under sections 210 and 211, they were subject to the jurisdiction of the Commission to enforce orders previously issued, and to issue new interconnection and wheeling orders under sections 210 and 211. *See Brazos*, 118 FERC ¶ 61,199 at P 30; *Kiowa*, 99 FERC ¶ 61,251 at P 30.

<sup>67</sup> Texas Commission January 12 Comments at 8 (citing Tex. Util. Code Ann. §§ 40.051, 41.051 (Vernon 2007)).

<sup>68</sup> *Brazos*, 118 FERC ¶ 61,199 at P 30; *Kiowa*, 99 FERC ¶ 61,251 at P 11.

The Commission orders

The petition for disclaimer of jurisdiction is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.