

132 FERC ¶ 61,232
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tres Amigas LLC

Docket No. EL10-22-001

ORDER DENYING REHEARING

(Issued September 16, 2010)

1. On March 18, 2010, the Commission issued an order on a petition for a declaratory order submitted by Tres Amigas LLC (Petitioner).¹ Occidental Chemical Corporation, Occidental Permian, Ltd., Occidental Power Marketing, L.P. (collectively, Occidental), and Texas Industrial Energy Consumers (Industrial Consumers) filed requests for rehearing. In this order, we deny the requests for rehearing.

I. Background

2. In the petition, Petitioner requested a disclaimer of jurisdiction over transmission facilities and entities that would interconnect the Electric Reliability Council of Texas (ERCOT) grid with the proposed Tres Amigas Superstation (Project). The Project would consist of 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).

3. Petitioner requested that the Commission issue an order finding that any transmission owner that constructed transmission facilities interconnecting ERCOT to the Project would 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 would not be subject to Commission jurisdiction, and that establishing a new AC to DC interconnection between ERCOT and the Project would not change the jurisdictional status of any other ERCOT utilities or ERCOT transactions.² Petitioner noted that the

¹ *Tres Amigas LLC*, 130 FERC ¶ 61,205 (2010) (March 18 Order).

² *Tres Amigas* Petition at 1.

Commission has previously directed interconnection and wheeling between ERCOT and the interstate grid pursuant to orders under sections 210 and 211 of the FPA without affecting the jurisdictional status of ERCOT entities.³ Petitioner stated that this path was no longer 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.⁴ An electric utility is defined by section 3(22) of the FPA as a “person ... that sells electric energy.”⁵ Petitioner stated that the Texas entities who proposed to build transmission lines to interconnect the ERCOT grid with the Project could not qualify as “electric utilities” because Texas law prohibits a transmission utility from selling electric energy.⁶ Thus, Petitioner requested a disclaimer of jurisdiction based on several alternative legal theories.

4. The Commission did not grant the disclaimer as requested, but stated that, upon receipt of a valid application under sections 210 and 211 of the FPA,⁷ the Commission could issue an order pursuant to those sections of the FPA allowing interconnection and transmission of electric energy between ERCOT and the Project while retaining the jurisdictional *status quo*.⁸ The Commission noted that section 210 of the FPA allows the Commission, upon application, to issue an order requiring the physical connection of the transmission facilities of any electric utility to the applicant’s facilities. The Commission acknowledged that, under Texas law, not every transmission provider within ERCOT would meet the definition of an electric utility and thus be subject to a Commission order directing interconnection pursuant to section 210. However, the Commission postulated that there could still be ways to achieve interconnections under section 210 using the existing legal framework. To support this statement, the Commission noted that a Rural Utilities Service-financed cooperative in Texas that was a transmission utility also generated and sold power and was able to qualify as an electric utility for section 210 purposes, as well as statements by the Public Utility Commission of Texas (Texas Commission) indicating that, in some cases, companies may continue to own

³ *Id.* at 15-17.

⁴ *Id.* at 16.

⁵ 16 U.S.C. § 796(22) (2006).

⁶ Petition at 16 (citing TEX. UTIL. CODE ANN. § 39.105 (Vernon 2007)). 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).

⁷ 16 U.S.C. §§ 824i and 824j (2006).

⁸ March 18 Order, 130 FERC ¶ 61,205 at P 44.

transmission and distribution utilities, a retail electric provider, and a power-generation company.⁹

5. In addition, in footnote 66, the Commission noted that, in prior cases, even though the transmitting utilities to which the applicants sought to interconnect no longer sold electric energy, the Commission found that they were still subject to the Commission's jurisdiction because they were the transmission and distribution successors of electric utilities that were previously ordered to interconnect and wheel under sections 210 and 211.¹⁰

II. Requests for Rehearing

A. Occidental

6. Occidental requests a limited rehearing of the March 18 Order related to the Commission's conclusions in footnote 66 regarding the reach of section 210. Occidental objects "to the Commission's finding in footnote 66 that summarily concluded that the transmission and distribution successors of the electric utilities in ERCOT that were previously ordered to interconnect and wheel power under sections 210 and 211 . . . remain subject to the Commission's jurisdiction to issue new interconnection orders" under section 210.¹¹ Occidental states that, according to Texas law, transmission and distribution utilities cannot sell electric energy. Occidental further states that section 210 only applies to the transmitting facilities of an "electric utility," and an electric utility must, by definition under the FPA, sell electric energy.¹² Occidental asserts that the Commission has improperly expanded the reach of section 210 by concluding that successor utilities that no longer sell electric energy could continue to qualify as "electric utilities" and therefore could continue to be eligible for new section 210 orders.¹³ Occidental contends that, because this expansive interpretation conflicts with the plain meaning of section 210, footnote 66 is in error.¹⁴

⁹ *Id.*

¹⁰ *Id.* P 44 n.66 (citing *Brazos Electric Power Coop., Inc.*, 118 FERC ¶ 61,199, at P 30 (2007) (*Brazos*); *Kiowa Power Partners, LLC*, 99 FERC ¶ 61,251, at P 30 (2002) (*Kiowa*)).

¹¹ Occidental Request for Rehearing at 1-2.

¹² *Id.* at 4.

¹³ *Id.* at 4-5.

¹⁴ *Id.* at 7-8.

7. Additionally, Occidental states that the Commission should not rely on *Kiowa* and *Brazos*, in which the Commission approved uncontested settlement agreements. Occidental maintains that approval of an uncontested settlement agreement does not constitute binding precedent and cannot be relied upon as the basis to order future interconnections.¹⁵ Moreover, Occidental contends that in the March 18 Order the Commission did not properly address Occidental's arguments against relying on uncontested settlement agreements as precedent.¹⁶

8. Occidental further argues that the Commission's interpretation of successor entities as electric utilities under federal law could result in unintended consequences. For instance, Occidental contends that such an interpretation could subject the successor entities to the provisions of section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), which would require the entities to purchase power from qualifying facilities (QFs) at avoided cost rates.¹⁷ Occidental contends that requiring ERCOT utilities to comply with PURPA would violate Texas law, which prohibits transmission and distribution utilities in ERCOT from purchasing electric energy. Likewise, Occidental argues that, under an expansive interpretation of footnote 66, the Commission could assert jurisdiction over electric utilities within ERCOT under section 203(a)(2) of the FPA¹⁸ and could impose conditions on transactions that are inconsistent with action by the Texas Commission.¹⁹

B. Industrial Consumers

9. Industrial Consumers also contest the Commission's authority, under section 210 of the FPA, to issue new interconnection orders to transmission and distribution utilities within ERCOT that are forbidden from selling electric energy under Texas law. Industrial Consumers state that footnote 66 is an "overly expansive" finding that the Commission could issue new section 210 orders to transmission and distribution utilities within ERCOT.²⁰ They state that this finding exceeds the scope of the cited orders, *Kiowa* and *Brazos*, which approved uncontested settlements and therefore should not

¹⁵ *Id.* at 8-9.

¹⁶ *Id.* at 11.

¹⁷ 16 U.S.C. § 824a-3 (2006). Subject to certain exemptions, PURPA and implementing Commission regulations establish an obligation of utilities to purchase energy and capacity made available by a QF under most circumstances. *See* 18 C.F.R. § 292.303 (2010).

¹⁸ 16 U.S.C. § 824(b)(a)(2) (2006).

¹⁹ Occidental Request for Rehearing at 12-14.

²⁰ Industrial Energy Consumers Request for Rehearing at 4.

serve as precedent for subsequent Commission action. They further state that, in spite of the Commission's findings in *Kiowa* and *Brazos*, the Commission did not create a "once an electric utility, always an electric utility" rule.²¹ Moreover, the Industrial Customers argue that, because an ERCOT transmission and distribution utility is generally not an electric utility under the FPA, it cannot lawfully be compelled by the Commission to interconnect under section 210.²²

III. Discussion

A. Procedural Matters

10. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2010), prohibits answers to requests for rehearing. Accordingly, we will deny all answers to the requests for rehearing.²³

B. Substantive Matters

11. The Commission will deny the requests for rehearing. In the March 18 Order, the Commission determined that Tres Amigas failed to provide sufficient information warranting a blanket disclaimer, under existing law, for transmission facilities that would interconnect the ERCOT grid with the Project.²⁴ However, the Commission made no findings in the March 18 Order under either section 210 or 211 of the FPA because no application under section 210 or 211 of the FPA was before it. Moreover, the Commission expressly declined to make prospective findings, stating that, "[t]he requirements of sections 210 and 211 of the FPA make it necessary to know the parties and circumstances of such an application."²⁵

12. As previously noted, the Commission will consider the specifics of an application under section 210 or 211 of the FPA when such an application is submitted to the

²¹ *Id.* at 4-5.

²² *Id.* at 5.

²³ Golden Spread Electric Cooperative, Inc., Oncor Electric Delivery Company, LLC, and Petitioner filed answers to the request for rehearing, and Occidental filed a reply to the answers.

²⁴ March 18 Order, 130 FERC ¶ 61,205 at P 41.

²⁵ *Id.* P 43 (citing *Suffolk County Electrical Agency*, 110 FERC ¶ 61,067, at P 6 (2005); *Nevada Power Co.*, 108 FERC ¶ 61,137, at P 13 (2004)). While it is true that footnote 66 did refer to *Brazos* and *Kiowa*, it merely noted what they said and neither added nor subtracted anything.

Commission. We will not, however, prejudge these issues or otherwise speculate on matters not before us at this time.²⁶

The Commission orders:

The requests for rehearing are hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁶ See, e.g., *American Transmission Systems, Inc.*, 129 FERC ¶ 61,249, at P 50 (2009), *order on clarification and reh'g*, 130 FERC ¶ 61,171 (2010).