

149 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Spinning Spur Wind Two, LLC and
Spinning Spur Wind Three, LLC

Docket No. EL14-96-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued December 10, 2014)

1. In this order, we grant a petition for a declaratory order filed by Spinning Spur Wind Two, LLC (Spur Two) and Spinning Spur Wind Three, LLC (Spur Three) (collectively, Petitioners) that disclaims jurisdiction over Petitioners as “public utilities” under Part II of the Federal Power Act (FPA)¹ by virtue of their joint ownership of poles and other non-electrical facilities that are used for Petitioners’ non-jurisdictional generator tie line and a Commission-jurisdictional generator tie line owned and operated by an affiliate.

I. Background

2. Petitioners and their affiliate, Spinning Spur Wind, LLC (Spinning Spur), are all indirectly owned by EDF Renewable Energy, Inc. (EDF Renewable) and have developed or are developing wind generation facilities in the panhandle of Texas in Oldham and Potter Counties. Spinning Spur owns and operates a 161 MW wind generation facility that is electrically connected to the transmission grid operated by the Southwest Power Pool, Inc. (SPP). All of the output of the Spinning Spur project is sold to Southwestern Public Service Company under a long term agreement.²

3. Spur Two owns and operates a 161 MW wind generation facility within the SPP region located adjacent to, and to the west of, the Spinning Spur project. Petitioners state that this facility is electrically connected exclusively to the Electric Reliability Council of Texas (ERCOT) transmission grid by way of an interconnection with a Sharyland Utilities, L.P. (Sharyland) transmission line under an ERCOT standard interconnection

¹ 16 U.S.C. Part II (2012).

² Petition for Declaratory Order at 1-3 (Petition).

agreement. Petitioners also state that Spur Three is developing a 194 MW wind generation facility adjacent to, and to the west of, Spur Two that will be interconnected only to the ERCOT grid under an ERCOT standard interconnection agreement. Petitioners state that Spur Three will be completed in 2015.³

4. Petitioners explain that Spur Two originally anticipated that it would sell its output to a purchaser in SPP and, therefore, in conjunction with Spinning Spur constructed interconnection facilities and a generator tie line to connect to the SPP grid (North Circuit). Petitioners state, however, that prior to beginning construction of the Spur Two facility, Spur Two entered into a power purchase agreement with a purchaser in ERCOT and, as a result, constructed a second generator tie line to connect solely to the ERCOT grid (South Circuit). Petitioners note that, when completed, Spur Three will also use the South Circuit. The North Circuit and South Circuit are supported by a series of common poles.⁴

5. Under a series of co-tenancy and common facilities agreements, Petitioners share ownership of the real estate interests for the interconnection facilities, and jointly own the South Circuit, but have no ownership interest in the poles that support the North and South Circuits. Rather, Petitioners state that they have been granted an easement to access and use the poles that are owned and used by Spinning Spur for its North Circuit. Petitioners state that the ownership interests have been separated in this fashion so that Petitioners will not be owners of the poles used by Spinning Spur for its interstate transmission and wholesale sale of electric energy and will not become public utilities under the FPA as owners of facilities subject to the Commission's jurisdiction.⁵

6. Petitioners state that joint ownership of the poles that support the North and South Circuits by Petitioners and Spinning Spur would be desirable to avoid the inefficient duplication of infrastructure and to simplify the ownership of and rights to the infrastructure. Further, Petitioners note that, if EDF Renewable chooses to sell its interest in either of the Petitioners, any such buyer is likely to prefer the security of an ownership interest in the poles supporting the South Circuit rather than a lesser right pursuant to an easement. However, Petitioners note that they do not want a joint ownership arrangement of the poles to render Petitioners public utilities.⁶

³ *Id.* at 4.

⁴ *Id.* at 4-5; *see also id.* at Attachment 1 (Map of Electrical Facilities).

⁵ *Id.* at 5-6.

⁶ *Id.* at 7.

7. On August 26, 2014, Petitioners filed the Petition for a disclaimer of Commission jurisdiction. In support, Petitioners aver that the Spur Two generation facility and the South Circuit are located entirely within the state of Texas and will be used only for sales of electric energy to a buyer within Texas for consumption within Texas. Petitioners state that there is no commingling of electricity produced by Spur Two with electric energy flowing in interstate commerce, nor will any of the station power come from SPP. Thus, because Spur Two does not transmit or sell electric energy in interstate commerce and does not own or operate any facilities subject to Commission jurisdiction, Petitioners assert that Spur Two is not currently a public utility. Petitioners add that, for the same reasons, Spur Three will not be a public utility.⁷

8. Petitioners contend that they should not become public utilities solely because of joint ownership of the poles that support the North and South Circuits. First, Petitioners argue that the Commission has the discretion to decline to exercise jurisdiction if doing so is in the public interest.⁸ According to Petitioners, the standards articulated in the Prior Notice Order permit the Commission to decline to exercise jurisdiction if it finds that “regulation will ... bring trivial or no public benefits” through a balancing of the equities.⁹

9. Petitioners argue that regulation of Spur Two and Spur Three as public utilities under the FPA would bring no public benefits because the only potential basis for Commission jurisdiction over Petitioners would be as joint owners of the poles, which will be used by Petitioners for intrastate transactions that are subject to the jurisdiction of the Public Utility Commission of Texas (Texas Commission). Further, Petitioners assert that exercising jurisdiction over Petitioners is not necessary to protect the interstate customers of Spinning Spur or the interstate market because Spinning Spur makes its wholesale sales pursuant to a market-based rate tariff, meaning that there are no rate impacts to consider. Finally, Petitioners assert that, if the Commission finds that joint ownership of the poles would subject them to Commission jurisdiction as public utilities, such a finding would create an incentive to construct separate and duplicative poles. Petitioners claim that such a result would be wasteful and inefficient.¹⁰

⁷ *Id.* at 8-9.

⁸ *Id.* at 10 (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,996 (1993) (Prior Notice Order)).

⁹ *Id.*

¹⁰ *Id.* at 11-12.

10. Second, Petitioners argue that joint ownership of the poles will not constitute the operation of any Commission-jurisdictional facilities. Petitioners assert that, in order to determine whether an entity will be regulated as a “public utility,” the Commission has focused on whether the entity effectively operates jurisdictional facilities through the ability to exercise control or decision-making authority over day-to-day jurisdictional operations.¹¹ Petitioners argue that application of the type of reasoning used in *ITC Great Plains*, *R.W. Beck*, and *D.E. Shaw* to the situation here will demonstrate that Petitioners should not become public utilities by virtue of joint ownership of the poles. Petitioners state that, pursuant to the co-tenancy agreement that will govern the proposed joint ownership, they will have no ability to exercise operating control or decision-making authority over Spinning Spur’s use of the North Circuit or to prevent Spinning Spur from making interstate sales. Petitioners assert that, as co-owners of the poles, they would have only the rights necessary to protect their business interest, i.e., to use the poles to interconnect their respective generation facilities to the ERCOT grid. Thus, Petitioners argue that the Commission should conclude that Petitioners would have no ability to operate jurisdictional facilities for purposes of Part II of the FPA.¹²

II. Notice of Filing and Responsive Pleadings

11. Notice of the Petition was published in the *Federal Register*, 79 Fed. Reg. 53,059 (2014), with interventions and protests due on or before September 25, 2014. Timely motions to intervene were filed by GE Energy Financial Services, Inc. (GE Energy) and NRG Power Marketing LLC (NRG). No comments were filed.

¹¹ *Id.* at 12-13 (citing *ITC Great Plains, LLC*, 148 FERC ¶ 61,002 (2014) (*ITC Great Plains*) (joint ownership of jurisdictional transmission facilities by ITC Great Plains and public power joint owner did not compromise independence of ITC Great Plains as transmission operator because public power joint owner had only the rights necessary to protect its investment and not day-to-day operational control); *R.W. Beck Plant Management, Ltd.*, 109 FERC ¶ 61,315 (2004) (*R.W. Beck*) (manager of generation facility is public utility because it governs the physical operation of jurisdictional transmission and interconnection facilities and is the decision-maker in determining wholesale sales); *D.E. Shaw Plasma Power, L.L.C.*, 102 FERC ¶ 61,265 (2003) (*D.E. Shaw*) (investment advisor affiliate is a public utility because of discretion to determine the trades and power to execute contracts constituting the operation of jurisdictional facilities)).

¹² *Id.* at 11-15.

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make GE Energy and NRG parties to this proceeding.

B. Commission Determination

13. Section 201(b)(1) of the FPA¹³ states that:

The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce The Commission shall have jurisdiction over all facilities used for such transmission or sale of electric energy. . . .

14. Section 201(e) states that “[t]he term ‘public utility’ . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter,” other than facilities subject to such jurisdiction solely by reason of certain enumerated sections of the FPA, including sections 210, 211, and 212.¹⁴

15. In the Prior Notice Order, the Commission found that it possesses the administrative discretion to allow for *de minimis* exceptions from its jurisdiction under Part II of the FPA if it finds, upon consideration of the balance of all equities, that regulation would bring “trivial or no benefits.”¹⁵ For the reasons discussed below, we find, based on the specific facts presented here, that a *de minimis* exception that would permit joint ownership of the poles without Petitioners becoming public utilities is appropriate. Therefore, we will grant the Petition.

16. We find that regulating Petitioners due to their joint ownership of the poles would not further any policy objective or bring about any non-trivial public benefits. Petitioners have no ownership interest in the North Circuit, which is used to interconnect Spinning Spur to the SPP grid, but only in the South Circuit, which interconnects solely to the ERCOT grid. There will be no commingling of electric energy produced by Petitioners

¹³ 16 U.S.C. § 824b(1) (2012).

¹⁴ *Id.* § 824(e) (citing 16 U.S.C. §§ 824i, 824j, 824 k (2012)).

¹⁵ Prior Notice Order, 64 FERC ¶ 61,139 at 61,996.

with electric energy produced by Spinning Spur and sold in interstate commerce. In addition, sales made by Petitioners into ERCOT using the South Circuit will be subject to the jurisdiction of the Texas Commission, and Spinning Spur's interstate wholesale sales over the North Circuit are made under a market-based rate tariff. Thus, joint ownership of the poles will not have any rate impacts that we need to consider.

17. On the other hand, subjecting Petitioners to Commission jurisdiction as a result of a joint ownership arrangement could lead to wasteful and inefficient use of infrastructure by creating an incentive for Petitioners to build a separate, and duplicative, set of poles to support only the non-Commission jurisdictional South Circuit. We find no public benefit in encouraging, even indirectly, the inefficient use of resources.

18. Finally, consistent with the rationale applied in *ITC Great Plains*, *R.W. Beck*, and *D.E. Shaw*, we find that Petitioners will not operate Commission-jurisdictional facilities as a result of joint ownership of the poles with Spinning Spur. Pursuant to the co-tenancy agreement that will govern the joint ownership arrangement, Petitioners will have no ability to exercise operating control or decision-making authority of Spinning Spur's use of the North Circuit. As such, we find that joint ownership of the poles by Petitioners will have no impact on Spinning Spur's ability to engage in interstate sales. Rather, Petitioners will retain only those ownership rights necessary to protect their business interests and that of their indirect owner, EDF Renewable.

The Commission orders:

The Petition requesting that the Commission disclaim jurisdiction over Petitioners as public utilities solely as a result of the joint ownership of the poles and other non-electrical infrastructure that is also used to support an affiliate's Commission-jurisdictional generator tie line, is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.