

124 FERC ¶ 61,129
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.

TexMex Energy, L.L.C.

Docket No. EL08-71-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued July 31, 2008)

1. In this order, the Commission grants a request by TexMex Energy, L.L.C. (TexMex) to determine that Electricity Reliability Council of Texas (ERCOT) and ERCOT electric utilities and 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 operating and using the Eagle Pass DC Tie, a transmission interconnection between ERCOT and Comisión Federal de Electricidad (CFE).

I. Background

2. On June 19, 2008, TexMex filed a petition for a declaratory order asking that the Commission find that 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 using and operating the Eagle Pass DC Tie between ERCOT and the transmission facilities of CFE. TexMex proposes to use the Eagle Pass DC Tie to schedule commercial transactions exporting electric energy from ERCOT into Mexico.

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

A. TexMex

3. TexMex is a power marketer formed for the exclusive purpose of purchasing wholesale power from the ERCOT region for export to Mexico. TexMex states that it is a wholly owned subsidiary of Protama, a Mexican corporation that develops energy projects. TexMex has obtained Department of Energy, Office of Electric Delivery and Energy, approval to export electric energy through interconnections between ERCOT and CFE.² TexMex states that it operates exclusively within the ERCOT region and is not a public utility as defined by the FPA.³

B. The Eagle Pass DC Tie

4. TexMex describes the Eagle Pass DC Tie as a five-mile, 138 kV high voltage direct current (HVDC) transmission line crossing the U.S./Mexico border between ERCOT and the CFE national grid. American Electric Power Texas Central Company (AEP Texas Central), formerly known as Central Power and Light Company (CP&L), owns and operates 1.3 miles of the line, from the Eagle Pass substation in Texas, to the U.S./Mexico border.⁴ In Mexico, the line continues another 3.7 miles to CFE's Piedras Negras substation.

5. TexMex states the Eagle Pass DC Tie was initially constructed and operated by CFE as a radial connection providing reliability support using block-load transfer procedures in emergency situations. In April 2000, the presidential permit for ownership and operation of the U.S. portion of the Eagle Pass DC Tie was transferred from CFE to CP&L.⁵ Following the transfer, back-to-back voltage source converter technology was installed at the Eagle Pass substation that enables the continuous asynchronous interconnection between ERCOT and CFE, allowing voltage support and 36 MW of real power transfers in either direction across the Eagle Pass DC Tie. Although installation of the back-to-back voltage source converter technology was completed in 2003, the line has continued to operate exclusively for reliability purposes pending the development and

² *TexMex Energy, L.L.C.*, Order No. EA-294-A (Dep't of Energy Feb. 22, 2007), available at http://www.oe.energy.gov/DocumentsandMedia/EA-294-A_TexMex.pdf.

³ Citing *Destec Power Services, Inc.*, 72 FERC ¶ 61,277, at 62, 204-05 (1995).

⁴ TexMex June 19, 2008 Petition at 5 (TexMex states that AEP Texas Central is a Commission-regulated public utility under the FPA, citing *Central Power and Light Co.*, 56 FPC 432 (1976), *reh'g denied*, 56 FPC 1752 (1976)).

⁵ Citing *Central Power and Light Co.*, Presidential Permit Order No. PP-219 (Dep't of Energy Apr. 5, 2000).

implementation of protocols applicable to commercial transactions. TexMex expects that protocols for commercial transactions across the tie will be in place shortly, and then use of the Eagle Pass DC Tie will be available to third parties on an open access basis.⁶

C. ERCOT

6. ERCOT is an independent system operator that administers a transmission grid solely within the state of Texas. The ERCOT grid is not synchronously interconnected to the rest of the United States but is asynchronously interconnected through HVDC interconnections with the Southwest Power Pool, Inc. (SPP) grid. These interconnections were established pursuant to Commission orders under FPA sections 210 and 211, and do not trigger Commission jurisdiction under FPA sections 203, 205 or 206.

D. The Sharyland Order

7. TexMex's petition relies heavily on the Commission's determinations in *Sharyland Utilities, L.P.*⁷ In *Sharyland* the Commission considered the jurisdictional implications of operating and using the Sharyland DC Tie, a large-scale, open-access asynchronous interconnection allowing the purchase and sale of electric energy between ERCOT and CFE. The Commission found that operating and using the Sharyland HVDC interconnection would not subject ERCOT or ERCOT electric utilities and Market Participants to regulation as public utilities to the extent those entities are not already subject to such regulation.⁸

8. In *Sharyland*, the Commission explained the power flows and interconnections between the United States and the CFE grids, including: (1) interconnections between the CFE Baja California system and the Western Electricity Coordinating Council (WECC); (2) the interconnections between the El Paso Electric Company (El Paso) and the national CFE grid; and (3) the interconnections between the national CFE grid and ERCOT, including the Eagle Pass Tie.⁹ The Commission's jurisdictional determination turned, in-part, on a finding that it was physically impossible for electric energy generated within ERCOT and exported to CFE's national grid to reach the WECC interconnection because CFE's national grid and CFE's Baja California system are not

⁶ TexMex June 19, 2008 Petition at 3-4.

⁷ 121 FERC ¶ 61,006 (2007) (*Sharyland*).

⁸ *Id.* P 24.

⁹ *Id.* P 8-13, 20-22.

connected.¹⁰ In addition, the Commission determined that the only way electric energy could flow from ERCOT across the Sharyland Tie to CFE and then into a state other than Texas is when El Paso imports electric energy from CFE over El Paso's interconnection with CFE through El Paso's Diablo substation in Sunland Park, New Mexico (Diablo Interconnection). The Commission found this rarely occurred, and that, when it did occur El Paso must isolate the part of its system served by CFE, preventing the imported electric energy from flowing into the rest of El Paso's system or into the Western Interconnection.¹¹ TexMex states that the Commission's analysis of power flows from *Sharyland* remains valid and applies to the Eagle Pass DC Tie.¹²

II. Notice of Filing and Responsive Pleadings

9. Notice of TexMex's filing was published in the Federal Register, 73 Fed. Reg. 40,574-75 (2008), with interventions and protests due on or before July 15, 2008. American Electric Power Service Corporation, on behalf of AEP Texas Central (collectively, AEP), CenterPoint Energy Houston Electric, L.L.C. (CenterPoint) and Sharyland Utilities, L.P. (Sharyland) filed timely motions to intervene.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene of AEP, CenterPoint and Sharyland serve to make them parties to this proceeding.

B. Statutory Criteria

11. 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 212.¹³ Section 201(c) of the FPA states that, for purposes of that section, "electric energy shall be held to be transmitted in

¹⁰ *Id.* P 9, 20.

¹¹ *Id.* P 10-11, 20.

¹² TexMex June 19, 2008 Petition at 10.

¹³ 16 U.S.C. § 824(b)(1) (2006); *Sharyland*, 121 FERC ¶ 61,006 at P 16; *Cottonwood Energy Co.*, 118 FERC ¶ 61,198, at P 14 & n.5 (2007).

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.”¹⁴ 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 another State, shall not make a person a public utility subject to regulation as such under other provisions of this part.”¹⁵

C. Commission Determination

12. The Commission has no reason to believe that its analysis of power flows and the nature of the interconnection transactions in *Sharyland* is no longer valid, nor any reason not to apply that analysis to the Eagle Pass DC Tie.¹⁶ Accordingly, the Commission finds that, based on the specific facts presented, the transmission of electric energy over the described interconnection will not affect the jurisdictional status of ERCOT or ERCOT electric utilities and Market Participants that are not currently public utilities. Therefore, with the exception of the Commission’s jurisdiction under FPA sections 210, 211 and 212, the Commission’s reliability jurisdiction under FPA section 215, and the Commission’s authority under any other FPA provisions that provide for limited jurisdiction over ERCOT entities, the Commission disclaims jurisdiction with regard to the transmission of electric energy over the described interconnection over (a) ERCOT and (b) ERCOT electric utilities and Market Participants that are not currently public utilities.

13. The Commission’s determination is based on the circumstances presented, including the current configuration and operation of the Eagle Pass DC Tie, the CFE national grid, the CFE Baja-California grid, and the Diablo Interconnection. Should the configuration or operation change, the Commission’s determination of lack of jurisdiction may no longer apply. Accordingly, should ERCOT or ERCOT electric utilities and Market Participants who are not currently public utilities seek assurance in the future that they will retain their non-public utility status under the FPA, they may obtain a jurisdictional determination from the Commission.

¹⁴ *Id.* § 824(c).

¹⁵ *Id.* § 824a(f).

¹⁶ *Sharyland*, 121 FERC ¶ 61,006 at P 18-22.

The Commission orders:

The petition for declaratory order is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.