

129 FERC ¶ 61,106  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Cross Texas Transmission, LLC,  
Sharyland Utilities, L.P.,  
E.ON Climate & Renewables North America Inc.,  
Eurus Energy America Corporation,  
Iberdrola Renewables, Inc., and  
Pattern Renewables LP

Docket No. EL09-66-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued November 5, 2009)

1. On August 7, 2009, Cross Texas Transmission, LLC (Cross Texas), Sharyland Utilities, L.P. (Sharyland), E.ON Climate & Renewables North America Inc. (E.ON), Eurus Energy America Corporation (Eurus), Iberdrola Renewables, Inc. (Iberdrola), and Pattern Renewables LP (Pattern) (collectively, Petitioners) filed a petition for a declaratory order requesting that the Commission disclaim jurisdiction over: (1) proposed transmission lines and facilities located solely within Texas that connect two Competitive Renewable Energy Zones (CREZs) in Texas to the Electric Reliability Council of Texas (ERCOT) grid (CREZ Lines); (2) transmission service over the CREZ Lines; and (3) sales of energy over the CREZ Lines. Petitioners also request that the Commission declare that ERCOT electric utilities and Market Participants<sup>1</sup> that are not currently subject to the Commission's jurisdiction as "public utilities" under the Federal Power Act (FPA) will not become subject to that jurisdiction as a result of the interconnection of the CREZ Lines with the ERCOT transmission system. As discussed below, we will grant the petition.

---

<sup>1</sup> Market Participants are entities that participate in the ERCOT electrical market, including generators, retail electric providers, transmission and distribution service providers, electric cooperatives, municipal utilities, and others.

## I. Background

2. On October 6, 2008, the Public Utility Commission of Texas (Texas Commission) issued an order that (1) designated five CREZs throughout Texas, (2) determined that transmission lines should be constructed to interconnect the CREZs with the transmission grid controlled by ERCOT, and (3) identified the major CREZ transmission improvements to be constructed.<sup>2</sup> Two of the zones are CREZ Panhandle A and CREZ Panhandle B, located in the Texas Panhandle. While the Texas Commission stated that the proposed CREZ Lines should interconnect with the ERCOT transmission grid and not the Southwest Power Pool, Inc. (SPP), the Texas Commission allowed generators in the Texas Panhandle to interconnect with SPP as long as they are not simultaneously interconnected with ERCOT.<sup>3</sup>

3. To preserve the jurisdictional *status quo*, the Texas Commission required that either the generators or the transmission service provider that interconnects the generators and the ERCOT grid obtain an order from this Commission disclaiming jurisdiction over (1) the proposed transmission lines to ERCOT, (2) transmission service over the proposed transmission lines, and (3) the utilities in ERCOT that are not currently public utilities under the FPA.<sup>4</sup> Further, the Texas Commission required that either the generators or transmission service provider obtain the disclaimer as a condition precedent to the Texas Commission approving a certificate of convenience and necessity to the transmission service provider for construction of the CREZ Lines.

4. After the issuance of the CREZ Order, the Texas Commission issued another order determining which entities would be assigned as transmission service providers to construct, own, and operate the CREZ Lines.<sup>5</sup> In that order, the Texas Commission assigned the transmission service provider role for the CREZ Lines to Cross Texas and Sharyland.

---

<sup>2</sup> *Petition for Designation of Competitive Renewable-Energy Zones*, Docket No. 33672 (Public Utility Commission of Texas, Oct. 6, 2008) (CREZ Order).

<sup>3</sup> CREZ Order at 23.

<sup>4</sup> CREZ Order at 24.

<sup>5</sup> *Petition for Selection of Entities Responsible for Transmission Improvements Necessary to Deliver Renewable Energy from Competitive Renewable-Energy Zones*, Docket No. 35665 (Public Utility Commission of Texas, May 15, 2009) (Selection Order).

**A. Petitioners**

5. Cross Texas is not currently an electric utility in Texas but plans to obtain a certificate of convenience and necessity as an electric utility subject to the Texas Commission's jurisdiction when it files its application to construct the CREZ Lines. The Texas Commission designated Cross Texas to construct certain CREZ Lines located in Briscoe, Carson, Childress, Collingsworth, Cottle, Donley, Gray, Hall, Motley, Roberts, and Wheeler Counties in Texas.

6. Sharyland is an investor-owned, Texas-based electric utility, currently regulated by the Texas Commission, and was granted a certificate of convenience and necessity by the Texas Commission in 1999. The Texas Commission designated Sharyland to construct certain CREZ Lines located in Armstrong, Briscoe, Carson, Castro, Floyd, Deaf Smith, Dickens, Donley, Motley, Randall, and Swisher Counties in Texas.

7. E.ON, Eurus, Iberdrola, and Pattern (collectively, Wind Developers) are developers of wind projects in Texas and elsewhere. Each of these developers plans to construct wind energy generation projects in the Panhandle A and/or Panhandle B CREZs, which will interconnect with the CREZ Lines that will be built and operated by Cross Texas and/or Sharyland.

**B. Petition for Declaratory Order**

8. Petitioners ask that the Commission disclaim jurisdiction over the proposed CREZ Lines and declare that the ownership, operation, and use of those lines would not disturb the jurisdictional *status quo* under the circumstances presented in this Petition. Petitioners assert that such a finding is consistent with the Commission's findings in *Cottonwood Energy*.<sup>6</sup>

9. In support, Petitioners state that the CREZ Lines will be located entirely within the State of Texas, will interconnect solely with the ERCOT grid, and will transmit electric energy generated and consumed solely within the State. The CREZ Lines will connect points in CREZ Panhandle A and CREZ Panhandle B to points on the current ERCOT grid. The lines will not cross state borders and will not interconnect to any SPP facilities or any other non-ERCOT facilities. Accordingly, Petitioners assert, no energy transmitted over the proposed CREZ Lines will be commingled with energy transmitted in interstate commerce.

---

<sup>6</sup> *Cottonwood Energy Co.*, 118 FERC ¶ 61,198 (2007) (*Cottonwood Energy*).

10. Further, Petitioners state that the wind energy projects being developed by the Wind Developers are also located solely in the State of Texas. When producing energy for the ERCOT market, the turbines at the projects will interconnect to the CREZ Lines so that the energy generated by the turbines will be transmitted via the CREZ Lines and sold into ERCOT.

11. Petitioners note that there are several limitations to simultaneous interconnection by a generator with both ERCOT and other transmission facilities. First, the CREZ Order bars wind turbines in the Wind Developers' Panhandle A and Panhandle B projects that generate energy for delivery to ERCOT customers over the CREZ Lines from simultaneously interconnecting with any SPP facilities. Second, ERCOT requires all Market Participants, including generators, to execute a Standard Form Market Participant Agreement. Section 5.B of the Standard Form Market Participant Agreement prohibits Market Participants from taking any action, without first providing notice to ERCOT and allowing a reasonable time to respond, that would cause a Market Participant to become a "public utility" under the FPA or become subject to the jurisdiction of the Commission. Third, all generators that interconnect to the ERCOT grid, including through the CREZ Lines, must also execute a Standard Generation Interconnection Agreement with the applicable transmission service provider. The Standard Generation Interconnection Agreement expressly provides that the generator will "not cause there to be a synchronous or an asynchronous interconnection between ERCOT and any other transmission facilities operated outside of ERCOT unless ordered by the [Commission] under Section 210 of the Federal Power Act."<sup>7</sup> Finally, Petitioners state that ERCOT would not approve a generator configuration that permitted simultaneous interconnection with the ERCOT and SPP grids.

12. Petitioners further state that the Wind Developers plan to obtain station power for their Panhandle A and Panhandle B projects, as needed, either through self supply or from the utility authorized to provide retail service to the projects. To the extent administrative operations and maintenance facilities at the project sites may be supplied by non-ERCOT resources, Petitioners add, the facilities will be physically and electrically separate from the turbines so there will be no possibility of commingling ERCOT and non-ERCOT energy. Accordingly, Petitioners assert there will be no commingling of energy in interstate commerce from any of the CREZ projects.

13. Petitioners request a disclaimer of jurisdiction based on the configuration and operation of the CREZ Lines and not limited to the specifically-identified Petitioners. They note that the Texas Commission has designated Cross Texas and Sharyland to construct, operate, and maintain the CREZ Lines, but point out that the identity of all of

---

<sup>7</sup> Application at Exhibit E, Caskey Affidavit, P 7 (quoting ERCOT Standard Generation Interconnection Agreement, Article 10.7).

the generators that may connect with the CREZ Lines is not yet known. Accordingly, Petitioners request that the Commission's disclaimer apply to all generators using the CREZ Lines, as well as to the two transmission service providers operating those lines, provided that the configuration and operation of their facilities are consistent with the configuration and operation described in this Petition.

14. To allow the transmission service providers and wind energy developers to move forward with their certificate of convenience and necessity proceedings at the Texas Commission for the CREZ Lines, Petitioners request that the Commission issue the requested declaratory order not later than December 1, 2009.

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

15. Notice of Petitioners' filing was published in the *Federal Register*, 74 FR 43694 (2009), with interventions and protests due on or before September 8, 2009. Timely motions to intervene were filed by Oncor Electric Delivery Company LLC, CenterPoint Energy Houston Electric, LLC, and American Electric Power Service Corporation. Motions for leave to intervene out-of-time were filed by Xcel Energy Services Inc. (Xcel), on behalf of Southwestern Public Service Company (Southwestern), and by Electric Transmission Texas, LLC. Xcel also filed comments on behalf of Southwestern. On September 24, 2009, Petitioners filed an answer to Xcel's motion to intervene out-of-time and comments.

16. In its comments, Xcel requests that the Commission address the effects of generators that may engage in "grid switching," where the output of the generation can be delivered into one market or another (e.g., either ERCOT or SPP) depending on the market offering the higher price, if the price differential exceeds the costs of switching grids. Xcel does not object to grid switching, but notes that it could have implications for operating and maintaining the SPP system, such as an effect on reserve margins and associated incremental costs, as well as transmission congestion from unplanned generation that could result in curtailments, conflicts with transmission maintenance, and energy imbalances. Xcel requests that the Commission require that generators that switch into the SPP grid comply with the SPP interconnection requirements and market participant requirements, and maintains that the Commission disclaimer in this order does not apply to entities that also propose to sell at wholesale in SPP. Xcel further states that wind generation that switches into SPP could have an effect on studies by SPP on how much wind can operate reliably within the SPP region.

17. Petitioners respond that Xcel's comments address speculative matters which are beyond the scope of the issues raised in this proceeding. Petitioners assert that, if concerns about grid switching do arise in the future, there are other more appropriate forums in which they may be addressed and that such concerns should not be addressed in this proceeding.

### **III. Discussion**

#### **A. Procedural Matters**

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the 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 the late-filed motions to intervene of Xcel and Electric Transmission Texas, LLC's given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

19. 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 unless otherwise ordered by the decisional authority. We will accept Petitioners' answer because it has provided information that assisted us in our decision-making process.

#### **B. Commission Determination**

20. Section 201 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.<sup>8</sup>

21. We find that the owners and operators of the CREZ Lines would not be "public utilities" under section 201 of the FPA as a result of the proposed transmission lines because, except as a result of Commission orders issued under sections 210, 211, and 212 of the FPA,<sup>9</sup> they would not own or operate facilities used for transmission of electric energy in interstate commerce or for sales of electric energy at wholesale in interstate commerce.<sup>10</sup> Petitioners state that the CREZ Lines will be located entirely within the

---

<sup>8</sup> 16 U.S.C. § 824(b)(1), (e) (2006); *see Jersey Central Power & Light Company*, 319 U.S. 61 (1943); *Connecticut Light & Power Company v. FPC*, 324 U.S. 515 (1945); *FPC v. Florida Power & Light Company*, 404 U.S. 453 (1972).

<sup>9</sup> *See Central Power and Light Co.*, 17 FERC ¶ 61,078 (1981), *order on reh'g*, 18 FERC ¶ 61,100 (1982), *modified*, 40 FERC ¶ 61,077 (1987); *Kiowa Power Partners, LLC*, 99 FERC ¶ 61,251 (2002).

<sup>10</sup> Although Petitioners would not be public utilities, Petitioners and/or their facilities would be subject to the Commission's jurisdiction for limited purposes under certain other provisions of the FPA, including the Commission's reliability jurisdiction under section 215 of the FPA. 16 U.S.C. § 824o (2006).

State of Texas, will interconnect solely with the ERCOT grid, and will transmit electric energy generated and consumed solely within the State. The lines will not cross state borders and will not interconnect to any SPP facilities or any other non-ERCOT facilities. Accordingly, Petitioners assert, no energy transmitted over the proposed CREZ Lines will be commingled with energy transmitted in interstate commerce. Based on these representations, we find that the proposed transmission lines, as described in the instant filing, do not disturb the jurisdictional *status quo*.

22. Regarding the Wind Developers, no facility will be simultaneously interconnected to SPP, so the energy cannot be sold, transmitted, or consumed outside of Texas.<sup>11</sup> As further specified by the CREZ Order, “generation within the CREZs will not be authorized to interconnect simultaneously with ERCOT and electrical grids outside of ERCOT.” Additionally, ERCOT will require the generators, to execute a Standard Form Market Participant Agreement, which prohibits the generators from taking any action, without first providing notice to ERCOT and allowing a reasonable time to respond, that would cause the generator to become a “public utility” under the FPA or become subject to the jurisdiction of the Commission. Moreover, all generators that interconnect to the ERCOT grid, including through the CREZ Lines, must also execute a Standard Generation Interconnection Agreement with the applicable transmission service provider, which expressly provides that the generator will “not cause there to be a synchronous or an asynchronous interconnection between ERCOT and any other transmission facilities operated outside of ERCOT unless ordered by the [Commission] under Section 210 of the Federal Power Act.”<sup>12</sup> Based on Petitioners’ representations, the Commission finds that, as described, the facilities will be operated in a manner that will not facilitate transmission in interstate commerce or sales at wholesale in interstate commerce, except as a result of prior Commission orders issued under sections 210, 211, and 212 of the FPA.<sup>13</sup>

---

<sup>11</sup> The exception is that energy may flow over the ERCOT grid through the High Voltage Direct Current ties previously approved by the Commission pursuant to sections 210, 211, and 212 of the FPA, but that would not cause electric utilities or other entities that are not otherwise public utilities to become public utilities. *See, e.g., Sharyland Utilities, L.P.*, 121 FERC ¶ 61,006 at P 7 (2007) (citing *Cottonwood*, 118 FERC ¶ 61,198, at P 5, 17 (2007)).

<sup>12</sup> Application at Exhibit E, Caskey Affidavit, P 7 (quoting ERCOT Standard Generation Interconnection Agreement, Article 10.7).

<sup>13</sup> We agree with Petitioners that Xcel’s concerns, regarding issues of the implications for the SPP system of generators switching between ERCOT and SPP, are neither relevant to the Petition before us, nor yet ripe. There is currently no filing before us that involves these generators selling into SPP.

23. This situation is analogous to that present in *Cottonwood Energy*. In that case, the Commission examined the jurisdictional implications of a proposal to construct a transmission line connecting a gas-fired generating facility located in the Southeastern Electric Reliability Council (SERC) portion of Texas to an interconnection point in the ERCOT portion of Texas. The Commission disclaimed jurisdiction based on the petition's description of the proposed transmission line and its representation that the line would be operated in a manner that does not result in the transmission or sale for resale of electric energy in interstate commerce, including any commingling of electric energy between SERC and ERCOT.<sup>14</sup>

24. Based on Petitioners' description of the proposed interconnection and transmission facilities and their representation that the facilities will be operated in a manner that does not result in the transmission or sale for resale of electric energy in interstate commerce, including any commingling of electric energy between SPP and ERCOT, the Commission will grant Petitioners' petition for a declaratory order as follows. With the exception of our jurisdiction pursuant to sections 210, 211, and 212 of the FPA, our reliability jurisdiction under section 215 of the FPA, and our authority under any other FPA provisions that provide for limited jurisdiction over Petitioners and/or their facilities, the Commission disclaims jurisdiction over: (1) the proposed CREZ Lines to ERCOT; (2) transmission service over the proposed CREZ Lines; and (3) sales of electric energy over the CREZ Lines. Moreover, the utilities in ERCOT that are not currently public utilities under the FPA will not become public utilities as a result of the interconnection of the CREZ Lines with the ERCOT grid.

The Commission orders:

Petitioners' petition for a declaratory order disclaiming jurisdiction over the proposed CREZ Lines to ERCOT, transmission service over the proposed CREZ Lines, and sales of electric energy over the CREZ Lines is hereby granted, as discussed above in the body of this order. Moreover, the utilities in ERCOT that are not currently public utilities under the FPA will not become public utilities as a result of the interconnection of the CREZ Lines with the ERCOT grid, as discussed above in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

---

<sup>14</sup> *Cottonwood Energy*, 118 FERC ¶ 61,198 at P 17.