

155 FERC ¶ 61,176  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

LS Power Development, LLC and  
Cross Texas Transmission, LLC

Docket No. EL16-46-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER  
AND DISCLAIMING JURISDICTION

(Issued May 19, 2016)

1. On March 10, 2016, LS Power Development, LLC (LS Power) and Cross Texas Transmission, LLC (Cross Texas) (jointly, Petitioners) petitioned the Commission (Petition), pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,<sup>1</sup> for a declaratory order stating that certain actions that Petitioners plan to take will not affect the jurisdictional status either of the Electricity Reliability Council of Texas (ERCOT)<sup>2</sup> transmission system or of the electric utilities, generators, retail electric providers, and transmission and distribution service providers that are associated with

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<sup>1</sup> 18 C.F.R. § 385.207 (2015).

<sup>2</sup> ERCOT is an independent system operator that administers a transmission grid solely within Texas, for approximately 90 percent of the state's electric load. 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 sections 210 and 211 of the Federal Power Act (FPA) and do not trigger Commission jurisdiction under FPA sections 203, 205 or 206. ERCOT is subject to oversight by the Public Utility Commission of Texas (Texas Commission) and the Texas legislature. *See American Elec. Power Serv. Corp.*, 117 FERC ¶ 61,359, at P 16 (2006) (*AEP*); *TexMex Energy, L.L.C.*, 124 FERC ¶ 61,129, at P 6 (2008).

the ERCOT market (collectively, ERCOT Market Participants). As discussed below, we grant the petition.

## **I. Background**

2. LS Power is the general partner and the principal operating company of LS Power Associates, L.P. Through its subsidiaries, LS Power develops, owns, and operates independent power projects and transmission facilities in the United States.<sup>3</sup>

3. Cross Texas, an indirect subsidiary of LS Power, is a transmission service provider that owns and operates transmission lines, substations, and associated facilities within ERCOT. Except for certain limited purposes, Cross Texas is not a public utility and is not subject to the Commission's jurisdiction.<sup>4</sup> Rather, it is regulated by the Texas Commission.<sup>5</sup>

4. Cross Texas has a primary control center and a back-up control center (together, the Control Centers) in Austin, through which it performs all necessary functions to monitor, operate, and control its electric facilities. Other Cross Texas employees, in other parts of Texas, perform engineering and other functions.<sup>6</sup>

5. Petitioners state that affiliates of LS Power are in the process of developing transmission projects outside of Texas, in other regions of the United States. For

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<sup>3</sup> Petition at 2. Such subsidiaries are located within the footprints of PJM Interconnection, L.L.C., Midcontinent Independent System Operator, Inc., New York Independent System Operator, Inc., SPP, and Florida Reliability Coordinating Council. *Id.* at 3-4.

<sup>4</sup> See *Cross Texas Transmission, LLC*, 129 FERC ¶ 61,106, at P 21 & n.10 (2009) (owners and operators of certain proposed transmission lines, solely within Texas, which will not be used for transmission of electric energy in interstate commerce or for sales of electric energy at wholesale in interstate commerce, will not be "public utilities" subject to the Commission's jurisdiction under section 201 of the FPA, 16 U.S.C. § 824 (2012), and do not disturb the existing, non-jurisdictional status of ERCOT and its market participants; however, the owners and operators of the transmission lines would be subject to the Commission's jurisdiction for certain limited purposes, including reliability).

<sup>5</sup> Petition at 2.

<sup>6</sup> *Id.* at 3.

administrative efficiency, LS Power seeks to use the Control Centers as the main control center for certain of the affiliated transmission projects.<sup>7</sup> Thus, the Petitioner's employees, while physically located in the Control Centers or elsewhere in Texas, would provide control center services (Control Center services) to affiliated transmission projects located outside of ERCOT.<sup>8</sup>

6. Petitioners state that the Control Center services will involve the day-to-day operation and administration of LS Power's and its associates' transmission assets, including real-time monitoring, inspection and field maintenance, and compliance with the North American Electric Reliability Corporation's and regional transmission organizations' or independent system operators' standards and requirements. Petitioners give as some examples of these duties: (1) maintaining the Control Centers as fully functional to ensure safe reliable operation and control of transmission lines; (2) staffing the Control Centers with sufficient, properly trained personnel; (3) establishing and maintaining adequate and reliable redundant communication paths between the Control Centers and the facilities; (4) establishing and maintaining communication with the reliability coordinator, balancing authority, and adjacent transmission operators; (5) implementing policies and procedures related to ensuring reliable transmission system operation; (6) taking necessary actions to alleviate operating emergencies, including removing facilities from service if necessary; (7) coordinating and scheduling planned outages of transmission facilities with the reliability coordinator, balancing authority, adjacent transmission operations, and others; and (8) submitting applicable reports, e.g., incident reports and mis-operation reports.<sup>9</sup>

7. Petitioners emphasize that the services to be provided by employees located in the Control Centers or other parts of ERCOT do not involve the sale or transmission of electric energy in interstate commerce, and aver that the services will not disturb the jurisdictional status quo with respect to ERCOT and ERCOT Market Participants.<sup>10</sup> Petitioners argue that, while their or their affiliates' employees will use the Control Centers to operate facilities in other parts of the country, outside of ERCOT, the

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<sup>7</sup> Some of the affiliated transmission projects will be operated by third parties and not from the Control Centers. *Id.* at 7 n.13.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 7-8.

<sup>10</sup> *Id.* at 8.

employees' actions will not result in any change to the power flows into or out of ERCOT or mean that electric energy is being sold or transmitted in interstate commerce. Therefore, Petitioners assert, the Commission's jurisdiction under the FPA is not triggered.<sup>11</sup> In support, Petitioners cite *Central and South West Services, Inc.* as a similar situation,<sup>12</sup> and *AEP*, for its holding that the Commission lacks jurisdiction over transactions in ERCOT.<sup>13</sup>

8. Petitioners conclude by stating that they are seeking a declaratory order only to ensure that their and their affiliates' provision of Control Center services will not have any impact on the jurisdictional status quo with respect to ERCOT and ERCOT Market Participants that are not otherwise subject to Commission jurisdiction under the FPA. Petitioners add that the Commission retains its jurisdiction under sections 210, 211, 212, and 215 of the FPA.<sup>14</sup>

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

9. Notice of Petitioners' filing was published in the *Federal Register*, 81 Fed. Reg. 15,098 (2016), with interventions and protests due on or before April 11, 2016. Timely motions to intervene were filed by American Electric Power Service Corporation, GridLiance Heartland LLC, and ERCOT. A notice of intervention was filed by the Texas Commission. No protests were filed.

## **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 (2015), the notice of intervention and timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>11</sup> *Id.* at 10-11.

<sup>12</sup> *Id.* at 11 (citing *Central and South West Servs., Inc.*, Opinion No. 332, 48 FERC ¶ 61,197, at 61,730, *reh'g denied*, Opinion No. 332-A, 49 FERC ¶ 61,118 (1989) (*Central and South West*)).

<sup>13</sup> *Id.* (citing *AEP*, 117 FERC ¶ 61,359).

<sup>14</sup> 16 U.S.C. §§ 824i (certain interconnection authority), 824j-1 (certain wheeling authority), 824k (provisions regarding certain orders requiring interconnection or wheeling), 824o (electric reliability) (2012).

**B. Commission Determination**

11. Section 201(b)(1) of the FPA 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....<sup>[15]</sup>

12. Section 201(e) of the FPA<sup>16</sup> 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 the 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>17</sup> Electric energy is deemed to be sold in interstate commerce only if it is transmitted in interstate commerce or is commingled with electric energy that is transmitted in interstate commerce.<sup>18</sup>

13. ERCOT utilities are not generally subject to Commission jurisdiction under the FPA because their facilities are neither used for transmission nor for sales of electric energy in interstate commerce (except as a result of interconnection and wheeling service provided pursuant to orders under sections 210 and 211 of the FPA).<sup>19</sup> According to Petitioners, Petitioners’ employees providing Control Center services does not change that fact; their actions will not involve the flow of electric energy, or the commingling of electric energy, between ERCOT and the rest of the continental United States, nor will

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<sup>15</sup> 16 U.S.C. § 824b(1) (2012).

<sup>16</sup> 16 U.S.C. § 824e (2012).

<sup>17</sup> See also *Jersey Central Power & Light Co. v. FPC*, 319 U.S. 61 (1943); *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945); *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972).

<sup>18</sup> See *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463.

<sup>19</sup> *Tres Amigas LLC*, 130 FERC ¶ 61,205, at P 41, *reh’g denied*, 132 FERC ¶ 61,232 (2010). ERCOT utilities are also subject to the Commission’s reliability jurisdiction pursuant to section 215 of the FPA.

they involve sales of electric energy at wholesale between ERCOT and the rest of the continental United States.

14. Based on Petitioners' description of the Control Center services, such services do not result in the transmission or sale for resale of electric energy between ERCOT and the rest of the continental United States (including any commingling of electric energy between ERCOT and the rest of the United States). Accordingly, we find that the provision by Petitioners' employees of such services will not affect the jurisdictional status quo of ERCOT or ERCOT Market Participants that are not currently subject to the Commission's jurisdiction as "public utilities" under the FPA.<sup>20</sup>

The Commission orders:

The petition filed by LS Power and Cross Texas is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>20</sup> Cf. *Central and South West*, 48 FERC ¶ 61,197 at 61,730 (recognizing that CSW provided accounting, financial, and engineering services to four companies operating in Oklahoma, Arkansas, and Louisiana, in addition to Texas, and acted as their agent; two companies operated solely within ERCOT and two operated outside ERCOT).