

any possible change in regulation of Oncor's transmission facilities.<sup>42</sup> Oncor states that it would prefer to continue operating under the jurisdiction of the Texas Commission and ERCOT and not subject to the Commission's jurisdiction. Oncor further states that, if the Commission finds that an interconnection between the Project and ERCOT would subject Oncor's facilities to Commission jurisdiction, Oncor would oppose construction of the Project. To that end, Oncor requests that any Commission decision on the Petition fully explain the boundaries of the Commission's jurisdiction and provide guidance as to the circumstances that could lead to an assertion of jurisdiction.<sup>43</sup>

### **Occidental**

25. Occidental states that the Petition should be summarily denied or, in the alternative, set for an evidentiary hearing. Occidental further states that granting the Petition would result in a disclaimer of jurisdiction over massive quantities of electric energy that is sourced in one interconnection and delivered to another. Occidental notes that electric energy will flow from ERCOT to the Project for delivery to grids subject to Commission jurisdiction for consumption in another state; that electric energy will flow from Commission-jurisdictional grids to interconnection facilities that connect with ERCOT via the Project; and that ERCOT parties that interconnect to the Project must build transmission lines that exit Texas and connect with the Project in New Mexico. Occidental states that this shows the electric energy will be transmitted from one state and consumed in another, the essence of transmission in interstate commerce under the FPA.

26. Occidental disputes Petitioner's arguments that ERCOT electric energy will not "commingle" with electric energy from the other interconnections and contends that transmission and commingling of ERCOT electric energy in interstate commerce will occur. Occidental characterizes the Project as facilitating the flow of electric energy between ERCOT and the interstate grids, eliminating "the 'isolation' of the ERCOT system upon which ERCOT's unique jurisdictional status has been based," and resulting in "vast quantities of electric energy flowing from and to ERCOT to the interstate grid."<sup>44</sup> Occidental notes the Petitioner admits that transactions transmitted across its facilities will be Commission-jurisdictional, but Occidental contends that Petitioner ignores the express language of the FPA which would also make the entities that engage in the transactions or that own or operate the facilities used for the transmission and sale of electric energy pursuant to those transactions "public utilities" under the FPA.

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<sup>42</sup> Oncor Comments at 2.

<sup>43</sup> *Id.* at 3.

<sup>44</sup> Occidental January 12 Protest at 13, 12-16.

### Petitioner's Answer

28. On January 20, 2010, Petitioner filed an answer to the comments in opposition to its Petition. Petitioner maintains that no intervenor will suffer direct injury if the Commission grants the Petition because none of the intervenors has requested that the Commission assert jurisdiction over ERCOT when Petitioner enters service or contends that they would be adversely affected if the Commission does in fact assert jurisdiction.<sup>47</sup> Petitioner further argues that the Commission should not pre-judge the question of whether any of the intervenors would have standing to appeal an order approving the Petition.<sup>48</sup>

29. Additionally, Petitioner responds that ERCOT is not in interstate commerce because it is operated asynchronously and is therefore electrically separated from the interstate grid. Therefore, Petitioner asserts, it is irrelevant to the Petition that the Project will enable more transactions to occur between ERCOT and the interstate grids. Petitioner concedes that the Commission has jurisdiction over transactions where an ERCOT supplier sells power that is delivered through the Project for delivery to another state, or vice versa, and that the only issue in this proceeding is whether the jurisdictional status quo will continue as to wholesale power and transmission service transactions that occur entirely within ERCOT. Petitioner notes that it has asked the Commission to disclaim jurisdiction over the ERCOT transmission line that interconnects with the Project by finding that it is entirely inside ERCOT, but acknowledges that the Project is one mile inside the New Mexico border. Petitioner states that, if crossing the New Mexico border makes the entire line subject to Commission jurisdiction, Petitioner will enter into a commercial arrangement under which ownership of the line changes at the Texas/ New Mexico border to avoid subjecting the owner of the line to Commission jurisdiction.<sup>49</sup>

30. Petitioner also disputes Occidental's arguments regarding commingling and argues that "commingling," as intended by the Supreme Court in *FP&L* and discussed in *New York v. FERC*,<sup>50</sup> means that electric energy becomes mixed or blended "in a vast pool" on the grid. Petitioner contends that the Supreme Court must have considered the effect of ERCOT's interconnection through existing AC/DC converters in its discussion of "commingling," and found that ERCOT was not subject to Commission jurisdiction because it was asynchronously tied to the interstate grids, and not due to prior

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<sup>47</sup> Tres Amigas January 20 Answer at 2.

<sup>48</sup> *Id.* at 2 n.2.

<sup>49</sup> *Id.* at 7 n.7.

<sup>50</sup> 535 U.S. 1 (2002).

Commission orders under section 201(b)(2). Petitioner disputes Occidental's arguments, arguing that ERCOT is not non-jurisdictional because there is a low volume of transactions across the existing AC/DC ties, but rather because ERCOT is electrically separated from the interstate "pool" of electric energy. Petitioner further contests Occidental's contention that commingling occurs whenever a transaction across state lines is possible, even across an AC/DC interconnection between asynchronous systems; Petitioner asserts that the Commission has avoided that question by relying on decisions under section 201(b)(2) and that such an assumption would conflict with the Supreme Court's decision in *New York v. FERC*.

31. Regarding Occidental's arguments related to section 211, Petitioner contends that the definition of a "transmitting utility" may apply to those who have not yet constructed transmission facilities in interstate commerce, and that the Commission should reject Occidental's narrow reading of the definition of "transmitting utility." Further, Petitioner counters Occidental's arguments that the Project should not be able to apply for a section 211 order, asserting that the Project could apply for an order under section 211 that would not be limited to transmission for its own sales, that such an order could also allow the Project to request delivery of energy, and that the section 211 public interest test can be satisfied by grounds other than an analysis of the sale of the applicant's energy; that is, it can be satisfied by arguments such as the benefit of moving renewable energy from Texas to the interstate grids. Petitioner reiterates its arguments that an order under section 210 would be superfluous if Petitioner will not interconnect voluntarily to the line interconnected with ERCOT in the absence of an order under section 211. Petitioner also counters EPSA's arguments that section 201(b)(2) is not available in circumstances where the interconnection is designed to expand the volume of transactions between ERCOT and the interstate grids. Petitioner argues that this Petition is simply an extension of earlier efforts to expand transactions between ERCOT and one of the other interstate grids. Petitioner also states that the Project will be an "electric utility," that "sells electric energy," and thus eligible to apply for an order under section 210, and argues that the phrase should not be read as narrowly as argued by EPSA.

32. Finally, Petitioner argues that the Commission could also rely on the separation between ERCOT and the interstate grids by the Project in finding that interconnection between ERCOT and the Project does not put ERCOT in interstate commerce based on the facts of this case.

### **Occidental's Motion and Answer**

33. On January 27, 2010, Occidental filed a motion to accept its answer to Petitioner's January 20 Answer. Occidental asserts that Petitioner, in that Answer, changed the facts and request for relief, and requests that the Commission direct Petitioner to file an amended Petition and permit additional comment. Occidental states that Petitioner initially requested that the Commission disclaim jurisdiction as to transmission service over the AC ties from ERCOT to the Project and the transmission owner constructing

transmission facilities from ERCOT to the Project, but that, in its Answer, Petitioner only requested disclaimer over transactions exclusively within ERCOT. Occidental further points to Petitioner's offer to "enter into a commercial arrangement under which ownership of the [transmission] line changes at the Texas/New Mexico border" as a change in the facts presented by the initial Petition.<sup>51</sup> Occidental notes that the Texas Commission commented that Petitioner provided "little concrete information," and argues that Petitioner continues to offer few details regarding its changing Petition. Occidental also states that there is a conflict between Petitioner's stated reliance on *Cottonwood Energy, Sharyland*, and *Cross Texas*, in which the Petitioners sought rulings that no market participants or utilities in ERCOT would become "public utilities" under the FPA by virtue of the interconnection and transmission outside ERCOT, and Petitioner's statement that entities in ERCOT that buy and sell power through the Project will be subject to Commission jurisdiction. Occidental argues that Petitioner should be required to file an amended Petition and the Commission should allow additional comments on the amended Petition.

34. Additionally, Occidental answers that the fact that the ERCOT grid is asynchronous with the Eastern Interconnection and WECC does not mean that electric energy delivered through the Project is not "commingling" in interstate commerce. Occidental also contests Petitioner's interpretation of *New York v. FERC* as providing that ERCOT is not subject to the Commission's jurisdiction as long as it is asynchronous with the Eastern Interconnection and WECC. Occidental states that the Court's statements regarding ERCOT in *New York v. FERC* were *dicta* and did not address the AC/DC interconnections between ERCOT and the interstate grids. Occidental also states that Petitioner would have the Commission overturn its decision in *Sharyland*, that electric energy sourced in ERCOT, even after flowing through an HVDC converter, would "commingle" with non-ERCOT electric energy and, if consumed in another state, would be subject to Commission jurisdiction due to the commingling with other electric energy. Occidental states that *New York v. FERC* is instructive in its discussion of the technological evolution of electric power systems, and points out that the Commission's brief in that case noted that this evolution was capturing more transactions and entities under the Commission's jurisdiction. The Commission's brief stated that, "when a utility attempts to have its operations 'quarantine[d] from the interstate grid,' 'such a quarantine from the interstate grid must be complete to be effective for jurisdictional purposes.'"<sup>52</sup> Occidental contends that the Project will result in substantial, frequent, and continuous

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<sup>51</sup> Occidental January 27 Answer at 3-4 (quoting Tres Amigas January 20 Answer at 7 n.7).

<sup>52</sup> *Id.* at 15 (quoting *New York v. FERC*, Nos. 00-568, 00-809, Brief for the Federal Energy Regulatory Commission, 2001 WL 716903 at 16 (U.S. May 31, 2009)).

flow of electric energy from the interstate grids to ERCOT and vice versa, breaching the “quarantine” of ERCOT and resulting in commingling of electric energy within ERCOT. Occidental states that ERCOT market participants that sell power on the Project for delivery to another state, or vice versa, would be “public utilities” under the FPA, because they would be engaged in the wholesale sale of electric energy in interstate commerce.

35. Regarding arguments relating to section 210, Occidental takes issue with the Texas Commission’s citation to the Commission’s decision in *Kiowa* for the proposition that entities exist or may be created in ERCOT that would allow use of sections 210, 211, and 212 to build interconnections with the Project that would not disrupt the jurisdictional status quo. Occidental notes that the Commission approved an uncontested settlement in *Kiowa*, thus that decision has no precedential value in a contested proceeding. Occidental states that it does not believe that *Kiowa* would allow the Commission to grant a section 210 order to direct interconnections between ERCOT utilities that are not “electric utilities” and the Project.<sup>53</sup> Occidental further argues that interconnection is a Commission-jurisdictional activity, and an exemption from jurisdiction for interconnection is not available unless covered by an order issued under section 210; a section 211 wheeling order will not provide an exemption for an activity outside the scope of that wheeling order.

36. Occidental also responds to Petitioner’s arguments regarding the “standing” of any intervenor to appeal an order, asserting that Occidental has met the requisites necessary to be granted status as an intervenor in this proceeding. Occidental further states that, as a large consumer, market generator, and market participant in ERCOT, SPP, and other markets, it would be aggrieved by an order granting the Petition.

#### **Petitioner’s Brief Answer**

37. On January 28, 2010, Petitioner filed a Brief Answer, responding that it has not changed its position in this proceeding, and that the issue is whether facilities and services occurring exclusively inside of the ERCOT interconnection (including transmission lines interconnecting with the Project) will remain subject to the Texas Commission’s jurisdiction after ERCOT is interconnected with the Project.<sup>54</sup>

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<sup>53</sup> *Id.* at 18 n.63.

<sup>54</sup> Tres Amigas Brief Answer at 3.

### **Occidental's Answer**

38. On February 1, 2010, Occidental responded to the Brief Answer. Occidental reiterates Petitioner amended its Petition by restating the issue to be whether wholesale power and transmission service transactions that occur entirely within ERCOT will remain, as they are today, subject to the jurisdiction of the Texas Commission and not this Commission, because they do not occur in interstate commerce. However, Occidental states that Petitioner has presented facts where electric energy will flow out of ERCOT to the Eastern Interconnection and WECC, and vice versa. Occidental also contends that the Project raises significant issues regarding reliability and just and reasonable rates to ratepayers and competitive markets.

### **III. Discussion**

#### **Procedural Matters**

39. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notice of intervention and 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 SPP's and the Texas Counsel's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. 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 or an answer unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

#### **Substantive Matters**

##### **A. General Commission Jurisdiction**

40. Section 201(b)(1) of the FPA states that the Commission has jurisdiction over:

the transmission of electric energy in interstate commerce and  
[] the sale of electric energy at wholesale in interstate  
commerce. ... The Commission shall have jurisdiction over  
all facilities for such transmission or sale of electric energy,  
but shall not have jurisdiction ... over facilities used for the  
generation of electric energy or over facilities used in local  
distribution or only for the transmission of electric energy in  
intrastate commerce.

Section 201(c) states that “electric energy shall be held to be transmitted in 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.”

41. ERCOT utilities are not generally subject to Commission jurisdiction under the FPA because their facilities are not used for transmission and sales of electric energy in interstate commerce (except as a result of interconnection and wheeling service provided pursuant to prior orders under sections 210 and 211 of the FPA).<sup>55</sup> Here, an interconnection between ERCOT (located in Texas) and the Project (located in New Mexico) has been proposed for the express purpose of facilitating the transfer of energy between ERCOT, the Eastern Interconnection, and WECC. This means that energy would be generated in one state and transmitted to another state for consumption in that other state, and would necessarily involve the “transmission of electric energy in interstate commerce.” Independent of whether “commingling” occurs at the Project, power transmitted to and from the Project crosses the Texas/New Mexico border.<sup>56</sup> Without the benefit of an exemption under the FPA, as discussed further below, the interconnection proposed would result in ERCOT and ERCOT utilities becoming subject to the Commission’s jurisdiction as public utilities. Accordingly, we do not believe Petitioner has demonstrated that the Commission should grant a blanket disclaimer under existing law over prospective transmission facilities that would interconnect the ERCOT grid with the Project.

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<sup>55</sup> The courts and the Commission have commonly referred to only three states whose electric energy transmission systems meet the intrastate commerce exception to Commission jurisdiction under the FPA: Hawaii, Alaska, and the “Texas Interconnect.” See, e.g., *New York v. FERC*, 535 U.S. 1, at 7; *Transactions Subject to FPA Section 203*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, at P 58, *order on reh’g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006); *Central Electric Cooperative, Inc.*, 77 FERC ¶ 61,076, at 61,316 n.34 (1996).

<sup>56</sup> While Petitioner argues that a commingling analysis supports its request, we note that a commingling analysis is used to determine whether electric energy has been transmitted in interstate commerce when that electric energy has not been scheduled across state borders. *FPC v. Florida Power & Light*, 404 U.S. 453, 467-69 (1972). And that is not the case here, where electric energy would admittedly be transmitted across a state border (between Texas and New Mexico), and thus subject to Commission regulation as transmission in interstate commerce. E.g., *New York v. FERC*, 535 U.S. 1, 5-7 (2002); cf. *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

42. The FPA does provide for an exemption from Commission jurisdiction. Section 201(b)(2) provides that certain sections, including sections 210 and 211, “shall apply to the entities described in such provisions,” but such compliance “shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.” Section 210 of the FPA allows the Commission, upon application of, among others, any electric utility, to issue an order requiring the physical connection of the transmission facilities of any electric utility with the facilities of such applicant.<sup>57</sup> Section 211 of the FPA allows the Commission, upon application of, among others, any electric utility, to issue an order requiring that a transmitting utility provide transmission services to such applicant.<sup>58</sup> In keeping with this statutory scheme, until now, the only interconnections between ERCOT and facilities outside Texas, and the transmission of power over those interconnections, have been made pursuant to Commission orders under sections 210 and 211 of the FPA.<sup>59</sup>

43. If an application is filed pursuant to section 211 that meets the requirements of that section, the Commission may grant the application. However, given the limited facts before us, we cannot now state that *any* application under section 211 submitted by the Petitioner, even an application that meets the assumptions set forth in the Petition,<sup>60</sup> would meet the section 211 criteria. Stating as much would essentially provide a blanket section 211 authorization to Petitioner. The Commission has rejected requests for a blanket section 211 order, stating that it may only order a transmitting utility to provide transmission service to an actual applicant.<sup>61</sup> The requirements of sections 210 and 211 of the FPA make it necessary to know the parties and circumstances of such an application.<sup>62</sup> Petitioner asks the Commission to make certain assumptions about its future section 211 application, but, as noted by the Texas Commission, Industrial

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<sup>57</sup> An electric utility is defined as “a person or Federal or State agency ... that sells electric energy.” 16 U.S.C. § 796(22).

<sup>58</sup> A transmitting utility is defined as “an entity ... that owns, operates, or controls facilities used for the transmission of electric energy – (A) in interstate commerce; (B) for the sale of electric energy at wholesale.” *Id.* § 796(23).

<sup>59</sup> *Brazos*, 118 FERC ¶ 61,199, at P 12; *Kiowa*, 99 FERC ¶ 61,251, at P 9; *Central Power & Light Co.*, 40 FERC ¶ 61,077 (1987); *Central Power & Light Co.*, 17 FERC ¶ 61,078 (1981).

<sup>60</sup> Petition at 24, 27-29.

<sup>61</sup> *Nevada Power Co.*, 108 FERC ¶ 61,137, at P 13-14 (2004), *order on reh’g*, 110 FERC ¶ 61,029 (2005) (*Nevada Power*).

<sup>62</sup> *See, e.g., Suffolk County Electrical Agency*, 110 FERC ¶ 61,067, at P 6 (2005); *Nevada Power*, 108 FERC ¶ 61,137 at P 13.



Consumers, and Occidental, Petitioner does not provide sufficient facts to support its assumptions. In addition, Petitioner contends that electric energy can flow from ERCOT to the Project without the benefit of an order issued pursuant to section 210 directing an interconnection between the two, but Commission precedent expressly states that sections 210 and 211 of the FPA are distinct provisions,<sup>63</sup> and it is unclear how an ERCOT utility could voluntarily interconnect its facilities in order to transmit electric energy from ERCOT (in Texas) to the Project (in New Mexico) for consumption in the Eastern Interconnection or WECC (i.e., outside Texas), without jeopardizing the jurisdictional *status quo*.

### **B. Sections 210 and 211**

44. That being said, upon receipt of valid applications under sections 210 and 211 of the FPA, the Commission could issue orders pursuant to those sections of the FPA allowing interconnection and transmission of energy between ERCOT and the Project while retaining the jurisdictional *status quo*. As noted above, section 210 of the FPA allows the Commission, upon application of, among others, any electric utility, to issue an order requiring the physical connection of *the transmission facilities of any electric utility* to the applicant's facilities. Although not every transmission provider within ERCOT would meet the definition of an "electric utility"<sup>64</sup> and thus be entitled to seek an interconnection pursuant to section 210 or eligible to be the subject of a Commission order directing interconnection pursuant to section 210, there may still be ways to achieve interconnection under section 210 using the existing legal framework. For instance, in *Brazos*, a Rural Utilities Service-financed cooperative in Texas that was a transmission utility also generated and sold power, thereby qualifying as an electric utility eligible to seek an order directing interconnection pursuant to section 210 of the FPA.<sup>65</sup> In addition, as noted above, the Texas Commission states that, even after unbundling, some

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<sup>63</sup> In *Laguna Irrigation District*, the Commission explained that "[n]othing in our [section 210] interconnection order requires transmission service. Rather, transmission service will be obtained by Laguna pursuant to other transmission tariffs or agreements." 95 FERC ¶ 61,305, at 62,038 (2001), *aff'd sub. nom.*, *Pacific Gas & Electric Co. v. FERC*, 44 Fed. Appx. 170 (9<sup>th</sup> Cir. 2002) (unpublished) (*Laguna*); *see also City of Corona, California v. Southern California Edison Co.*, 104 FERC ¶ 61,085, at P 7-10 (2003) (Corona's application under section 210 did not constitute a request for transmission under section 211).

<sup>64</sup> 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).

<sup>65</sup> *Brazos*, 118 FERC ¶ 61,199 at P 29.

companies may continue to own transmission and distribution utilities, a retail electric provider, and a power-generation company.<sup>66</sup> The Texas Commission also states that no municipally-owned utility or electric cooperative has chosen to unbundle its operations,<sup>67</sup> and therefore they may potentially be eligible applicants or eligible to be the subject of a Commission order issued under section 210. While Petitioner asserts that “the entities located in Texas who propose to build transmission lines to interconnect the ERCOT grid with [the Project] apparently cannot be electric utilities,” Petitioner does not identify those entities, nor does Petitioner indicate whether some other entity that does qualify as an electric utility could build the transmission lines.

45. Likewise, section 211 of the FPA allows the Commission, upon application, to issue an order requiring that a transmitting utility provide transmission services to any electric utility or person generating electric energy for sale for resale. An arrangement could possibly be structured so that a transmitting utility transmits electric energy pursuant to section 211 from Texas into New Mexico. In fact, the Commission has found that the entities that own and operate the existing facilities used to transmit power into and out of ERCOT (albeit directed pursuant to sections 210 and 211) meet the definition of transmitting utilities for the purpose of issuing new orders under section 211 of the FPA.<sup>68</sup>

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<sup>66</sup> In both *Kiowa* and *Brazos*, the Commission acknowledged that the transmitting utilities to which the applicants sought to interconnect no longer sell electric energy, but found that, as the transmission and distribution successors of electric utilities that were previously ordered to interconnect and wheel under sections 210 and 211, they were subject to the jurisdiction of the Commission to enforce orders previously issued, and to issue new interconnection and wheeling orders under sections 210 and 211. *See Brazos*, 118 FERC ¶ 61,199 at P 30; *Kiowa*, 99 FERC ¶ 61,251 at P 30.

<sup>67</sup> Texas Commission January 12 Comments at 8 (citing Tex. Util. Code Ann. §§ 40.051, 41.051 (Vernon 2007)).

<sup>68</sup> *Brazos*, 118 FERC ¶ 61,199 at P 30; *Kiowa*, 99 FERC ¶ 61,251 at P 11.

The Commission orders

The petition for disclaimer of jurisdiction is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.