

164 FERC ¶ 61,056  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Neil Chatterjee,  
Robert F. Powelson, and Richard Glick.

AEP Energy Partners, Inc.

Docket No. TX18-1-000

PROPOSED AND FINAL ORDER DIRECTING  
TRANSMISSION SERVICE

(Issued July 26, 2018)

1. In this order, we grant AEP Energy Partners, Inc.'s (AEP Energy) request under section 211 of the Federal Power Act (FPA)<sup>1</sup> and direct Sharyland Utilities, L.P. (Sharyland), AEP Texas, Inc. (AEP Texas), and Electric Transmission Texas, LLC (ETT) (collectively, Tie Operators) to provide transmission services for power flow into and out of the Electric Reliability Council of Texas (ERCOT). We also approve a settlement among the parties regarding the terms and conditions of transmission service under this order.

**I. Background**

2. The ERCOT transmission grid is located solely within the State of Texas and is not synchronously interconnected to the Western or Eastern Interconnections. To date, the only interconnections between transmission facilities in ERCOT and transmission facilities in the United States outside of 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>2</sup> Because the Commission ordered these interconnections and the associated transmission service pursuant to its authority under sections 210 and 211 of

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<sup>1</sup> 16 U.S.C. § 824j (2012).

<sup>2</sup> 16 U.S.C. § 824i (2012); *City of College Station, TX*, 137 FERC ¶ 61,230 (2011) (*College Station*); *Brazos Elec. Power Coop., Inc.*, 118 FERC ¶ 61,199 (2007) (*Brazos*); *Kiowa Power Partners, LLC*, 99 FERC ¶ 61,251 (2002) (*Kiowa*); *Central Power and Light Co.*, 40 FERC ¶ 61,077 (1987); *Central Power and Light Co.*, 17 FERC ¶ 61,078 (1981) (collectively, *Central Power and Light*).

the FPA, the ERCOT entities providing the requested services did not become “public utilities” subject to the Commission’s plenary jurisdiction under Part II of the FPA.<sup>3</sup>

3. There are several transmission projects that connect ERCOT to Mexico.<sup>4</sup> At the time these projects were built, the part of the Mexican electric grid to which the projects interconnected (the eastern portion of the Mexican electric grid, which is located south of Arizona, New Mexico, and Texas) was not otherwise connected with the United States’ electric grid or with the electric grid of Baja California (the western portion of the Mexican electric grid, which is located south of California and is interconnected with the Western Interconnection of the United States). In these cases, the Tie Operators filed, and the Commission granted, petitions for declaratory order determining that, based on the specific facts in existence at that time, ownership and operation of ties between ERCOT and Mexico would not cause ERCOT or ERCOT market participants that were not already public utilities to become subject to the Commission’s plenary jurisdiction as public utilities.<sup>5</sup>

4. There are, however, two proposed transmission projects that, if and when completed and energized, would interconnect, respectively, the United States and Mexico and the two currently disconnected parts of the Mexican Comisión Federal de Electricidad (CFE) transmission system. First, Nogales Transmission, L.L.C., an affiliate of Sharyland, filed a petition for declaratory order related to a proposal to construct a High Voltage Direct Current (HVDC) interconnection between the UNS Electric, Inc. system near Nogales, Arizona and the CFE national grid in Sonora, Mexico (Nogales Project).<sup>6</sup> Second, the Mexican government has indicated that it plans to interconnect the CFE national grid with the CFE Baja California system. As a result, without any changes to the current ERCOT-CFE Ties, either the Nogales Project or the CFE interconnection

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<sup>3</sup> Section 201(b)(2) of the FPA states that compliance with Commission orders under sections 210 and 211 shall not make an entity subject to Commission jurisdiction for any purposes other than the purposes specified in those orders. 16 U.S.C. § 824(b)(2) (2012).

<sup>4</sup> These include, as relevant here, the Sharyland DC Tie, the Eagle Pass DC Tie, and the Laredo Variable Frequency Transformer (VFT) Tie (collectively, Ties). Sharyland leases and operates the Sharyland DC Tie, AEP Texas owns and operates the Eagle Pass DC Tie, and ETT owns and operates the Laredo VFT Tie.

<sup>5</sup> *Sharyland Utilities, L.P.*, 121 FERC ¶ 61,006, at PP 23-24 (2007) (*Sharyland*); *Elec. Transmission Tex., LLC*, 121 FERC ¶ 61,007, at PP 9-11 (2007); *TexMex Energy, L.L.C.*, 124 FERC ¶ 61,129, at PP 12-13 (2008).

<sup>6</sup> *Nogales Transmission, L.L.C.*, 161 FERC ¶ 61,009 (2017).

could separately result in interstate power flows (via power generated in the United States flowing into the CFE system, comingling with power generated in Mexico, and then flowing back into the United States) between either Arizona or California and ERCOT.

## **II. Filing**

5. In the Filing, AEP Energy, on behalf of the Tie Operators, requests that the Commission issue an order under section 211 directing the Tie Operators to provide transmission service over the Ties. They further request that the Commission confirm that providing transmission services to, from, and over the Ties in compliance with the Commission's order will not cause ERCOT or any ERCOT market participant to become a public utility subject to the Commission's plenary jurisdiction.

### **A. Effect of a Section 211 Order**

6. AEP Energy states that, because each of the Ties includes either a back-to-back HVDC converter or a VFT, no electric energy will flow over the Ties unless the Tie Operators schedule the service and operate the facilities to allow transmission to occur.<sup>7</sup> Thus, AEP Energy argues, if the Tie Operators stop providing transmission service, there is no potential for the Ties to become facilities used for interstate commerce. AEP Energy therefore states that, if the Tie Operators stop providing transmission service over the Ties, the inert interconnection facilities will not cause ERCOT or any ERCOT market participant to become a public utility. AEP Energy argues that the jurisdictional threat to ERCOT does not arise from the mere existence of the Ties, but rather from the potential for transmission of electric energy in interstate commerce over the Ties.<sup>8</sup>

7. AEP Energy asserts that, if the Commission were to grant the section 211 order, the Ties would become facilities for transmission and wholesale sales of electric energy in interstate commerce "solely by reason of" a Commission order issued under section 211. Therefore, regardless of the realization of either the Nogales Project or any CFE interconnections, the continuing operation of the Ties in compliance with the requested section 211 order would not cause the Tie Operators to become "public utilities" as section 201(e) defines that term.<sup>9</sup>

8. AEP Energy asserts that, notwithstanding the Commission's pattern of issuing section 210 interconnection orders alongside section 211 transmission service orders,

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<sup>7</sup> Filing at 24.

<sup>8</sup> *Id.* at 24-25.

<sup>9</sup> *Id.* at 26-27 (citing 16 U.S.C. § 824(e) (2012)).

only a section 211 order is required to preserve the ERCOT jurisdictional status quo in this case. It argues that the previous cases required the construction of new or expanded facilities to provide the requested transmission service, while no new facilities are needed in this proceeding. Therefore, AEP Energy asserts that there is no need to obtain a section 210 order requiring physical interconnection. As such, AEP Energy requests that the Commission confirm that the requested section 211 order will be sufficient to ensure that the continued operation of the Ties will not cause ERCOT entities to become public utilities subject to the Commission's plenary jurisdiction.<sup>10</sup>

### **B. Offer of Settlement**

9. In addition, AEP Energy requests that the Commission approve the Offer of Settlement that AEP Energy and the Tie Operators executed. According to AEP Energy, the Offer of Settlement contains the negotiated terms and conditions under which the Tie Operators would provide the requested transmission services in accordance with a Commission order issued under sections 211 and 212 of the FPA.<sup>11</sup> AEP Energy states that the Offer of Settlement conforms to the Commission's previous orders for transmission service over the ERCOT grid.<sup>12</sup>

### **III. Notice and Responsive Pleadings**

10. Notice of the Filing was published in the *Federal Register*, 83 Fed. Reg. 14,451 (2018), with interventions and protests due on or before April 18, 2018. NRG Power Marketing and GenOn Energy Management, LLC, and Oncor Electric Delivery Company LLC filed motions to intervene. The Public Utility Commission of Texas (Texas Commission) filed a notice of intervention and comments in support of the Filing. CenterPoint Energy Houston Electric, LLC and ERCOT filed motions to intervene and comments in support of the Filing.

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<sup>10</sup> *Id.* at 29.

<sup>11</sup> 16 U.S.C. § 824k (2012).

<sup>12</sup> Filing at 43 (noting the Commission's decisions in *College Station*, 137 FERC ¶ 61,230; *Southern Cross Transmission LLC*, 137 FERC ¶ 61,206 (2011) (*Southern Cross*); *Brazos*, 118 FERC ¶ 61,199; *Kiowa*, 99 FERC ¶ 61,251).

#### IV. Discussion

##### A. Procedural Matters

11. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the notice of intervention and the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

##### B. Substantive Matters

12. As discussed below, we find that AEP Energy has satisfied the requirements of sections 211 and 212 of the FPA.

##### 1. Jurisdiction

13. Pursuant to section 211(a) of the FPA, any “electric utility” may request an order requiring “a transmitting utility to provide transmission services.” An “electric utility” is defined in section 3(22) of the FPA, in relevant part, as “a person or Federal or State agency . . . that sells electric energy.”<sup>13</sup> A “transmitting utility” is defined in section 3(23) of the FPA 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.”<sup>14</sup>

14. AEP Energy states that it is engaged in the wholesale sale of electric capacity, energy, and ancillary services in the ERCOT region in the state of Texas. Thus, we find AEP Energy qualifies as an “electric utility” eligible to request an order requiring transmission services pursuant to section 211 of the FPA.

15. As transmission service providers, AEP Texas, ETT, and Sharyland are prohibited by state law from buying or selling electric energy. However, they own and operate transmission facilities that are used for the sale of electric energy at wholesale and, as a result of Commission directives in *Central Power and Light*, they own and operate ERCOT facilities that are used for the transmission of electric energy in interstate commerce. Thus, we find that each is a “transmitting utility” as that term is defined in section 3(23) and used in section 211(a). Accordingly, we find that the Commission has jurisdiction under sections 201(b)(2) and 211 of the FPA to issue an order requiring AEP Texas, ETT, and Sharyland to provide transmission to, from, and over the interconnections between ERCOT and CFE. Exercise of this jurisdiction, however, will

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<sup>13</sup> 16 U.S.C. § 796(22) (2012).

<sup>14</sup> 16 U.S.C. § 796(23) (2012).

not cause any ERCOT utility that is not already a public utility to become a public utility under Part II of the FPA.

16. Additionally, we find that, under the specific circumstances present here, where there is not yet interstate commerce (except as a result of prior section 210 and 211 orders) and where the Ties are pre-existing and in operation, there is no need for a separate order under section 210 directing interconnection service, and the requested section 211 order is sufficient to ensure that the Tie Operators' continued operation of the Ties will not cause ERCOT, AEP Texas, ETT, Sharyland, or any other ERCOT utility or other entity that is not already a public utility to become a "public utility."

## **2. Good Faith Request**

17. Because the Tie Operators have waived their rights under sections 211(a) and 213(a)<sup>15</sup> of the FPA<sup>16</sup> to a request for transmission service and have, in the Offer of Settlement, agreed upon the terms and conditions under which requested transmission service would be provided, compliance with this requirement is not necessary here.

## **3. Public Interest**

18. Section 211(a) of the FPA provides that the Commission may issue an order directing transmission service if the order meets the requirements of section 212 of the FPA and would otherwise be in the public interest. In *Florida Municipal Power Agency v. Florida Power & Light Company*,<sup>17</sup> the Commission determined that, as a general matter, the availability of transmission service enhances competition in power markets by increasing power supply options of buyers and sales options of sellers, and that this should result in lower costs to consumers. Accordingly, we find that the transmission service requested of the Tie Operators will be in the public interest.

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<sup>15</sup> 16 U.S.C. § 824l(a) (2012).

<sup>16</sup> Section 211(a) requires the applicant to make a request to the transmitting utility for transmission service at least 60 days prior to filing the application for an order with the Commission. Section 213(a) contains procedures for an applicant to request transmission service and for the transmitting utility to respond to that request.

<sup>17</sup> 65 FERC ¶ 61,125, *reh'g dismissed*, 65 FERC ¶ 61,372 (1993), *final order*, 67 FERC ¶ 61,167 (1994), *order on reh'g*, 74 FERC ¶ 61,006 (1996), *order on reh'g*, 96 FERC ¶ 61,130 (2001), *aff'd*, 315 F.3d 362 (D.C. Cir. 2003).

#### **4. Reliability**

19. Section 211(b) of the FPA precludes a transmission order that would unreasonably impair the continued reliability of the affected electric systems. According to AEP Energy, the Department of Energy found that the operation of each tie would not adversely affect the reliability of the U.S. electric power supply system.<sup>18</sup> Moreover, AEP Energy states that each Tie Operator has been providing transmission service without adversely affecting the reliability of the ERCOT or CFE transmission systems. Therefore, we find that ordering the requested transmission service will not unreasonably impair the continued reliability of the affected electric systems.

#### **5. Effect on Contracts or Rate Schedules**

20. Section 211(c)(2) of the FPA prevents the issuance of an order that would require the transmitting utility subject to the order to transmit energy which would replace energy required by contract to the applicant or replace energy currently provided to the applicant pursuant to a rate schedule on file with the Commission. It also provides that no order may be issued by the Commission under section 211(a) that requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy that replaces any amount of electric energy that is required to be provided to the applicant pursuant to a contract during such period or that the utility subject to the order currently provides to the applicant pursuant to a rate schedule on file with the Commission. AEP Energy does not purchase electric energy from any of the Tie Operators because each is a transmission and distribution utility that is prohibited by state law from selling electric energy. Accordingly, this order does not compel any transaction prohibited by section 211(c).

#### **6. Rates, Charges, Terms, and Conditions**

21. Section 212(a) requires that the transmitting utility subject to an order under section 211 “provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all costs incurred in connection with the transmission services and necessary associated services.” Furthermore, “such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential.” Section 212(k) provides that any order issued under section 211 “requiring provision of transmission services in whole or in part within ERCOT shall provide that any ERCOT utility which is not a public utility and the

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<sup>18</sup> Filing at 37 (citing Presidential Permit No. 285 at 2-3 (Sharyland Utilities, L.P.) (Jan. 21, 2005); Presidential Permit No. PP-423 at 4 (AEP Texas, Inc.) (Feb. 13, 2017); Presidential Permit No. PP-424 at 4 (AEP Texas, Inc.) (Feb. 13, 2017)).

transmission facilities of which are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a), on the transmission ratemaking methodology used by the [Texas Commission].”<sup>19</sup>

22. The Commission has previously found that the ERCOT protocols and procedures regarding transmission service meet the requirements of section 212 for purposes of transmission service under section 211.<sup>20</sup> Here, under the Offer of Settlement, the parties have agreed that transmission services to, from, and over the Ties will be provided on an open-access and non-discriminatory basis and the rates charged are in accordance with the Texas Commission’s rules and ratemaking methodology. Accordingly, we find that, with respect to the transmission services that the Tie Operators will provide, the Offer of Settlement meets the requirements of sections 212(a) and 212(k).

**7. Prohibition on Orders Inconsistent with Retail Wheeling Marketing Areas and Prohibition on Mandatory Retail Wheeling and Sham Wholesale Transactions**

23. Section 212(g) of the FPA prohibits issuance of an order which is inconsistent with any state law which governs the retail marketing areas of electric utilities. Also, section 212(h) provides that no order under the FPA may require transmission of electric energy: (1) directly to an ultimate consumer; or (2) to or for the benefit of any entity which would otherwise sell electric energy directly to an ultimate consumer, unless (A) such entity is a “Federal power marketing agency; . . . a State or any political subdivision of a State; . . . a corporation or association that has ever received a loan for the purpose of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by one or more of the foregoing; and (B) such entity was providing electric service to such ultimate consumer on the date of enactment of this subsection or would utilize transmission or distribution facilities that it owns for controls to deliver all such electric energy to such electric consumer.”<sup>21</sup> We find that the instant order does not compel any transaction prohibited by either section 212(g) or 212(h).

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<sup>19</sup> 16 U.S.C. § 824k(k) (2012).

<sup>20</sup> See, e.g., *College Station*, 137 FERC ¶ 61,230 at P 27; *Southern Cross*, 137 FERC ¶ 61,206 at P 34.

<sup>21</sup> 16 U.S.C. § 824k(h) (2012).



## 8. Applicability

24. An order under section 211 of the FPA cannot be made effective prior to the date of a final Commission order.<sup>22</sup> As the parties have agreed to the terms and conditions under which the requested transmission service would be provided, as reflected in the Offer of Settlement, and the Tie Operators have waived their rights to a proposed order, this is a final order. Therefore, we will grant AEP Energy's request to direct the Tie Operators to provide the requested transmission service, effective on the date of this order.

### The Commission orders:

(A) AEP Texas, ETT, and Sharyland are hereby directed to provide transmission services pursuant to section 211 of the FPA under the applicable tariff and rate schedules, as discussed in the body of this order.

(B) The Offer of Settlement is hereby approved, as discussed in the body of this order.

(C) Compliance with this order and the Offer of Settlement shall not cause ERCOT, AEP Texas, ETT, Sharyland, or any other ERCOT utility or other entity that is not already a public utility to become a "public utility" as that term is defined by section 201 of the FPA and subject to the jurisdiction of the Commission for any purpose other than for the purpose of carrying out the provisions of section 211 of the FPA.

By the Commission. Chairman McIntyre is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>22</sup> See, e.g., *City of College Station, TX*, 76 FERC ¶ 61,138, at 61,743 (1996), *final order*, 86 FERC ¶ 61,165, at 61,583 (1999).

Document Content(s)

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