

## ERCOT'S JURISDICTIONAL STATUS: A LEGAL HISTORY AND CONTEMPORARY APPRAISAL

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### I. INTRODUCTION

For the purposes of jurisdictional analysis, the Electric Reliability Council of Texas (ERCOT) refers to the network of interconnected utilities that together cover approximately 75% of the land area in the state of Texas.<sup>2</sup> As is widely known, ERCOT is generally not subject to the plenary jurisdiction of the Federal Energy Regulatory Commission (FERC),<sup>3</sup> and thus to the panoply of federal regulation that includes, for example, the power to set rates for transmission service and wholesale power.<sup>4</sup> Because ERCOT's electrical interconnections are contained

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1. The author is a third year student at Harvard Law School and holds an undergraduate degree in Government from Harvard College.

2. Electric Reliability Council of Texas Company Profile, <http://www.ercot.com/about/profile/> (last visited December 15, 2007) (also referring to the independent system operator charged with administering this transmission grid and assuring its reliability).

3. See, e.g., ELECTRIC ENERGY MARKET COMPETITION TASK FORCE, REPORT TO CONGRESS ON COMPETITION IN WHOLESALE AND RETAIL MARKETS FOR ELECTRIC ENERGY (2007), available at <http://www.ferc.gov/legal/staff-reports/competition-rpt.pdf> ("ERCOT generally is not subject to FERC jurisdiction").

4. 16 U.S.C. § 824(b)(1) (2000) (granting FERC the power to regulate rates for the

wholly intrastate, the conventional explanation goes, and because the Federal Power Act (FPA) imparts federal jurisdiction only with respect to the transmission and wholesale of electric energy in interstate commerce, ERCOT remains beyond the reach of generalized federal jurisdiction.<sup>5</sup>

The conventional explanation for ERCOT's jurisdictional status based on its "wholly intrastate" character, however, fails to account for a significant degree of the complexity actually built into ERCOT's jurisdictional architecture. First, the distinction between intrastate and interstate operation in the context of electrical systems is itself highly complicated, whereby many utility networks that ostensibly operate intrastate actually transmit interstate as a matter of jurisdictional law. Accordingly, a proper account of ERCOT's jurisdictional status must begin with the legal framework for establishing FERC jurisdiction more generally.

A robust analysis of ERCOT's jurisdictional status must also address the two asynchronous interconnections that currently link ERCOT to the Southwest Power Pool (SPP) outside of Texas,<sup>6</sup> and that seemingly undermine its wholly intrastate nature. A common tendency in ERCOT-related analyses is to dismiss these as jurisdictionally inconsequential.<sup>7</sup> On the contrary, FERC's ability to order such interconnection without otherwise impacting ERCOT's jurisdictional status—and the protracted legal and political process by which this was achieved—represents perhaps the most important chapter in ERCOT's legal history.<sup>8</sup> The chapter in fact remains open as FERC approved a second set of interconnections on the same basis in March 2007,<sup>9</sup> though the March 15th order directing the interconnection was suspended.<sup>10</sup>

As a final matter, it is necessary to take into account that the FPA's jurisdictional grant is a creature purely of the statute itself and that

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transmission and sale of electric energy at wholesale in interstate commerce); 16 U.S.C. §§ 824-828(c) (2000) (outlining FERC's additional regulatory powers).

5. See, e.g., *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 312 (Tex. 2001) (stating that "because ERCOT is a wholly intrastate power grid, the federal scheme that the [FERC] administers does not generally govern ERCOT.").

6. Federal Energy Regulatory Commission, *Electric Power Markets: Texas (ERCOT)*, <http://www.ferc.gov/market-oversight/mkt-electric/texas.asp> (last visited December 15, 2007).

7. ROBERT J. MICHAELS, *ELECTRICITY IN TEXAS*, TEXAS PUBLIC POLICY FOUNDATION (2007), available at <http://www.texaspolicy.com/pdf/2007-02-RR04-electricity-rm.pdf> (describing ERCOT as the only electric grid that "apart from a few interconnections" does not cross any state lines).

8. Richard J. Cudahy, *The Second Battle of the Alamo: The Midnight Connection*, 10 J. NAT. RESOURCES AND ENV'T 56 (1995) (providing an intimate account of the process leading to the interconnections as experienced by a leading participant).

9. Federal Energy Regulatory Commission, *News Release: Commission Addresses Proposed Transmission Additions in Texas, Oklahoma* (Mar. 15, 2007), <http://www.ferc.gov/news/news-releases/2007/2007-1/03-15-07-E-5.asp>.

10. Brazos Electric Power Cooperative, *Motion Granting Request to Suspend Compliance Obligations*, 72 Fed. Reg. 19,913 (April 13, 2007).

subsequent legislation can and has enabled varying exercises of federal authority within the ERCOT region.<sup>11</sup> Illustrating the potential reach of statutory reform, Congressman Joe Barton (R-TX), dissatisfied with the proposed sale of a major Texas utility, instructed FERC in March 2007 to draft legislation that would bring ERCOT wholly within FERC jurisdiction.<sup>12</sup>

Before turning to address these issues in greater detail, it is important to emphasize why ERCOT's jurisdictional status is an area worthy of study. Of course, exemption from plenary federal jurisdiction means exemption from regulation of all rates, terms, and conditions of transmission; of wholesale rates by investor-owned utilities; and of corporate transactions, including mergers and acquisitions.<sup>13</sup> As a major participant in the ERCOT market has argued, the success of Texas' competitive electricity market may in large part be owed to the "comprehensive jurisdiction over that market that is exercised by Texas legislatures and regulators."<sup>14</sup> Not everyone takes this point of view.<sup>15</sup> It does, however, reveal the stakes of the matter.

ERCOT's jurisdictional status is also worthy of study from a political perspective. In a statement issued in March 2007 after FERC approved a second set of interconnections linking ERCOT to out of state transmission capacity, Commission Chairman Joseph Kelliher emphasized that FERC's order was going to "provide important customer benefits by increasing the ties and power flows between Texas and the Eastern Interconnection, while maintaining the current jurisdictional status of ERCOT utilities."<sup>16</sup> In its application for the order, Brazos Electric Cooperative also emphasized its intent "to preserve the existing federal/state jurisdictional relationship regarding ERCOT, while making possible the introduction of ... new capacity into

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11. Public Utility Regulatory Policies Act of 1978 (PURPA), Pub.L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.); Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of 42 & 25 U.S.C.); Energy Policy Act of 2005, Pub.L. No. 109-58, 119 Stat. 594 (codified as amended through scattered sections of 42 U.S.C.) (all acts have significantly modified the jurisdictional grant originally set forth in the Federal Power Act).

12. *Representative Barton, Worried about TXU Buyout, Presses for FERC to Have Authority over ERCOT*, GLOBAL POWER REPORT, Apr. 5, 2007, at 32.

13. *See generally* 16 U.S.C. §§ 824-828(c) (2000).

14. Application of Brazos Electric Cooperative, Inc. for an Order Directing a Physical Interconnection, Docket No. TX07-1-000, 5 (November 21, 2006) (application and request for expedited action).

15. ROBERT J. MICHAELS, COMPETITION IN TEXAS ENERGY MARKETS, TEXAS PUBLIC POLICY FOUNDATION 23 (2007), *available at* <http://www.texaspolicy.com/pdf/2007-03-RR07-electric3-rm.pdf> ("competition did not succeed in Texas because ERCOT was 'exempt' from federal regulation that complicated many other restructurings," insisting that "the same institutional choices that succeeded in Texas could have been made elsewhere").

16. *FERC Orders Two Interconnections Between ERCOT and the Eastern Interconnection, while Preserving ERCOT's Utilities' Non-Jurisdictional Status*, FOSTER ELECTRIC REPORT, Mar. 20, 2007, at 23.

that market.”<sup>17</sup> For better or worse, ERCOT’s jurisdictional autonomy is clearly sustained by something other than its independence from the national electrical grid.

The remainder of the article follows the agenda set forth above. Part II provides a brief review of the constitutional, statutory, and decisional background essential to understanding the jurisdictional grant set forth in the Federal Power Act. Part III undertakes a detailed examination of ERCOT’s legal history, including the “watershed” events leading to the creation of ERCOT’s dual asynchronous interconnections outside of Texas. Part IV concludes by focusing directly on recent statutory and regulatory developments.

## II. JURISDICTION UNDER THE FEDERAL POWER ACT

The exercise of federal jurisdiction with respect to interstate energy transmissions has its roots in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, which held that states were constitutionally prohibited, under the dormant authority of the Commerce Clause, from setting the price of electricity generated in-state but sold across state lines.<sup>18</sup> As states were the leading actors in the field at the time, the so-called “Attleboro gap” necessitated federal intervention into the interstate energy market.<sup>19</sup> The Federal Power Act (FPA) of 1935 thus granted the Federal Power Commission (FPC), now the Federal Energy Regulatory Commission (FERC), authority over the rates and conditions for the interstate sale and transmission of wholesale electricity.<sup>20</sup>

The core jurisdictional provisions of the FPA are as follows. Under section 201 of the Act, 16 U.S.C. § 824(b)(1), federal jurisdiction extends “to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce.”<sup>21</sup> Under the savings provision of § 824(b)(2), however, FERC “shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of

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17. Application of Brazos Electric Power Cooperative, Inc. for an Order Directing a Physical Interconnection, Docket No. TX07-1-000, 5 (November 21, 2006) (application and request for expedited action).

18. *Pub. Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

19. *See* *N.Y. v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 6 (2002) (describing the “Attleboro gap” and explaining the origins of the FPA); *see also* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, ENERGY EFFICIENCY: CHALLENGES AND OPPORTUNITIES FOR ELECTRIC UTILITIES 40 (1993) (reviewing the history and scope of the FPA).

20. *See generally* 16 U.S.C. § 824 et seq. (2000) (codifying Subchapter II of the FPA, pertaining to the “Regulation of Electric Utility Companies Engaged in Interstate Commerce”).

21. 16 U.S.C. § 824(b)(1) (2000).

electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce....”<sup>22</sup> Finally, § 824(c) holds electric energy to be transmitted in interstate commerce if it is “transmitted from a state and consumed at any point outside thereof.”<sup>23</sup> Entities that are jurisdictional by way of these provisions are referred to as “public utilities” under the law.<sup>24</sup>

ERCOT's general non-jurisdictional status thus follows directly from the above excerpted provisions, insofar as ERCOT is regarded as a separate network whose facilities, transmissions, and transactions are contained wholly intrastate.<sup>25</sup> In order to understand the legal basis for specific challenges to ERCOT, however, it is necessary to examine in greater detail the meaning of “interstate commerce” under the FPA.

#### A. Interstate Commerce and the Federal Power Act

The meaning of “interstate commerce” under the FPA is a highly complex question that has been adjudicated before the Supreme Court on several occasions, including the recent decision in *New York et al. v. Federal Energy Regulatory Commission*.<sup>26</sup> Before moving on, however, it is important to pause for a moment on the fact that interstate commerce in this context is a statutory term and does not refer to the Interstate Commerce Clause of the United States Constitution. From a constitutional standpoint, there is little doubt that electricity transmission, even that wholly contained within a state, “substantially effects” interstate commerce as that standard has been developed by the Supreme Court.<sup>27</sup> As such, it is essential to remain aware that ERCOT's jurisdictional status is a product of the FPA's regulatory scheme and almost certainly represents an under-reach in terms of the Commerce Clause power.<sup>28</sup>

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22. *Id.*

23. § 824(c) (2000).

24. § 824(e) (2000).

25. See Brief for the Federal Energy Regulatory Commission in Opposition to a Writ of Certiorari, *N.Y. v. Fed. Energy Regulatory Comm'n*, 531 U.S. 1189 (2001) (No. 00-568) (FERC confirming its conclusion that “intrastate transmission” as defined in the FPA applies only to “Alaska, Hawaii, and most areas of Texas” that “have no interconnection that would permit the physical transmission of power outside of a State.”).

26. 535 U.S. 1 (2002).

27. See *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that even wheat grown and consumed on a single farm substantially affects interstate commerce, because that consumption of wheat decreased the demand for wheat in general); see also Cassandra Burke Robertson, *Bringing the Camel Back into the Tent: State and Federal Power Over Electricity Transmission*, 49 CLEV. ST. L. REV. 71, 78 (2001) (explaining the broad constitutional basis for the federal regulation of electrical transmission).

28. In *Fed. Energy Regulatory Comm'n v. Miss.*, 456 U.S. 742 (1982), the State of Mississippi Public Service Commission brought a rare constitutional challenge against the Public Utilities

With that said, the general rule for determining the interstate character of a transmission under the FPA is the “technological transmission test,” a scientific or engineering test holding that “federal jurisdiction [is] to follow the flow of electric energy.”<sup>29</sup> The technological transmission test sustains ERCOT’s non-jurisdictional status insofar as the flow of electrical energy within that system is recognized as wholly contained within the state of Texas.<sup>30</sup> However, as the rest of the United States operates upon a grid interconnected across the several states, and as the physical properties of an electrical system mean that “energy flowing onto a power network or grid energizes the entire grid,”<sup>31</sup> the technological transmission test has resulted in an expansive role for federal jurisdiction everywhere else – including with respect to utilities that ostensibly operate on an intrastate basis.

Two examples may help clarify the point. In *Federal Power Commission v. Florida Power & Light Co.*, the Supreme Court upheld the FPC’s assertion of jurisdiction when an otherwise intrastate Florida utility transmitted power to a second utility just south of the Georgia border that maintained other interconnections across the state line.<sup>32</sup> Based on the fact that any activity on the interstate electrical grid necessarily affects the rest of the grid, the Court upheld the FPC’s determination that the initial electrical transmission, by “commingling” with energy transmitted out of state, constituted a transmission in interstate commerce.

A second example comes from within ERCOT itself. In March 2007, FERC issued a declaratory order stating that federal jurisdiction would not extend to a planned transmission line linking an ERCOT utility to a generating station still within Texas, but outside of ERCOT, and therefore connected to the national grid.<sup>33</sup> The case implicated the same issues as above, but overcame them by preventing the initial interconnection to the national grid. Specifically, FERC found that a proposed series of “facility design modifications,” especially the use of

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Policy and Regulation Act (PURPA). The Supreme Court, however, “readily conclude[d]” that the appellant utilities were erroneous in their contentions as to lack of power under the Commerce Clause and reiterated instead its particularly broad scope in the energy context.

29. *Conn. Light & Power Co. v. Fed. Power Comm’n*, 324 U.S. 515, 529-531 (1954) (explicitly naming the test); *N.Y. v. Fed. Energy Regulatory Comm’n*, 535 U.S. at 8 n.5 (discussing the test); *Fed. Power Comm’n v. S. Cal. Edison Co.*, 376 U.S. 205 (1964) (applying the test).

30. The Supreme Court in *N.Y. v. Fed. Energy Regulatory Comm’n*, 535 US at 7-8, stated that “[i]t is only in Hawaii and Alaska and on the ‘Texas Interconnect’ - which covers most of that State - that electricity is distributed entirely within a single State. In the rest of the country, any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce.”

31. *N.Y. v. Fed. Energy Regulatory Comm’n*, 535 U.S. at 8 n.5.

32. 404 U.S. 453 (1972).

33. *Order Granting Petition for Declaratory Order*, 118 F.E.R.C. ¶ 61, 198, Docket No. EL-06-87-000 (March 15, 2007).

“configured disconnect switches,” would ensure the independent operation of the two interconnections “so as to prevent electricity from moving between ERCOT and the Eastern Interconnection.”<sup>34</sup> At the same time, “an open disconnect switch on the main bus bar” would prevent intermingling at the initial switchyard “by creating two independent busses,” therefore preventing the receipt of interstate transmissions at that access point.<sup>35</sup>

In short, the technological transmission test and the meaning of interstate commerce under the FPA remain the keystone of FERC's expansive authority outside of ERCOT<sup>36</sup> while providing the legal foundation and operating conditions for the maintenance of ERCOT's non-jurisdictional intrastate status.

### III. THE LEGAL HISTORY OF ERCOT'S JURISDICTIONAL STATUS

Moving now from legal rules to legal history, ERCOT as a concerted intrastate electrical interconnection traces its roots to the response of certain principal Texas utilities to passage of the Federal Power Act.<sup>37</sup> On or about August 26, 1935, “solely because of the passage of the Federal Power Act, and solely to avoid becoming subject to FPC jurisdiction,”<sup>38</sup> these select utilities “elected to isolate their properties from interstate commerce” so as to place themselves beyond the reach of the FPC, “whose jurisdiction was limited to utilities operating in interstate commerce.”<sup>39</sup> During World War II, these and other intrastate utilities interconnected their grids to meet wartime imperatives, forming what was then known as the Texas Interconnected System (TIS).<sup>40</sup> In 1970, members of TIS as well as “various municipalities and rural electric cooperatives,” all operating on an exclusively intrastate basis, formed the Electric Reliability Council of Texas (ERCOT).<sup>41</sup>

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34. *Id.*

35. *Id.*

36. In *N.Y. v. Fed. Energy Regulatory Comm'n*, 535 U.S. at 17, for example, the Supreme Court sustained general federal jurisdiction over unbundled retail transmissions, holding them to be “transmissions of ‘electric energy in interstate commerce’ *because of the nature of the national grid*” (emphasis added).

37. Note that the FPA was not created anew in 1935. Instead, the Federal Water Power Act of 1920 was renamed the Federal Power Act in 1935 after the law was expanded to include provisions for the “Regulation of Electric Utility Companies Engaged in Interstate Commerce.” Public Utility Act of 1935, ch. 687, 49 Stat. 803, 863.

38. *W. Tex. Utils. Co. v. Tex. Elec. Serv. Co.*, 470 F. Supp. 798, 808 (N. D. Tex.1979) (anti-trust action describing the formation of ERCOT).

39. Cudahy, *supra* note 8, at 57 (describing how ERCOT members are “binding themselves to intrastate operation”).

40. ELECTRICITY IN TEXAS, *supra* note 7, at 7.

41. *W. Tex. Utils. Co.*, 470 F.Supp. at 808.

As formed in 1970, ERCOT was a “regional electric reliability council” reporting to the North American Electricity Reliability Corporation. While its member utilities operated their own control areas, ERCOT as an administrative entity “coordinated interconnection and operating guides among them.”<sup>42</sup> In its formation, ERCOT was not an entity exercising delegated state power, but was more akin to a “voluntary membership organization.”<sup>43</sup> In point of fact, no comprehensive state energy regulation existed until 1975.

In 1975, the Texas legislature first undertook state regulation of the energy market with the Public Utility Regulation Act (PURA), formally granting the Public Utility Commission of Texas (PUCT) traditional state regulatory powers.<sup>44</sup> ERCOT initially continued as a private coordinating council in this newly regulated market. In 1995, however, amendments to PURA deregulated the wholesale market, and in 1996, PUCT employed its rulemaking authority under these amendments to make ERCOT the first “Independent System Operator” for Texas, thereby “giv[ing] ERCOT responsibilities over wholesale competition and for ensuring efficient use of the transmission network by all market participants” within its footprint.<sup>45</sup> In 1999, the Texas Legislature passed Senate Bill No. 7 creating a competitive retail market and granted to PUCT the authority to certify ERCOT as the independent organization overseeing network reliability and retail operations.<sup>46</sup>

Accordingly, at present ERCOT “monitors schedules submitted by wholesale buyers and sellers for the next day’s energy supply” to ensure the system can accommodate those schedules; “ensures electricity transmission reliability” managing and monitoring incoming and outgoing supply of electricity over the grid; and finally “serves as the central [administrative] hub for retail transactions.”<sup>47</sup>

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42. ELECTRICITY IN TEXAS, *supra* note 7, at 7.

43. *W. Tex. Utils. Co.*, 470 F. Supp. at 806. Throughout the evolution of ERCOT, obligations for maintaining intra-state character were sometimes, though not always, memorialized in formal agreements. The members, however, always proceeded upon the “common understanding” that any entity making interstate connections was free to do so, but would be required to advise the organization, which could then sever its connections with that entity to maintain its intrastate character. See *West Tex. Utils. Co.*, 470 F. Supp. at 809 (describing this “common understanding” as well as the use of bi-lateral agreements among principal utilities); see also Cudahy, *supra* note 8, at 57 (describing how ERCOT members are “binding themselves to intrastate operation”).

44. ELECTRICITY IN TEXAS, *supra* note 7, at 6-7.

45. *Id.* at 7.

46. SUNSET ADVISORY COMM’N, STAFF REPORT 98 (Apr. 2004), available at <http://www.sunset.state.tx.us/79threports/puc/puc.pdf> (outlining this sequence of events); see also ELECTRICITY IN TEXAS, *supra* note 7, at 8-9 (outlining this sequence of events).

47. Electricity Reliability Council of Texas, ERCOT’s Role, <http://www.ercot.com/about/ercotrole.html> (last visited Dec. 15, 2007).

*A. On the Road to Today's ERCOT: The Origins of Jurisdictional Controversy*

Although its jurisdictional autonomy is founded upon a lack of interconnection and transmission across state lines, ERCOT is currently linked by two asynchronous connections to the Southwest Power Pool (SPP) in Oklahoma. These interconnections were established in 1981 and 1987 as the culmination of a FERC-approved settlement to a lengthy jurisdictional controversy, and they are based on key statutory innovations that continue in force, more or less, to this day. This section traces through the jurisdictional controversy in considerable detail given its direct causal relation to the present state of affairs both legally and historically.

The events culminating in the above settlement arose with respect to a holding company, Central Southwest Holdings (CSW), which had utilities in both Texas and Oklahoma. In order to comply with the highly punitive integration provisions of the Public Utilities Holding Company Act (PUHCA), CSW needed to establish an electrical connection between its four constituent utilities, which it could not do without violating ERCOT's intrastate character. In 1974, a group of utilities in Oklahoma forced the issue by filing an action asserting PUHCA non-compliance.<sup>48</sup>

As a first effort to force interconnection, CSW mounted an anti-trust challenge alleging ERCOT amounted to an illegal restraint of trade in interstate commerce, an argument rejected by the District Court on the grounds that intrastate isolation was a permissible end under the FPA, and that the plaintiff failed to establish any unlawful restraint of trade, conspiracy in restraint of trade, or unlawful boycott.<sup>49</sup>

CSW then embarked on a strategy of directing a power flow originating within ERCOT into the SPP in Oklahoma, such that all ERCOT utilities would become connected to, and thus contribute to, the flow of electrical energy across state lines. Undertaken the night of May 4, 1976 and known as the "midnight connection," CSW's intent was to subject ERCOT to federal jurisdiction under the "technological transmission test" and then petition the FPC to order interconnection pursuant to section 202 of the FPA, e.g. U.S.C. § 824a(b) (where jurisdiction exists, allowing the Commission to order interconnection when certain conditions are met) and 16 U.S.C. § 824a(c) (where

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48. For an excellent review of these events by an intimate participant, *see* Cudahy, *supra* note 8, at 59.

49. *See* W. Tex. Utils. Co. v. Tex. Elec. Serv. Co., 470 F. Supp. 835 (N.D. Tex. 1979) (rejecting anti-trust claim); W. Tex. Utils. Co. v. Tex. Elec. Serv. Co., 470 F. Supp. 798 (N.D. Tex. 1979) (denying motion for a new trial and for injunctive relief).

jurisdiction exists, allowing the Commission to order interconnection in the event of an emergency, as broadly defined by the sub-paragraph).

CSW's petition was filed when the defendant ERCOT utilities were still transmitting in interstate commerce, but was decided after such transmissions had been disconnected and isolated. In *Central Power & Light Co.*, most of CSW's motions were resolved against it.<sup>50</sup> In particular, the FPC held CSW's constituent utilities to be "public utilities" subject to federal jurisdiction due to their interstate connection, but found that the other ERCOT utilities, which had disconnected and formed a bifurcated system shortly after the midnight connection, could not be subjected to federal regulation, assumedly because their operations, transmissions, and interconnections were now wholly intrastate. Absent a finding of jurisdiction, the FPC rejected CSW's claims for forced interconnection under 16 U.S.C. § 824a(b) and (c).<sup>51</sup>

Due to lack of clarity in its decisional underpinnings, the FPC judgment was remanded for reconsideration by *Central Power and Light Company, et al. v. Federal Energy Regulatory Commission*.<sup>52</sup> However, while the remand order is important in understanding that the jurisdictional significance of the brief interconnection was in fact a contested matter, the critical elements of the litigation quickly moved to the PUCT.

In January of 1977, the major ERCOT utilities filed an action with the PUCT alleging that the continuing connection of the CSW utilities in Texas and the SPP in Oklahoma negatively impacted the reliability of service within ERCOT<sup>53</sup> and violated CSW's contractual obligations requiring notice before transmitting in interstate commerce or directly proscribing such activity. The petition was upheld by the PUCT, and an order was issued prohibiting the CSW utilities from reestablishing any interstate connections.<sup>54</sup> The result was the restitution of the status quo

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50. *Cent. Power & Light v. Fed. Power Comm'n*, 56 F.P.C. 432 (1976).

51. In *Central Power & Light Co. v. Fed. Power Comm'n*, the FPC did find, however, a "reasonable probability" that some systemic disruption would arise due to the now bifurcated nature of the energy grid, and thus that an emergency situation was present under 16 U.S.C. § 824a(d) (allowing the FPC to order temporary connection during emergency for entities *not* otherwise subject to FPC jurisdiction). So holding, the FPC ordered the disconnected Texas utilities to temporarily restore certain important physical connections, emphasizing as directed by the sub-paragraph that such forced interconnections were not to impart jurisdictional status.

52. *Cent. Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 575 F.2d 937 (D.C. Cir. 1978).

53. The reliability argument was based upon the continuing bifurcation of the ERCOT grid. The bifurcated operation continued because the ERCOT utilities "steadfastly refused to reconnect" with two of the CSW companies, West Texas Utilities and Central Power & Light, despite the Federal Power Commission's order in which those utilities were granted the opportunity to reconnect voluntarily without being subjected to FPC jurisdiction. *See Cent. Power & Light Co.*, Docket No. E-9558, 56 F.P.C. 432 (1976).

54. *See Application of Houston Lighting and Power Co. for Reconnection of the Texas Interconnect System*, PUCT Docket No. 14 (July 11, 1977).

ante, which is to say, the situation that led to the “midnight connection” in the first instance.

### B. The Enactment of PURPA

Although CSW was denied relief from the PUCT order in state and federal court,<sup>55</sup> the passage of the Public Utility Regulatory Policy Act of 1978 (PURPA) provided an opportunity to seek federal administrative relief. Before proceeding to a discussion of PURPA itself, however, it is important for proper historical perspective to understand that “certainly much of the political impetus—perhaps the decisive force behind the[se] provisions—were the forces seeking the interconnection of ERCOT and the Southwest Power Pool.”<sup>56</sup>

The relevant provisions of PURPA are as follows. First, under Section 205(a) of PURPA, codified at 16 U.S.C. § 824a-1, FERC was granted the authority to exempt “electric utilities” from any state law, rule or regulation that “prohibits or prevents the voluntary coordination of electric utilities,” should the “Commission determine[] that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area.” Note that the term “electric utilities” is used in contradistinction to the term “public utilities” precisely to signify that the general jurisdictional limitation of the FPA was being altered in favor of a broader grant in this domain.

Even more importantly, under sections 202, 203, and 204 of PURPA, FERC was given the power to order interconnection<sup>57</sup> and wheeling<sup>58</sup> by non-jurisdictional entities without otherwise impacting their jurisdictional status,<sup>59</sup> so long as certain statutory conditions were satisfied.<sup>60</sup> These

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55. The state court upheld the PUCT order in *Cent. Power & Light Co. v. Pub. Util. Comm'n of Tex.*, Docket No. 261,605. The federal district court invoked the abstention doctrine to withhold consideration until the state proceedings terminated, as affirmed by *Cent. Power & Light Co. v. Pub. Util. Comm'n of Tex.*, 592 F.2d 234 (5th Cir. 1978).

56. Cudahy, *supra* note 8, at 61.

57. Section 202 of PURPA, adding section 210 to the FPA, provided in pertinent part that “[u]pon application of any electric utility...the Commission may issue an order requiring...the physical connection of ... the transmission facilities of any electric utility, with the facilities of such applicant.” The provision exists in identical form today. See 16 U.S.C. § 824i (2000).

58. Section 203 of PURPA, adding section 211 to the FPA, provided in pertinent part that, “Any electric utility or Federal power marketing agency may apply to the Commission for an order under this subsection requiring any other electric utility to provide transmission services to the applicant.” Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 203, 92 Stat. 31117. As discussed in Part III, *infra*, the Energy Policy Act of 2005 has significantly modified this provision and it no longer allows FERC to reach “any ... electric utility.” Federal Power Act of 2005, Pub. L. No. 109-58, §§ 1291, 1295, 119 Stat. 594, 984-85 (codified as amended at 16 U.S.C. § 824j (2000)).

59. Section 204 of PURPA, amending section 201(e) of the FPA, provided in pertinent part that compliance with any order the Commission under the provisions of sections 210, 211, or 212

three subsections of PURPA added, in this order, Sections 210, 211, and 212 of the FPA, codified as such at 16 U.S.C. § 824i-k.

### C. Petitions for Relief Under PURPA

On February 9, 1979, the CSW utilities filed a petition under the above-mentioned provisions of PURPA seeking relief from the decision of the PUCT and a federal order for interconnection and wheeling by the ERCOT utilities. Most importantly, FERC definitively rejected the ERCOT utilities' defense of non-jurisdiction, holding that "whether or not the 'intrastate' ERCOT companies are subject to the jurisdiction of this Commission for purposes other than the ordering of interconnection or wheeling is irrelevant...[Sections 210 through 212 of the FPA now] clearly state that interconnection and wheeling orders issued pursuant to those sections may apply to any electric utilities if the stated criteria are met."<sup>61</sup> The jurisdictional holding was affirmed upon review.<sup>62</sup>

Upon reaching the merits, FERC initially denied the CSW companies' application for exemption from the PUCT order under PURPA Section 205(a), 16 U.S.C. § 824a-1(a).<sup>63</sup> Although the docket was still active with the claims for interconnection and wheeling under sections 210 through 212 of the FPA, 16 U.S.C. § 824i-k, a series of political events, including position taking by the Department of Energy in favor of interstate interconnection, compelled the litigants to compromise.<sup>64</sup>

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of the Act (i.e. the interconnection and wheeling provisions) 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 those provisions. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 204(b), 92 Stat. 3117 (codified at 16 U.S.C. § 824(b)(2)).

60. Section 204 of PURPA, amending section 212 of the FPA, also established "general provisions regarding interconnection and wheeling authority." As is discussed in Part III, *infra*, the criteria by which FERC is to evaluate the substantive merits of a proposal for interconnection or wheeling, and the procedure it is to follow, have been substantially altered by subsequent amendment (codified as amended at 16 U.S.C. § 824(k) (2005)).

61. *Cent. Power & Light Co.*, 8 F.E.R.C. ¶ 61,065 (1979) (order).

62. *Cent. Power & Light Co.*, 9 F.E.R.C. ¶ 61,011, 61,219 (1979) (order denying reh'g and modifying prior order).

63. *Id.* at ¶ 61,038. FERC found that the PUCT order "did not prevent voluntary coordination among the CSW companies in the manner contemplated by section 205(a)" (emphasis added). Insofar as the PUCT order was an unconstitutional embargo upon interstate commerce, subjecting it to consideration under section 205(a), which allows state regulations to stand if they promote the public welfare, could lead to the anomalous "finding that the states' exercise of its police powers would provide a defense to a section 205(a) exemption for state action which would be unconstitutional under both the Supremacy Clause and the Commerce Clause."

64. Cudahy, *supra* note 8, at 62-63.

*D. Final Settlement*

On June 27, 1980, in an attempt to settle the dispute, CSW filed an amended application seeking approval of two asynchronous direct current interconnections between its electric utilities in ERCOT and SPP. On July 28, 1980, both CSW and the other ERCOT utilities submitted an Offer of Settlement in Docket No. EL79-8 to effectuate the proposal set forth in the application. The settling parties agreed upon asynchronous direct-current interconnection because, unlike an alternating current tie, the power flows over a direct-current link could be controlled. This meant that the parties could specify exactly how much power to send in a chosen direction.<sup>65</sup> The Offer of Settlement, as supplemented, was certified to the Commission as an uncontested Offer of Settlement on July 10, 1981. The process went then through several rounds, and interveners, including the Department of Justice and the Department of Energy, had to address their respective regulatory concerns.

The Commission accepted the settlement offer in its *Order Requiring Interconnection and Wheeling, and Approving Settlement*, 17 F.E.R.C. ¶ 61,078 (1981), as corrected by the *Errata Notice* issued on November 5, 1981, 17 F.E.R.C. ¶ 61,078 (1981), as again modified by the *Order on Rehearing* issued January 29, 1982, 18 F.E.R.C. ¶ 61,000 (1982).<sup>66</sup>

FERC issued the order pursuant to sections 210, 211, and 212 of the FPA, 16 U.S.C. § 824i-k, exercising FERC's new authority to order interconnection and wheeling over non-jurisdictional entities where the applicable statutory provisions are satisfied. In effect, the settlement process channeled the private agreement through FERC and, in doing so, allowed the Commission to rely upon the provision added by PURPA to order the interconnection and transmission without subjecting ERCOT to plenary federal jurisdiction.<sup>67</sup>

#### IV. RECENT STATUTORY AND REGULATORY DEVELOPMENTS

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65. See *Cent. Power & Light Co.*, 40 F.E.R.C. ¶ 61,077 (1987) (there was a change in the location of one of the interconnections approved in this order).

66. See *Cent. Power & Light Co.*, 17 F.E.R.C. ¶ 61,078 at 6, for FERC's findings as to the required statutory conditions, including that the interconnection was in the public interest and encouraged the overall conservation of energy

67. Energy Policy Act of 1992, Pub. L. No. 102-486, sec. 721, § 211, 106 Stat. 2776, 2921. See 16 U.S.C. § 824j (2007) (current amended version of law).

*A. The Energy Policy Act of 1992*

The Energy Policy Act of 1992 (EPA 1992), amended in important part by the Energy Policy Act of 2005, was passed to “open and expand the wholesale transmission market and encourage the development of new competitive generating companies,” and it armed FERC with additional powers under 16 USC § 824i-j to do so. Most importantly, EPA 1992 amended 16 U.S.C. § 824j to enhance FERC authority to order wheeling by declaring that “any electric utility ... or any other person generating electric energy for resale, may apply to the commission for an order ... requiring a *transmitting utility* to provide transmission services to the applicant” (emphasis added).<sup>68</sup> This provision replaced the term “electric utility” employed by PURPA with “transmitting utility” to broaden coverage of the intended class; essentially, a “transmitting utility” had to own only instrumentalities for transmission and not necessarily the other components of a fully operational electric utility.<sup>69</sup>

EPA 1992 also added a separate provision for ERCOT facilities, effectively carving out rate-setting jurisdiction for PUCT. As codified at 16 U.S.C. § 824k(k), “[a]ny order under Section 211 [i.e. § 824j] 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 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 Public Utility Commission of Texas.”

In that these provisions of EPA 1992 were based on an application process and “largely contemplated discrete, transactional requests for transmission access,”<sup>70</sup> FERC was not satisfied with the efficacy of its new regulatory powers. As such, FERC aimed to build upon its authority to mandate wholesale wheeling under 16 U.S.C. § 824j and in 1996 issued Order No. 888 to systematize and greatly expand the provision of “open access” transmission services.<sup>71</sup>

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68. Energy Policy Act of 1992, Pub. L. No. 102-486, sec. 726 § 3, 106 Stat. 2776, 2921 (defining “transmitting utility”); see also *Kiowa Partners, LLC*, 99 F.E.R.C. ¶¶ 61,251, 62,095 (2002)..

69. *Id.*

70. Cassandra Burke Robertson, *Bringing the Camel Back into the Tent: State and Federal Power Over Electricity Transmission*, 49 *Clev. St. L. Rev.* 71,78 (2001).

71. F.E.R.C. ¶ 61,080 (1996); or Order No. 888, F.E.R.C. Stats. & Regs. ¶ 61,080 (1996). For an excellent summary of the Rule’s myriad provisions, see Convergence Research Group, “Commission Orders Sweeping Changes for Electric Utility Industry, Requires Wholesale Market to Open to Competition,” available at [http://www.converger.com/FERCNOPR/888\\_889.htm](http://www.converger.com/FERCNOPR/888_889.htm).

Importantly, Order No. 888 was not meant to reach ERCOT, referring as it did to “public utilities” and concerning itself with ratemaking which § 824k(k) leaves to ERCOT. As stated in Order No. 888 at footnote 516, however, jurisdiction still existed under section 211 of the FPA: “The Commission also has jurisdiction to order wholesale transmission services in either interstate or intrastate commerce by transmitting utilities that are not also public utilities.” In making this statement, FERC specifically cited applications of such jurisdiction within ERCOT.<sup>72</sup> At this juncture, there was no doubt that “sections 211 and 212 of the FPA clearly give [FERC] jurisdiction to order transmission services within ERCOT, subject to the special rate provision for ERCOT utilities” discussed above.<sup>73</sup>

### *B. The Energy Policy Act of 2005*

Among other alterations, the Energy Policy Act of 2005 (EPA 2005) significantly amended the operation of section 211 of the FPA relating to wheeling and forced transmission access. The term “transmitting utility” used in that section, defined by EPA 1992 to encompass “any electric utility” transmitting electric energy for wholesale, was redefined by EPA 2005 to include only those entities that “own, operate, or control facilities used for the transmission of electric energy (a) *in interstate commerce* and (b) for the sale of electric energy at wholesale” (emphasis added).<sup>74</sup> Quite clearly the majority of ERCOT utilities would thereafter, by virtue of their intrastate operation, be immune from any such order.

The word “majority” is purposively used to account for the March 2007 decision approving Brazos Electric Cooperative’s request for an order under sections 210 and 211 of the FPA allowing a third interconnection between ERCOT and SPP without otherwise impacting its own, or any other utility’s, jurisdictional status.<sup>75</sup> In granting the order for transmission, FERC reasoned that the transmitting utilities in question did in fact own and operate “facilities used for the transmission

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72. See *Tex-La Electric Cooperative of Texas, Inc.*, 67 F.E.R.C. ¶ 61,019 (1994) (where, under sections 211 and 212 of the FPA, 16 U.S.C. § 824j-k, FERC ordered wholesale transmission services to a rural electric cooperative operating within ERCOT); see also *Kiowa Partners, LLC*, 99 F.E.R.C. ¶ 61,251 (2002) (Order Directing Interconnection and Transmission Services, Approving Settlement and Accepting Interconnection Agreement for Filing.).

73. *City of College Station, TX*, 76 F.E.R.C. ¶ 61,138 (1996).

74. 16 U.S.C. § 796, as amended by EPA 2005, Pub L. No. 109-58, section 1291, 119 Stat. 594, 984 (2005).

75. *Brazos Electric Cooperative, Inc.*, 118 F.E.R.C. ¶ 61,199 (2007) (Order Directing Interconnection and Transmission Services and Approving Settlement Offer).

of electric energy in interstate commerce” and “for the sale of electric energy at wholesale,” as they happened to be legal “successors to the rights and obligations” created by FERC in ordering the two previous interconnections.<sup>76</sup> As such, it seems as though FERC may continue to order transmission access for otherwise non-jurisdictional utilities where FERC has issued prior interconnection orders pursuant sections 210-212 of the FPA.

EPA 2005 also subjected ERCOT to federal jurisdiction with respect to the mandatory electric reliability provisions of 16 U.S.C. § 824o. Under 16 U.S.C. § 824(b)(2), however, as applies to orders for interconnection and wheeling, “[c]ompliance with any order or rule of the Commission under ... 16 U.S.C. § 824o ... shall not make an electric utility or other entity subject to the jurisdiction of the Commission for the any purposes other than the purposes specified” in the provision.<sup>77</sup>

Note as a final matter that EPA 2005 specifically exempts ERCOT from several modified or additional requirements imposed by the Act. Specifically, ERCOT is exempted from new federal zoning and siting requirements (16 U.S.C. § 824p); native load service obligations (16 U.S.C. § 824q); and new market transparency requirements (16 U.S.C. § 824t). For these reasons, EPA 2005 is generally regarded as reaffirming ERCOT’s jurisdictional autonomy.

## V. CONCLUSION

ERCOT remains free from plenary federal jurisdiction but still remains subject to the provisions of PURPA, as codified at 16 U.S.C. § 824a(1)-(a) and 16 U.S.C. § 824i-k, and as amended by the Energy Policy Acts of 1992 and 2005. While FERC’s basis for exerting jurisdiction within ERCOT reached its zenith after EPA 1992, its authority over wheeling and transmission access is now limited to interstate and wholesaling entities pursuant to EPA 2005. Indeed, as stated above, observers have characterized EPA 2005 as a congressional reaffirmation of ERCOT’s exemption from the full panoply of federal “public utility”

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76. Note that the utilities in question were also subject to FERC’s directives under sections 210 and 211 of the FPA in *Kiowa Partners, LLC*, *supra* note 66, to provide interconnection at their “switching station in ERCOT (Valley Interconnection) for a generator located approximately 80 miles away in Pittsburg County, Oklahoma, and transmission to, from, and over the Valley Interconnection.” This provided further basis for finding the entities to be “transmitting utilities” as defined by EPA 2005.

77. 16 U.S.C. § 824(b)(2) provides that compliance with the provisions of the Code listed in that section shall not impart federal jurisdiction for any purposes other than the purposes specified in the those provisions. *Brazos Electric Power Cooperative*, 71 Fed. Reg. 70372 (November 27, 2006).

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regulations.<sup>78</sup> In conjunction with this exemption, FERC's willingness to approve a second set of interconnections between ERCOT and SPP suggests that the legal and political landscape will continue to be oriented towards the goal of maintaining the jurisdictional status quo while enabling ERCOT to operate dynamically in addressing the need for additional generating capacity "essential to the economic success and reliability of the ERCOT market."<sup>79</sup>

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78. Electric Power Cooperative, 71 Fed. Reg. 70372 (November 27, 2006).

79. *Id.*