

INTRODUCTION TO ERCOT'S JURISDICTIONAL STATUS

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Jared Fleisher's exploration of the jurisdictional status of the Electric Reliability Council of Texas (ERCOT) will be of interest and use to most readers of this journal, including, in particular, energy law practitioners as well as aficionados of energy market restructuring. Many of us have long known that ERCOT was a strange animal, but fewer of us knew exactly why, or how strange. Fleisher has provided us with a thorough-yet-concise explanation of the law and history that defines the boundaries (such as they are) between state and federal jurisdiction over ERCOT and its members.

Have you ever wondered how ERCOT came to be? When it came to be? Did you know that ERCOT is not entirely separated from the outside, interstate grid? If you did know that, have you ever wondered why the Federal Energy Regulatory Commission (FERC) does not issue plenary jurisdiction over ERCOT or ERCOT utilities? Intrastate electricity transactions in Texas are not really beyond Congress's Commerce Clause jurisdiction, are they? And if not, why does FERC not exercise plenary jurisdiction over ERCOT utilities? Fleisher answers all these questions and more.

These are not merely academic questions, of course. As the United States and Europe continue to experiment with competitive electricity markets, many commentators see Texas' market as one of the success stories in this grand experiment. Why has Texas not succumbed to the price volatility, supply, and market abuse problems that beset the California market? Why has Texas seen more competition among retail sellers, and more customer switching, than most other American and European markets? Naturally, many wonder whether some part of the answer to these questions lies in the unification of regulatory jurisdiction over Texas' wholesale and retail markets in the Public Utilities Commission of Texas (PUCT), rather than the bifurcated regulatory system that prevails elsewhere in the United States. Fleisher does not attempt to tell us whether unified jurisdiction is the secret to Texas' relative success, but he provides a clear and complete explanation of the jurisdictional foundations for such an inquiry.

Those foundations will also serve scholars and practitioners who are

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exploring Texas' response to some common restructuring problems. Why have retail prices not fallen precipitously in these competitive markets? Can Texas do a better job than other states of providing adequate transmission capacity over the long term? Or of providing adequate generation capacity? Or of monitoring markets for the presence and exercise of market power? Does unified jurisdiction help Texas respond to these problems any more efficiently than other markets? A clear understanding of the legal basis for ERCOT's unique status is a predicate to answering these questions.

The story of ERCOT is part historical narrative and part statutory interpretation. As Fleisher tells us, the ERCOT story is not merely one of trying to isolate Texas utilities from interstate commerce. Rather, marking the boundary between federal and state jurisdiction over Texas electricity sales and transmission services has unfolded over time as part of an elaborate dance between utilities, Texas legislators and regulators, Congress, FERC, and the courts. The dance has played out over almost forty years and has been more voluntary accommodation and compromise than power play (no pun intended), though it has been all of these things. Nor is the dance complete. As Fleisher tells us, the boundary line was moved a bit as recently as the Energy Policy Act of 2005, and it might be moved again if a Texas congressman has anything to say about it.

So, this is a timely and important article. Energy practitioners and scholars will want to read it, and keep it, as a clear, thorough, forceful, and concise explanation of a "strange animal" that is far more complicated and interesting than meets the eye.