



Texas (ERCOT) grid, and the merits of the project alone are not a sufficient legal basis for the Commission to disclaim jurisdiction. EPSC is concerned about the very real, broad impacts that these jurisdictional questions could have on the electricity markets in and around Texas.

## I. INTRODUCTION

According to the Petitioner, “[t]he very purpose of Tres Amigas is to eliminate the barrier created by the current separation of the U.S. transmission system into three asynchronous grids (namely, ERCOT, the Eastern Interconnection and the Western Electricity Coordinating Council (WECC)), providing new transaction opportunities across much of the United States.”<sup>6</sup> As described in the Petition, the Tres Amigas facility:

*will employ cutting edge technologies, such as voltage source converters and underground superconducting DC transmission cable, in a unique and creative engineering configuration in order to remove electrical barriers to the movement of power across the three interconnections. Tres Amigas will permit power sellers in ERCOT to schedule power to either the Eastern Interconnection or the WECC; power sellers in the Eastern Interconnection to schedule power to either ERCOT or the WECC; and power sellers in WECC to schedule power to either ERCOT or the Eastern Interconnection.*<sup>7</sup>

As characterized by the Petitioner, the “very purpose” served by the Tres Amigas facility is to enable the flow of wholesale power transactions throughout the country. At a minimum, this statement of intended purpose raises the question whether Tres Amigas would be engaged in interstate transmission. Further, Petitioner’s insistence that interstate transmission cannot occur because “commingling” of ERCOT transactions with interstate commerce are prevented

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<sup>6</sup> See Application for Negotiable Transmission Rates, at p. 2. (emphasis added)

<sup>7</sup> Petition at p. 4.

by asynchronous operation of the grid has not been adequately supported either as a matter of fact or law. If in fact the Tres Amigas facility will be used to transmit power in interstate commerce, then the relief that the Petitioner seeks is inappropriate. The Commission's exercise of jurisdiction over transmission facilities in interstate commerce is statutory, and therefore, non-waivable. Regardless of the merits of the proposed project, the Petition fails to provide sufficient information to adequately support a legal basis for disclaiming jurisdiction over the ERCOT facilities that would interconnect with the Tres Amigas facilities. Additionally, more information on technical and operational aspects of the project are necessary for the involved markets to assess how Tres Amigas will function in and among the markets, and therefore how it must be classified and overseen. Such assessments by each market are critical to determining the legal jurisdictional question in this case.

## **II. BACKGROUND**

In the Petition, Tres Amigas requests that FERC disclaim jurisdiction over transmission lines that would interconnect the proposed Tres Amigas "Superstation" in Clovis, New Mexico with the ERCOT grid. The Tres Amigas project consists of a three-way AC/DC transmission substation in eastern New Mexico, one mile from the Texas border, that will purportedly interconnect ERCOT, the Western Electric Coordinating Council ("WECC") and the Eastern Interconnection.

The proposed Tres Amigas facility itself will consist of three voltage source converters terminals backed up by on-site battery systems and linked together in

a three way configuration through two miles of underground superconducting direct current (DC) cables.<sup>8</sup> Each HVDC terminal will be linked to one of the three asynchronous grids. Petitioner explains that the voltage source converter technology,

will allow Tres Amigas to independently control the direction of real and reactive power flows at each terminal, permitting Tres Amigas to move scheduled power in different directions on short notice and also to supply reactive power to the electric system as necessary, acting much like a large generator stabilizing the electric system surrounding Tres Amigas, but with the added capability to supply different amounts of reactive power to each of the three asynchronous interconnections depending on system needs.<sup>9</sup>

Further, the cables interconnecting the three terminals will be designed to carry up to 5 Gigawatts with potential for future expansion to 30 Gigawatts.<sup>10</sup> The Tres Amigas interconnection point with ERCOT appears to be located inside the New Mexico border. Thus, it appears that any transmission facilities constructed and owned by ERCOT transmission owners must cross state lines to reach the Tres Amigas facility.

The Petitioner states that the disclaimer of jurisdiction relief is necessary given that potential ERCOT customers have expressed reluctance to interconnect with the Tres Amigas facility out of concern of becoming subject to FERC jurisdiction. As such, the Petitioner asserts that Tres Amigas will not be viable as a business venture absent such disclaimer. Tres Amigas asks the Commission to disclaim jurisdictional grounds based on either of the following:

(a) that the ERCOT grid is not in interstate commerce and therefore not subject

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<sup>8</sup> Petition at 5.

<sup>9</sup> Application for Negotiable Transmission Rates, at p. 6.

<sup>10</sup> Application for Negotiable Transmission Rates, at p. 7.

to the Commission’s jurisdiction or (b) that Petitioner would be entitled to a disclaimer of jurisdiction if it obtained a wheeling order under Section 201(b)(2) of the Federal Power Act (“FPA” or the “Act”).<sup>11</sup>

Finally, the Petitioner requests that, if these grounds do not provide a sufficient basis for disclaiming jurisdiction, the Commission nonetheless disclaim jurisdiction “based on the unique design of the Tres Amigas superstation, which will maintain the electrical separation of ERCOT and the interstate grids using new technology and a unique configuration of facilities.”<sup>12</sup>

### III. COMMENTS

In this filing, EPSA takes no position on the ultimate fate of the Tres Amigas project. However, EPSA is concerned that Tres Amigas’s Petition fails to provide an adequate legal basis for the requested disclaimer of jurisdiction or the technical specification required for a full assessment of the project’s system impacts to several markets to support a jurisdictional legal finding. Therefore, EPSA urges the Commission to proceed with deliberation in considering the Petition. In the Petition and elsewhere, Tres Amigas cites numerous benefits of its “game chang[ing]”<sup>13</sup> project, and warns that, without the requested disclaimer

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<sup>11</sup> Section 201(b)(2) of the FPA provides that: “Compliance with any order of the Commission under the provisions of section 210 or 211, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes [of carrying out such provisions and applying the enforcement authorities of the FPA with respect to such provisions.]” Section 201(e) states that “[t]he term ‘public utility’ . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part (other than facilities subject to such jurisdiction solely by reason of section 210, 211, or 212).” See 16 U.S.C. § 824(b)(2); see also *Central Power and Light Co.*, 40 FERC ¶ 61,077 at 61,223 (1987).

<sup>12</sup> Petition at 3.

<sup>13</sup> Peter Behr, *An electric ‘game changer’ gets FERC scrutiny*, *Climate Wire* (Dec. 23, 2009) (“*Electric Game Changer*”) (quoting Phillip Harris). See also Petition at 4-5 (describing the project as “unique” and “help[ing] to resolve a problem that has confounded the electric industry for many years”).

of jurisdiction, “the unique benefits of Tres Amigas will be lost.”<sup>14</sup> In considering the Petition, the Commission must remain focused on the legal merits of the Petition and not be distracted by the purported benefits of the project or rushed by Tres Amigas’s demands for expedited action.<sup>15</sup> Whatever the merits of the project or the timing goals of the Petitioner, the Commission must act deliberately to ensure that this project is legally structured in such a way that FERC can soundly disclaim jurisdiction based on how the project and related transmission function in the markets. This is all the more important because, as Tres Amigas implicitly concedes in asserting that the “Commission’s [p]rior [p]ractice [i]s [n]o [l]onger [s]ufficient,”<sup>16</sup> its Petition advocates a departure from Commission precedent.

The decision that the Tres Amigas project seeks is multi-faceted. On one hand, the Tres Amigas project will interconnect ERCOT with the Eastern Interconnection and WECC; thus, it represents an interstate issue that would seem, on its face, to be FERC-jurisdictional. On the other hand, several early commenters have observed that “ERCOT has been reluctant to cooperate with the Eastern and Western Interconnects due to concerns with regard to coming

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<sup>14</sup> Petition at 2. See also *Electric Game Changer* (“Clearly, if we don’t [get] the jurisdiction disclaimer, I can’t imagine how we get support for this in Texas.” (quoting Tres Amigas’s counsel)).

<sup>15</sup> See Petition at 2 & n.2 (asking that the Commission grant the Petition “as expeditiously as possible” and specifically to act within the same 60-day period applicable to a companion rate filing). See also Answer of Tres Amigas LLC to the Electric Power Supply Association’s Motion for Extension of Time at 2, Docket No. EL10-22-000 (filed Dec. 22, 2009) (objecting to EPSC’s request for a two-week extension in light of intervening holidays on the grounds that it would be “prejudiced” by the potential delay in ruling on the Petition, despite the fact that, as Tres Amigas concedes, the Commission is under no statutory obligation to issue order in response to petitions for declaratory orders within 60 days).

<sup>16</sup> Petition at 15.

under FERC jurisdiction.”<sup>17</sup> EPSA urges the Commission to consider its full statutory obligations and not allow the purported benefits of the project to obfuscate the enormously important legal jurisdictional issues presented by the Petition. If the project as currently structured would be FERC-jurisdictional, the Commission should hold as much and leave it to the Petitioner to restructure the proposal if necessary.

**A. THE THREE ARGUMENTS SET FORTH AS POTENTIAL BASES FOR THE DISCLAIMER OF FERC JURISDICTION ARE FUNDAMENTALLY FLAWED OR INCOMPLETE**

Tres Amigas has laid out three ways that FERC could justify disclaiming jurisdiction. First, it notes that the ERCOT grid will continue to be “asynchronous” with the other two grids and electric energy from ERCOT will therefore not “commingle” with electric energy from the other two grids. Next, Tres Amigas asks that if the Commission does not agree with its first line of reasoning, it find Tres Amigas to be eligible for a jurisdictional exemption by obtaining a wheeling order under FPA Section 211. Finally, if the Commission does not agree with the “asynchronous” argument and will not grant a wheeling order under FPA Section 211, Tres Amigas requests that:

[T]he Commission rule that the Petitioner is entitled to a disclaimer of jurisdiction based on the unique design of the Tres Amigas superstation, which will maintain the electrical separation of ERCOT and the interstate grids using new technology and a unique configuration of facilities.”<sup>18</sup>

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<sup>17</sup> Comments of the Coalition of Renewable Energy Landowner Associations, Inc. at 3, Docket No. EL10-22-000 (filed Dec. 23, 2009).

<sup>18</sup> *Id.* at 3.

**i. AN 'ASYNCRHONOUS' GRID THAT WILL NOT COMMINGLE'**

The United States Supreme Court set the standard for determining when formerly non-jurisdictional facilities became jurisdictional in *Federal Power Comm'n v. Florida Power & Light Co.*<sup>19</sup> In *FPL*, the court found that it was sufficient for power to have been “commingled” in a transmission bus to assert jurisdiction over Florida Power and Light Company (“FPL”) by virtue of FPL’s sales of power to Florida Power Corp, which, in turn, engaged in back and forth sales with an out-of-state utility.

Further, and as correctly noted by Petitioner, whether facilities are subject to FERC jurisdiction will be determined based on the actual physics of the flows on those facilities, not just the contractual arrangements. If in fact Tres Amigas operates on a regular basis as a conduit for the passage of power originating in WECC or the Eastern Interconnection through to ERCOT beyond incidental commingling, interstate commerce will be occurring. The Supreme Court addressed just such a question in a case involving deliveries of power by Jersey Central Power and Light Company (“JCP&L”) to its in-state neighbor, Public Service Electric and Gas Company, which, in turn, regularly scheduled deliveries to an out-of-state utility through a designated bus and the record showed that JCP&L was, at times, the only entity supplying power to the bus.<sup>20</sup> In that case, the Supreme Court concluded that JCP&L owned and operated facilities used for

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<sup>19</sup> , 404 U.S. 453 (1972) (“*FPL*”).

<sup>20</sup> See *Jersey Cent. Power & Light Co. v. FPC*, 319 U. S. 61 (1943).

the transmission of electric energy in interstate commerce and was thus correctly subject to the jurisdiction of the Federal Power Commission.<sup>21</sup>

The Petitioner, in large part, seeks to distinguish the Tres Amigas project from the scenario in *FPL* and in *JCP&L* on the basis that commingling is not possible given that the ERCOT grid would be interconnected asynchronously with the Tres Amigas facility. In the Affidavit of Philip G. Harris submitted in support of the filing, Mr. Harris explains that the electrical currents on the AC grids cannot be mixed but that power flowing on one AC grid must be converted to DC and then to converted back to AC to flow on another AC grid. His basic theory appears to be that the conversion process applied to power flowing from any of the asynchronous grids will prevent commingling from occurring:

The first thing that has to be recognized is that, even with the conversion of electricity from AC to DC and then back to AC, the two AC grids are never synchronized. They do not, and they cannot, act as a single electrical machine. The electricity does not “commingle” as the Supreme Court used that term in discussing flows within the Eastern Interconnection. In fact, if the AC current in each synchronized interconnection were physically allowed to commingle, it would create electrical chaos, damaging any electric facilities and equipment that could not be electrically isolated from the disturbance.

. . .

It is critical to this conversion process that the electricity in each of the synchronized AC grids be kept electrically separate at all times in order to avoid damage to the electric system. Therefore, while the outcome of the AC/DC conversion process is that electricity from one interconnection is able to be used in another, the electrons are never allowed to commingle. It is only by keeping the interconnections electrically separated that the process of AC/DC conversion described above can occur. It is in the DC process where the comingling is stopped.<sup>22</sup>

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<sup>21</sup> *Id.* at 72-73.

<sup>22</sup> Affidavit of Phillip G. Harris, at p. 4.

This explanation does not provide an adequate basis for disclaiming jurisdiction, because, as Mr. Harris concedes in the foregoing passages, the fact remains that electric energy produced in one AC grid is transmitted and consumed in another AC grid as the result of a project whose “very purpose” is “to eliminate the barrier created by the current separation of the U.S. transmission system into three asynchronous grids, providing new transaction opportunities across much of the United States.”<sup>23</sup> The Affidavit further suggests that Tres Amigas is operating under a fundamental misapprehension regarding the meaning of the term “commingling” as used in the case law. Nothing in the case law supports the proposition that simply because power must be converted flowing from one asynchronous grid to another, it does not commingle with energy flowing in interstate commerce.<sup>24</sup>

As such, whether ERCOT is connected asynchronously is not dispositive as to whether commingling can occur. The bottom line is that, notwithstanding any required conversion process, the Tres Amigas facility will facilitate the import and export of power into and out of ERCOT. Once such imports or exports occur, commingling with energy in interstate commerce may be possible. Mr.

Harris’s affidavit does not address this issue and the legal conclusion he reaches

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<sup>23</sup> See Application for Negotiable Transmission Rates at p. 2, Docket No. ER10-396-000.

<sup>24</sup> Indeed, EPSA notes that in *Sharyland Utils., LP*, 121 FERC ¶ 61,006 (2007) (“*Sharyland*”), a case involving the proposed construction of a new high voltage direct current transmission line to interconnect an ERCOT based utility with a transmission line being constructed in Mexico by the Commission Federal de Electricidad (CFE), the Commission, in disclaiming jurisdiction, did not rely on the ground that the two systems were asynchronous. Instead, FERC specifically found that based on the specific configurations in place that there were minimal and infrequent opportunities for any ERCOT sourced power to make its way into other American states. Moreover, the Commission specifically reserved the right to revisit the issue of federal jurisdiction in the event there were changes in the operation or configuration of the project or if there were new interconnections that linked to other states. See *Sharyland*, 121 FERC ¶ 61,006 at P23 (2007).

lacks factual support. Additionally, the Petition does not include sufficient technical and operational information to constitute factual support for the legal arguments posed by the Petitioners, or provide the necessary system impact analysis by each of the affected markets.

## **ii. THE PETITIONER’S REQUEST FOR A WHEELING ORDER UNDER FPA SECTION 211**

Tres Amigas has included in its petition a case history of where the Commission has issued wheeling orders under FPA Section 211. But, as Tres Amigas states over and over, its project is “unique” in any number of important ways. The cases cited by the Petitioner do not establish any entitlement by Tres Amigas to a reading of the FPA that would essentially abrogate federal jurisdiction over a discrete portion of interstate commerce. In other words, Tres Amigas is requesting that the Commission intentionally relinquish its jurisdiction over all ERCOT facilities interconnected with the Tres Amigas facility. In doing so, Tres Amigas is asking this Commission to close its eyes to the fact that the intent of the project is to facilitate interstate commerce by “remov[ing] electrical barriers to the movement of power across the three interconnections.”<sup>25</sup> Tres Amigas will permit power sellers in ERCOT to schedule power to either the Eastern Interconnection or the WECC; power sellers in the Eastern Interconnection to schedule power to either ERCOT or the WECC; and power sellers in WECC to schedule power to either ERCOT or the Eastern Interconnection.<sup>26</sup>

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<sup>25</sup> Petition at 4.

<sup>26</sup> See *id.*

While it is true enough that the Commission has nonetheless disclaimed jurisdiction over certain ERCOT transactions that flow in interstate commerce based on the statutory exemption available where interconnection and wheeling are ordered under Sections 210 and 211 of the FPA, the majority of those cases involved circumstances where a generator located near ERCOT was seeking to interconnect with ERCOT or a wholesale customer was interconnecting remotely located resources to serve its load. See e.g. *Brazos Elec. Power Coop., Inc.*, 118 FERC ¶ 61,199 at P 12 (2007) (“*Brazos*”); (requiring ERCOT transmission utilities to interconnect with an Oklahoma plant built and jointly owned by two cooperatives in order to serve the cooperatives’ wholesale load located in both SPP and ERCOT); *Kiowa Power Partners, LLC*, 99 FERC ¶ 61,251 at P 9 (2002) (requiring ERCOT transmission owner to interconnect Oklahoma located generator thereby permitting said generator to deliver to ERCOT wholesale customers and to access the wholesale energy market in the Southwest Power Pool (“SPP”).

None of these cases involved projects whose “very purpose” was to break down the barriers between ERCOT and the FERC-jurisdictional grid.<sup>27</sup> Further, in those cases, the intent and operation of the facilities was assessed and supported the related jurisdictional findings.

As Tres Amigas acknowledges, an order under Section 210 of the FPA compelling interconnection, like that obtained in past cases involving interconnection with the ERCOT grid, is “not obtainable,”<sup>28</sup> because the

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<sup>27</sup> See Application for Negotiable Transmission Rates at 2.

<sup>28</sup> Petition at 23.

companies that would be the subject of an FPA Section 210 order are not “electric utilities” within the meaning of the FPA.<sup>29</sup> Tres Amigas asks the Commission to disregard this important distinction, because, it claims, the transmission could occur pursuant to an order under Section 211 of the FPA. But Tres Amigas has not established that it, or the would-be owner of a transmission line interconnecting it with the ERCOT grid, would actually be eligible to seek such an order. Section 211(a) provides that “[a]ny electric utility, Federal power marketing agency, or other person generating electric energy for sale for resale” may request an order requiring transmitting utilities to provide transmission services.<sup>30</sup> Tres Amigas claims that it would be an “electric utility” eligible to seek a wheeling order under FPA Section 211 by virtue of its ownership of battery units. An “electric utility” is “a person or Federal or State agency . . . that sells electric energy.”<sup>31</sup> It is not clear that Tres Amigas would be engaged in the sale of electric energy in connection with its ownership of battery units. Indeed, on the facts presented, Tres Amigas is not proposing to sell energy, but instead to provide transmission service, which suggests that its battery units would be performing transmission functions and not being used to sell energy.<sup>32</sup> Without a showing that it, much less the owner of a transmission line that would interconnect its facility with the ERCOT grid, is eligible to seek a wheeling order under FPA Section 211, Tres Amigas is in no position to request a disclaimer of jurisdiction over facilities interconnecting it with ERCOT based on

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<sup>29</sup> Id. at 16.

<sup>30</sup> 16 U.S.C. § 824j.

<sup>31</sup> 16 U.S.C. § 796, as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1291, 119 Stat. 594, 984 (2005).

<sup>32</sup> See *generally*, Application for Negotiable Transmission Rates, FERC Docket ER10-396-000.

an order issued under FPA Section 211. Nor should Tres Amigas's offer to sell small amounts of energy in order to qualify as an electric utility<sup>33</sup> be sufficient to establish a good faith request by an electric utility.

Moreover the scope of the relief requested by Tres Amigas may effectively undermine the intent of that section – to grant limited relief from rules or practices that would normally prevent interconnection and in turn provide access to markets and/or meet reliability needs without involuntarily causing the entity ordered to interconnect – in this case ERCOT – to become subject to FERC jurisdiction. However, the proposed interconnection is not being requested to provide market access to stranded generators or electrically isolated municipalities but to facilitate wide-scale economic transactions across and through the Tres Amigas facility - in essence connecting ERCOT with both WECC and the Eastern Interconnection.

**iii. THE PURPORTED BENEFITS OF THE TRES AMIGAS PROJECT ARE IRRELEVANT TO THE LEGAL QUESTION OF WHETHER THE PROJECT SHOULD BE FERC JURISDICTIONAL**

Finally, a large portion of the Tres Amigas Petition is devoted to a recitation of why the project is in the public interest. Tres Amigas has developed a bold proposal that could have a large number of benefits in terms of facilitating the development of renewable generation, enhancing the value of new generation by providing greater access to three interconnections (thereby increasing new investment), bridging the gap between marginal energy prices in each of the three markets, and increasing the value of transmission

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<sup>33</sup> Petition at 16.

investments.<sup>34</sup> However, these hypothetical benefits of the yet unconstructed Tres Amigas project may not be realized, according to the Petitioner, because prospective beneficiaries – namely, transmission and renewable generation developers involved with the project – have insisted that Tres Amigas obtain assurance that the Texas portion of the project will not be FERC jurisdictional.<sup>35</sup> Regardless, any benefits resulting from the project do not provide a legal justification for FERC to disclaim jurisdiction.

The petition appears to overlook one vital point – the Commission cannot disclaim jurisdiction as requested in this instance based on the submitted information and arguments. No matter how beneficial the merits of the project may be, FERC's jurisdiction is a matter of statute,<sup>36</sup> and, with respect to this type of issue, the Commission "has no discretion to reject that jurisdiction."<sup>37</sup> No party, including Tres Amigas, would benefit from a Commission order granting the petition without a clear legal basis for disclaiming jurisdiction.

The only way the Commission can legally disclaim jurisdiction in this case would be to find that this project does not result in ERCOT utilities or transactions associated with the Tres Amigas project being deemed to occur in interstate commerce. As Tres Amigas acknowledges, "the Commission's jurisdiction generally extends to all transmission facilities that operate in 'interstate

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<sup>34</sup> See Petition at 5-7.

<sup>35</sup> See *id.* at 8 (stating that "Tres Amigas' discussions with transmission and renewable generation developers operating in ERCOT have quickly turned to the necessity of providing assurance that transactions and facilities operating in ERCOT, including (but not limited to) any AC transmission lines from ERCOT that directly interconnect to Tres Amigas, will not become subject to FERC jurisdiction as a result of establishing an AC/DC interconnection between ERCOT and Tres Amigas").

<sup>36</sup> See, e.g., *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 924 (9th Cir. 2005); *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 463 (D.C. Cir. 2005).

<sup>37</sup> *FPC v. Southern California Edison Co.*, 376 U.S. 205, 210 n.5 (1964).

commerce."<sup>38</sup> The term "interstate commerce" encompasses "[t]raffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state and points in another state; commerce between two states; or between places lying in two states."<sup>39</sup>

It appears that, absent exemption, transmission lines interconnecting the ERCOT grid with Tres Amigas would be operating in interstate commerce simply by virtue of the movement of electricity between Texas and New Mexico, irrespective of whether a synchronous or asynchronous interconnection was created between the ERCOT grid and one or both of the other interconnections.

More broadly, the purpose of Tres Amigas as regards the interconnection with ERCOT appears to center on facilitating interstate commerce. Specifically, Tres Amigas states that the "very purpose of Tres Amigas is to eliminate the barrier created by the current separation of the U.S. transmission system into three asynchronous grids, providing new transaction opportunities across much of the United States."<sup>40</sup> It is hard to see how such a purpose, as regards the integration of the intrastate ERCOT market with interstate markets in the Eastern and Western Interconnections, does not involve interstate commerce. Moreover, the fact that there may be numerous benefits to this yet unconstructed project would not erase the likely interstate nature of the project.

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<sup>38</sup> Petition at 9.

<sup>39</sup> *Black's Law Dictionary* 819 (6th Ed. 1990).

<sup>40</sup> Application for Negotiable Transmission Rates a 2.

**B. THE PETITIONERS HAVE NOT PROVIDED NECESSARY PLANNING DATA AND ANYALSIS TO DEMONSTRATE THAT IT WILL NOT REPRESENT INTERSTATE COMMERCE**

As demonstrated above, the Petition contains virtually no discussion of any system impact studies that may have been performed or of participation by Tres Amigas in the Order No. 890 planning processes for any of the markets it will affect. Neither in the instant petition nor in the concurrently filed Section 205 pleading in Docket No. ER10-396 does the Petitioner discuss how this project will actually impact the markets it plans to conjoin.<sup>41</sup> This failure is particularly striking given Tres Amigas's recognition that "whether or not electricity produced in one state 'commingles' with electricity in interstate commerce is a factual question to be determined based on the physic of electricity flows on the grid."<sup>42</sup> Without at least some data about how electricity is expected to flow in and out of ERCOT, how the batteries actually function in each market, and how Tres Amigas will perform as a Balancing Authority, the affected markets are unable to assess system impacts and the Commission lacks the information to answer this critical factual question.

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<sup>41</sup> In the ER10-396 Application, Tres Amigas states that it "will obtain required regulatory approvals – including planning, siting and cost allocation," Application at 10. Beyond this passing mention, however, there is no evidence that Tres Amigas has given much thought to these issues.

<sup>42</sup> Petition at 10 (quoting *FPL* at 462-63).

**C. TRES AMIGAS’S DESIRE FOR AN EXPEDITED DISCLAIMER OF JURISDICTION SHOULD NOT BE THE SINGLE FACTOR THAT CHANGES THE JURISDICTIONAL BALANCE OVER ERCOT**

The Petition also includes a lengthy discussion of the historically “recognized and honored separation between ERCOT and the interstate grid.”<sup>43</sup> While the instant petition is not legally sound, it raises a very important question should the project be structured to trigger a change – what would be the implications of asserting statutory FERC jurisdiction over the Texas portion of the project? There would be a great deal of uncertainty introduced into the state’s market, as it has operated since market startup under the oversight and jurisdiction of the Public Utility Commission of Texas without commensurate or concurrent FERC jurisdiction. FERC authority over ERCOT would require the development of a FERC-approved tariff or the possible reexamination of market elements settled within ERCOT to date (such as resource adequacy, transmission cost allocation, generator interconnection protocols). Additionally, a transition would necessarily involve an extensive period of uncertainty over ERCOT market rules, operations and requirements.

EPSA expresses no opinion as to precisely where jurisdictional boundaries between PUCT and FERC should lie, but is concerned that one project should not be able to change those boundaries without an in-depth analysis of the subsequent market impacts. Any such drastic market change requires extensive impact analysis, deliberation and input by ERCOT, the PUCT, stakeholders and the Commission. This monumental change to the ERCOT

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<sup>43</sup> Petition at 8.

market should not be triggered by one discrete project. Therefore, it is of the utmost importance that the Commission undertake an extensive, reasoned, deliberative analysis of the implications of the Tres Amigas project as structured. As noted in our request for an extension of time to comment, the legal issues posed by Tres Amigas are both complicated and of vital importance to all market participants in ERCOT and the neighboring regions.

#### **IV. CONCLUSION**

**WHEREFORE**, EPSA respectfully requests that the Commission grant the relief requested in its Protest submitted herein.

Respectfully submitted,



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Nancy Bagot, Vice President of Regulatory Affairs  
Tara Ormond, Director of Regulatory Affairs  
Electric Power Supply Association  
1401 New York Avenue, NW, 11<sup>th</sup> Floor  
Washington, DC 20005

January 12, 2010.

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the Protest upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 12<sup>th</sup> day of January, 2010.

A handwritten signature in black ink that reads "Nancy Bagot". The signature is written in a cursive style with a horizontal line extending from the end of the name.

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Nancy Bagot, VP of Regulatory Affairs