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Item Number: 76

Addendum StartPage: 0

**JOINT PETITION OF
SOUTHWESTERN PUBLIC SERVICE
COMPANY AND SOUTHWEST
POWER POOL, INC. FOR
DECLARATORY ORDER**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

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DECLARATORY ORDER

This order addresses the petition for a declaratory order filed jointly by the Southwestern Public Service Company (SPS) and the Southwest Power Pool, Inc. (SPP). The petitioners requested that the Commission determine whether SPS has the exclusive right to construct and operate new, regionally-funded transmission facilities in areas of Texas that lie within SPS's certificated service area.¹ After examining this matter, the Commission concluded that other issues should also be addressed in this docket and requested briefing on all relevant issues.²

For the reasons discussed in this order, the Commission concludes that SPS does not possess an exclusive right to construct and operate transmission facilities, including new regionally-funded transmission facilities, within its service area. The Commission further concludes that transmission facilities that will serve the public cannot be constructed in Texas without first obtaining from the Commission a certificate of convenience and necessity. The Commission also decides that it has the authority to grant a certificate to an entity that will provide only transmission service outside of the Electric Reliability Council of Texas.

I. Background and Procedural History

SPP is a not-for-profit regional transmission organization that operates the region's electric power grid to ensure reliable service; it does not build or own transmission facilities. SPS is a bundled utility that serves approximately 378,000 retail electric customers in Texas. It is a member of SPP and, therefore, is located outside of the Electric Reliability Council of Texas (ERCOT). SPS is responsible for the day-to-day operation and maintenance of its transmission system.

¹ Petition (Feb. 28, 2017).

² Briefing Order (May 19, 2017).

76

However, SPP directs the operation of SPS's transmission facilities in accordance with SPP's membership agreement and its open-access transmission tariff (OATT). The OATT, which is approved by the Federal Energy Regulatory Commission (FERC), sets forth the rates, terms, and conditions for wholesale-transmission-service rates in the various zones of SPP's region, including SPS's zone.

Under the Federal Power Act,³ the FERC regulates regional transmission organizations' OATTs. In 2011, the FERC adopted Order No. 1000,⁴ which, among other things, requires that each public-utility transmission provider, such as SPP, remove from its OATT all federal rights of first refusal to construct transmission facilities selected in a regional transmission plan for cost allocation. SPP has complied with Order No. 1000 and has devised a competitive bidding process for transmission projects that are no longer subject to a federal right of first refusal. In this process, SPP allows all who meet certain qualifications to submit bids to build transmission facilities. Ultimately, SPP's board of directors selects a bidder to build the facilities.

Nevertheless, Order No. 1000 removes only federal rights of first refusal. Order No. 1000 clarifies that it is not "intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."⁵ Thus, if Texas state law provides an incumbent transmission owner (like SPS) with the right to construct transmission facilities, or a right of first refusal, in its certificated service area, Order No. 1000 does not remove those rights. However, if Texas state law does not provide incumbent transmission owners outside of ERCOT with such rights, FERC Order No. 1000 controls, and projects must be competitively bid and awarded under SPP's OATT.⁶

In this docket, SPS contends that under Texas law it has a right to construct transmission facilities, or a right of first refusal, in its certificated service area. SPP does not believe that any provision of PURA would be violated by use of the SPP competitive process and, therefore, under

³ 16 U.S.C. §§ 79–828(c) (2017).

⁴ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, (Docket No. RM10-23-000) (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

⁵ *Id.*, Order No. 1000, 136 FERC ¶ 61,051, at P 253, n.231.

⁶ For the preceding three paragraphs, *see* Petition at 5–8.

FERC Order No. 1000, SPP may solicit and designate utilities, including transmission-only utilities, to construct and operate new transmission facilities within SPS's service area under the competitive bidding process set forth in SPP's OATT.

SPS and SPP filed their joint petition on February 28, 2017. Various entities sought intervention and filed lists of issues, and after reviewing the parties' pleadings, the Commission issued a briefing order on May 17, 2017 in which it posed the three briefing questions described below. The following parties submitted briefing in response to the Commission's briefing order: Commission Staff, Golden Spread Electrical Cooperative, LLC, Southwestern Electrical Power Company, the Office of Public Utility Counsel (OPUC), Southwest Transmission, LLC, Texas Industrial Energy Customers (TIEC), South Central MCN, LLC and Midcontinent MCN LLC, SPS, SPP, and Entergy Texas, Inc.

II. Discussion

In addition to the issue on which the joint applicants seek a declaration by the Commission, the Commission addresses two other issues that it deems relevant to this matter.

A. Requirement to Obtain a CCN

May an electric utility as defined in PURA § 37.001 or other person construct transmission facilities in the State of Texas to provide service to the public without first obtaining from the Commission a certificate of convenience and necessity (CCN) under chapter 37 of PURA?⁷

An electric utility or other person may not construct transmission facilities in Texas to provide service to the public without first obtaining a CCN from the Commission.

"An electric utility or other person may not directly or indirectly provide service to the public . . . unless the utility or other person first obtains from the commission a certificate that states that the public convenience and necessity requires or will require the installation, operation or extension of service."⁸ "*Service* has its broadest and most inclusive meaning. The term includes any act performed, anything supplied, and any facilities used or supplied by a public utility in the performance of the utility's duties under this title to its patrons, employees, other public utilities,

⁷ Briefing Order, Issue No. 1.

⁸ PURA § 37.051(a).

an electric cooperative, and the public.”⁹ Further, *transmission service*, “which is a subset of service,”¹⁰ is defined to include “the construction or enlargement of facilities.”¹¹ The Commission recently stated that transmission service includes the construction of a transmission substation and that construction includes the siting of the substation.¹² This conclusion necessarily applies to all facilities that provide transmission service.

Therefore, because a CCN is required to provide service to the public, and the construction of transmission facilities is included in the broad definitions of service and transmission service, an electric utility or other person must obtain a CCN from the Commission to construct transmission facilities in Texas to provide service to the public.

B. Transmission-Only Utilities Outside of ERCOT

Does the Commission have authority under Chapter 37 of PURA to grant a certificate of convenience and necessity to an electric utility as defined in PURA § 37.001 or other person that will provide only transmission service outside the Electric Reliability Council of Texas? In answering this question, please address the conclusion of the court in *Public Utility Commission of Texas v. Cities of Harlingen* that “[t]he PURA authorizes the Commission to grant a CCN to an electric utility that provides only transmission services and does not have a certificated area in which such services will be provided.” 311 S.W.3d 610, 621 (Tex. App.—Austin 2010, no pet.) citing PURA §§ 31.002(6), 37.056(a), 37.154(a).¹³

The Commission has authority to grant a CCN to an electric utility or other person that will provide only transmission service outside of ERCOT without a service area. This authority exists under PURA §§ 37.056 and 37.154 as decided by the *Harlingen* court, is longstanding, and was unaffected by the 2009 amendments to chapter 37 of PURA.¹⁴

⁹ PURA § 11.003(19).

¹⁰ *Appeal of Brazos Electric Power Cooperative, Inc. and Denton County Electric Cooperative, Inc. D/B/A CoServ Electric from an Ordinance of the Colony, Texas, and, in the Alternative, Application for a Declaratory Order*, Docket No. 45175, Order on Rehearing at 14 (June 29, 2017).

¹¹ PURA § 31.002(20); see also *id.* § 35.005(b) (“The commission may require transmission service at wholesale, including the construction or enlargement of a facility.”).

¹² Docket No. 45175, Order on Rehearing at 14; *id.*, Conclusion of Law No. 11B.

¹³ Briefing Order, Issue No. 2.

¹⁴ Act of May 31, 2009, 81st Leg., R.S., ch. 1170 (HB 3309), §§ 1–4, 2009 Tex. Gen. Laws 3700 (codified at Tex. Util. Code §§ 37.0541, .051, .053, .055, .057, .151).

1. Authority under PURA §§ 37.056 and 37.154

The Commission implicitly decided that it has authority to issue a CCN to a new utility that would provide only transmission service by certificating such an entity in Docket No. 33734.¹⁵ In that docket, Electric Transmission Texas (ETT), a newly formed company that was a new entrant to the electric market in Texas, sought a CCN from the Commission.¹⁶ ETT would own only transmission facilities and would provide only transmission service in ERCOT, and would not have a service area. The Commission concluded “that PURA clearly contemplates a utility providing transmission services only”¹⁷ The Commission based its decision simply on the definition of electric utility in PURA § 31.002(6), which includes a person that owns or operates for compensation in Texas equipment or facilities to transmit electricity,¹⁸ and the prohibition that an electric utility cannot provide service without obtaining a CCN from the Commission.¹⁹ The Commission further concluded that it was “appropriate to grant a CCN to an entity that, although not yet a utility, will become a utility upon completion of a proposed plan to own and operate utility facilities.”²⁰

Neither the definition of electric utility nor the definition of person is limited to a specific power region or to membership in a regional transmission organization and the requirement to obtain a CCN is applicable statewide. While the Commission’s decision in that docket applied to an electric utility in ERCOT, its analysis and conclusions were not limited to a specific power region or membership in a regional transmission organization. Thus, its decision that it had authority to grant a CCN to an electric utility without a service area that provided only transmission service is applicable to any area of the state.

On appeal, the Commission’s decision in Docket No. 33734 that a transmission-only utility was eligible for certification was overturned by a district court in Travis County, which held that

¹⁵ *Application of Electric Transmission Texas, LLC for a Certificate of Convenience and Necessity, for Regulatory Approvals, and Initial Rates*, Docket No. 33734, Order on Rehearing (Dec. 21, 2007).

¹⁶ *Id.*

¹⁷ Docket No. 33734, Order at 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 3–4.

the Commission lacked the authority to make such a certification.²¹ On further appeal, the Third Court of Appeals reversed the district court, finding that PURA authorizes the Commission to grant a CCN to a transmission-only utility without a service area.²²

The *Harlingen* court also looked at the definition of electric utility and stated that “[t]his definition does not require that an electric utility provide a service in addition to transmission.”²³ It came to the same conclusion after looking at the definition for a transmission and distribution utility.²⁴ That court also rejected arguments that the Commission was without authority to issue a CCN because it would be inconsistent with PURA §§ 37.056 and 37.151. In addressing both sections, the court recognized the different character of transmission service, that such service was not limited to an isolated, or particular, geographic area,²⁵ and that the service obligation in section 37.151 only applied to a utility with a service area and did not mandate that every utility have a service area.²⁶ The court also rejected the argument that section 37.056 precludes a transmission-only utility from being certificated if it does not have a service area.²⁷ The court acknowledged the Legislature’s 2009 amendments to PURA § 37.051, but only for the purpose of disposing of certain policy arguments.²⁸

Nowhere in the *Harlingen* decision does the court limit the scope of the Commission’s authority to only those utilities operating in ERCOT. All of the statutory provisions on which it relied have statewide application. Consequently, under the decision of the *Harlingen* court, the Commission has authority to grant a CCN under PURA § 37.056 or to approve the transfer of certificate rights under PURA § 37.154 to a transmission-only utility without a service area outside of ERCOT.

²¹ *Cities of Harlingen v. Pub. Util. Comm’n*, No. D-1-GV-08-000253, 2008 WL 809334 (345th Dist. Ct., Travis Co., Tex., Oct. 8, 2008).

²² *Pub. Util. Comm’n v. Cities of Harlingen*, 311 S.W.3d 610, 619–21 (Tex. App.—Austin 2010, no pet.).

²³ *Id.* at 617.

²⁴ *Id.*

²⁵ *Id.* at 619.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 620.

2. 2009 Amendments to chapter 37 of PURA

After the district court reversed the Commission's order, but before the *Harlingen* court reversed the district court, the Legislature in 2009 amended the utility certification provisions in PURA in part by adding subsections (d), (e), and (f) to § 37.051.²⁹

Subsection (d) states that

[a] certificate may be granted to an electric utility or other person under this section for a facility used as part of the transmission system serving the ERCOT power region solely for the transmission of electricity.

Subsection (e) allows the Commission to consider an application by a person not currently holding a CCN for a CCN to construct transmission facilities in ERCOT and mandates the findings that the Commission must make before it can issue a certificate under § 37.051.³⁰ Subsection (f) requires that the Commission deem the requirements of subsection (e) are met by an entity selected by the Commission to construct transmission lines to serve a competitive renewable energy zone when certain other requirements are met.

Several of the parties in this docket argue that the 2009 amendments of PURA § 37.051 created an exclusive source of authority that allows the Commission to issue a CCN for transmission-only service to a transmission-only utility but only in the ERCOT power region.³¹ Or to restate this argument, no other provision of PURA authorizes the Commission to issue a CCN to a transmission-only utility. While none of the parties state their assertion in these words, they are asserting that the 2009 amendments amended by implication the authority of the Commission to issue CCNs under PURA §§ 37.056 and 36.154 as found by the *Harlingen* court. The Commission disagrees that the 2009 amendments amended these sections by implication or otherwise limited its authority to issue CCNs to transmission-only utilities only in the ERCOT power region.

²⁹ Act of May 31, 2009, 81st Leg., R.S., ch. 1170 (HB 3309), §§ 1-4, 2009 Tex. Gen. Laws 3700 (codified at Tex. Util. Code §§ 37.0541, .051(e)-(g), 053(a), .055, .057, .151).

³⁰ Subsection (e) mandates that the Commission find that the applicant has the technical and financial ability and the resources to properly operate and maintain reliable transmission facilities in conformance with Commission rules, ERCOT requirements, and National Electric Reliability Council requirements.

³¹ OPUC's Initial Brief at 2-6 (Jun. 21, 2017); Texas Industrial Energy Consumer's Initial Brief at 4-7 (Jun. 21, 2017) (TIEC's Brief).

a. The words chosen by the Legislature

This argument presents a question of statutory construction. In construing a statute, the goal is to ascertain and give effect to the Legislature's intent.³² When construing a statute, the Texas Supreme Court has recognized that "the words [the Legislature] chooses should be the surest guide to legislative intent."³³ This general rule applies unless enforcing the plain language of the statute as written would produce absurd results.³⁴ Only when those words are ambiguous do we "resort to rules of construction or extrinsic aids."³⁵ Thus, the Commission first examines the words in these subsections.

Under subsection (d), the Commission may grant a CCN "to an electric utility or other person." Contrary to numerous assertions in the briefs submitted in this matter, subsection (d) is not limited to *transmission-only utilities*, a term that is not defined in PURA. But both *electric utility* and *person* are defined in PURA, and, "because the Legislature has supplied its own definition, which we are bound to follow."³⁶ Neither the definition of electric utility³⁷ nor the definition of person³⁸ can reasonably be construed to mean someone that only provides transmission service. An electric utility can produce, generate, transmit, distribute, sell, or furnish electricity,³⁹ or any combination of these activities, and is not limited to just transmission service. A person is defined to include individuals, partnerships, a mutual or cooperative association (but not an electric cooperative) without any limitation as to the activities in which such entities may be involved: they are without question not limited to only providing transmission service. To limit the Commission's authority in the manner suggested, one would have to add language to the end of subsection (d) like the following: *but only if the electric utility is certificated to provide only*

³² *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009), citing *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007).

³³ *Id.*, quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999).

³⁴ *Id.*, citing *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

³⁵ *Id.*, citing *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007).

³⁶ *Entergy Gulf States v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

³⁷ PURA § 31.002(6). Electric utility means a person that owns or operates facilities to produce, generate, transmit, distribute, sell, or furnish electricity.

³⁸ PURA § 11.003(14). Person includes an individual, a partnership, a mutual or cooperative association (not including an electric cooperative), and a corporation, but is not limited by its activities.

³⁹ PURA § 31.002(6).

transmission service. This Commission may not add words to a statute. The Commission's authority under these subsections is not limited to a transmission-only utility.

The express language of these provisions shows that the 2009 amendments were meant to authorize the Commission to issue a CCN in particular circumstances: for transmission facilities located in and used to transmit electricity in the ERCOT system. Thus, the 2009 amendments do not authorize the Commission to issue a CCN outside of ERCOT. However, there is no language in these subsections that expressly limits the authority of the Commission to issue CCNs outside of ERCOT under other provisions of PURA, particularly PURA §§ 37.056 and 37.154.

b. History of the times: CREZ and transmission-only entities

Justice Hecht cautioned that, when construing statutory language, one “cannot ignore a statute’s context that may illumine its meaning.”⁴⁰ He then quoted Special Chief Justice Samuels who stated “that in determining the meaning, intent, and purpose of a law or constitutional provision, the history of the times out of which it grew, and to which it may be rationally supported to bear some direct relationship, the evils intended to be remedied, and the good to be accomplished, are proper subjects of inquiry.”⁴¹

As discussed above, the 2009 amendments were enacted in response to the Travis County District Court ruling that the Commission had no authority to issue a CCN to an electric utility that provided only transmission service without a service area. Before that court’s decision in October 2008, the Legislature had in 2005 significantly increased the state’s renewable-energy goal and directed the Commission to designate competitive renewable-energy zones throughout this state and to develop a plan to construct transmission capacity necessary to deliver to electric customers the electric energy from renewable-energy sources constructed in the competitive renewable-energy zones.⁴²

⁴⁰ *Entergy*, 282 S.W.3d at 447 (Hecht, J. concurring).

⁴¹ *Id.*, quoting *Wortham v. Walker*, 128 S.W.2d 1138, 1150 (1939); *see also*, Tex. Gov’t Code § 311.023 (“In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.”).

⁴² Act of July 14, 2005, 79th Leg., 1st C.S., ch. 1 (SB 20), § 3, 2005 Tex. Gen. Laws 1, 1–2 (codified at PURA § 39.904(g)–(n)).

The Commission established those zones and a transmission plan in 2008⁴³ (its initial decision was made several months before the district court's decision), and designated the entities that were to build the transmission lines to deliver renewable energy throughout ERCOT in 2009.⁴⁴ The Commission made its initial decision selecting the entities at the January 29, 2009 open meeting.⁴⁵ It made its final decision at the March 11 open meeting⁴⁶ and issued its order on March 30.⁴⁷ It issued an order on rehearing on May 15.⁴⁸ Coincident with the Commission's initial decision, three bills were filed at the Legislature to address the Commission's certification authority, two on March 11 and one on March 12.⁴⁹ That timing was not coincidental.

All of the zones and the transmission lines were located in ERCOT, and three of the entities selected by the Commission were new entrants that would own only transmission facilities and would provide only transmission service without a service area. The district court's decision that a transmission-only utility without a service area could not be certificated severely affected the Commission's CREZ plan—it undermined the Commission's authority to issue CCNs to three of the entities that it had selected to build CREZ transmission lines. Thus, without legislative action, the CREZ plan, and the state's renewable energy goal, were in jeopardy. This is the history out of which grew the 2009 amendments. The need for legislation was to ensure that the Commission had authority to issue CCNs to utilities that would provide only transmission service without a service area to construct the CREZ transmission lines to service the CREZ, which were all located in ERCOT.

c. Legislative history

Three different bills were proposed in the 81st Legislature to amend chapter 37 of PURA, two in the House (HB 3309 and HB 3406) and one in the Senate (SB 1913). The House State

⁴³ *Commission Staff's Petition for Designation of Competitive Renewable Energy Zones*, Docket No. 33672, Order on Rehearing (Oct. 7, 2008).

⁴⁴ *Commission Staff's Petition for Selection of Entities Responsible for Transmission Improvements Necessary to Deliver Renewable Energy from Competitive Renewable Energy Zones*, Docket No. 35665, Order on Rehearing (May 15, 2009).

⁴⁵ Open Meeting Tr. at 71 (Jan. 29, 2009).

⁴⁶ Open Meeting Tr. at 49 (Mar. 11, 2009).

⁴⁷ Docket No. 35665, Order (March 30, 2009).

⁴⁸ *Id.*, Order on Rehearing (May 15, 2009).

⁴⁹ See *infra* Section II.B.4.

Affairs Committee reported a committee substitute of House Bill (HB) 3406 favorably to the House, but the bill never reached second reading. The Senate passed a committee substitute of Senate Bill (SB) 1913⁵⁰ and the House State Affairs Committee reported favorably on this bill without amendment, but it also never reached second reading in the House. As filed, HB 3309 would have only added a new section to chapter 37 to require the Commission to consolidate two CCN applications if they had a common point of interconnection.⁵¹ The bill passed out of the House, and on second reading in the Senate, the bill was amended to add the language referenced in this order as the 2009 amendments.⁵² The House refused to concur in the Senate's amendments and asked for a conference committee.⁵³ The Senate granted the request of a conference committee, and that committee reported out a bill that was passed by both chambers. The conference report accepted all of the Senate's amendments related to chapter 37 of PURA with the exception of a minor word change to section 37.151, and was adopted by both chambers.

The committee substitute of HB 3406, the committee substitute of SB 1913, and HB 3309 as amended by the Senate and finally adopted after conference all contain identical language in relation to the changes to chapter 37 of PURA. The Commission looks at the legislative history of all three bills as having the same relevance.

The Texas Supreme Court has often said that where the language of a statute is clear and unambiguous, the words of the statute should be applied without resort to rules of construction or extrinsic aids such as an act's legislative history.⁵⁴ The plain language of the 2009 amendments is clear: section 37.051 is *limited to ensuring* the Commission's authority to grant a CCN for transmission facilities that are to be part of the ERCOT system. The 2009 amendments do not mention, much less amend, the Commission's authority under sections 37.056 and 37.154 to issue a CCN to a utility that provides only transmission service without a service area outside of ERCOT as determined by the *Harlingen* court. Whether the 2009 amendments affect the Commission's

⁵⁰ S.J. of Tex. 81st Leg. R.S. 1904 (reported passed) (2009).

⁵¹ Tex. H.B. 3309, 81st Leg. R.S. (2009) (as filed).

⁵² See *supra* n.29.

⁵³ H.J. of Tex., 81st Leg. R.S. 5754 (2009).

⁵⁴ *Entergy*, 282 S.W.3d at 442, quoting *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007) and *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652, n.4 (Tex. 2006).

authority under sections 37.056 or 37.154 to issue a CCN to such an entity within ERCOT need not be addressed to answer the question presented and is not addressed in this Order.

Even if one assumed that the language of the 2009 amendments is ambiguous, the legislative history supports the Commission's conclusion that its authority under sections 37.056 and 37.154 was not affected by the 2009 amendments. In adopting these changes to chapter 37 of PURA, the Legislature was reacting to the district court's judgment that limited the certification authority of the Commission. At the time this legislation was considered, as adjudged by the district court, the Commission had no authority to issue a CCN under section 37.056 and 37.151 to a utility that would provide only transmission service without a service area without regard to location.⁵⁵ The purpose of the 2009 amendments was to confirm the authority of the Commission to issue CCNs to carry out the CREZ plan adopted by the Commission. Thus, the amendments were limited to transmission facilities located in ERCOT.

Some of the parties assert that the fact that the Commission's authority was limited to transmission facilities in ERCOT during the legislative process of adopting the 2009 amendments indicates a legislative intent to remove authority the Commission has under other sections of PURA.⁵⁶ As the Commission stated earlier in this order, the 2009 amendments addressed only the Commission's authority to authorize CCNs for transmission facilities that are part of the ERCOT system: CCNs outside of ERCOT were not addressed by the amendments. And as discussed above, there was no need to address facilities outside of ERCOT because the focus of the concern was the construction of the CREZ transmission lines, which required a CCN from the Commission, and the CREZ transmission lines were all to be connected in ERCOT. Because some of the awarded CREZ lines could not be completed under the ruling by the district court, the proper focus of the 2009 amendments was transmission facilities located in ERCOT. That was the Legislature's intent in adopting the 2009 amendments: confirming the authority of the Commission to issue CCNs to entities that it had selected to build some of the CREZ lines, entities that would provide only transmission service without a service area within ERCOT.

⁵⁵ *Cities of Harlingen v. Pub. Util. Comm'n*, No. D-1-GV-08-000253, 2008 WL 8089334 (345th Dist. Ct., Travis Co., Tex., Oct. 8, 2008).

⁵⁶ See, e.g., SPS's Brief at 14.

There was no legislative intent to limit the certification authority of the Commission to issue a CCN under sections 37.056 and 37.151 to an electric utility that would provide only transmission service without a service area because there was no need to do so. The district court had already ruled the Commission had no such authority anywhere in the state. There also is no legislative history, either express or implied, that indicates that the Legislature intended to limit the Commission's authority under sections 37.056 and 37.154. The fact that the Legislature limited its changes to section 37.051 to clarify the Commission's authority to issue CCNs for transmission facilities in ERCOT provides no support for the theory that the Legislature intended to confirm the district court's judgment that the Commission did not have authority under sections 37.056 and 37.154 to issue CCNs to transmission utilities.

The Commission finds that the legislative history of the 2009 amendments demonstrates that the Legislature's intent was to confirm the Commission's authority to issue CCNs as needed to implement the CREZ plan. Thus the amendments were limited to transmission facilities located in ERCOT. It is well known that before the district court's ruling, the Commission had awarded transmission lines to serve the competitive renewable energy zones (CREZ) and that some of the companies would be transmission-only utilities without a service area. Thus, the Legislature was concerned that the implementation of CREZ was imperiled by the district court's decision and sought to clarify the authority of the Commission to issue CCNs to transmission-only utilities without a service area.⁵⁷ The language of the amendments is consistent with this intent to clarify the Commission's authority to issue CCNs for transmission-only utilities without a service area to serve the CREZ within ERCOT. And the legislative history also demonstrates that there was concern about whether there were appropriate standards to apply to new entrants. Subsection (e) addressed those concerns.

There is no disagreement that the 2009 amendments to add PURA § 37.051(d) and (e) apply only to ERCOT. Given the narrow focus of the 2009 amendments, one can only conclude that the Legislature focused on ERCOT both because the immediate situation at issue in Docket No. 33734 took place in ERCOT, and because the Legislature sought to avoid impeding the CREZ buildout that was happening at that time, also in ERCOT.

⁵⁷ Senate Comm. on State Affairs, Bill Analysis, Tex. S.B. 1913, 81st Leg., R.S. (2009); Hearings on Tex. S.B. 1913 before the Senate Comm. on State Affairs, 81st Leg., R.S. 2–3 (Mar. 31, 2009) (statement of Rep. Swinford). (S.B. 1913 contained language nearly identical to the language ultimately adopted).

3. Other arguments regarding the 2009 amendments

The parties presented a number of arguments that the Commission addresses here.

a. Pre-2009 authority

SPS questions whether the law before the 2009 amendments authorized the Commission to grant CCNs to transmission-only utilities without a service area anywhere in Texas.⁵⁸ And OPUC argues that, because section 37.051 includes an express provision for when a transmission-only CCN can be granted, other sections of PURA (and other subsections of PURA § 37.051) should not be interpreted as granting the Commission authority to issue a CCN for transmission-only service.⁵⁹ The *Harlingen* court has already decided differently, and this Commission is bound by that decision:

We conclude that the district court erred in holding that the Commission exceeded its statutory authority in granting a CCN to “a transmission-only utility without a service area.” The PURA authorizes the Commission to grant a CCN to an electric utility that provides only transmission services and that does not have a certificated area in which such services will be provided.⁶⁰

b. *Expressio unius est exclusio alterius*

TIEC argues that “[u]nder the well-known principle of *expressio unius est exclusio alterius*, the Legislature’s decision to limit the authorization for new transmission-only utilities to those serving the ERCOT power region creates a negative implication that transmission-only utilities are not authorized in the non-ERCOT areas.”⁶¹ SPS makes the same argument,⁶² and then argues subsections (e) and (f), and section 37.151, which was also amended in 2009, support this reading of the statute.⁶³

The Commission disagrees. A proper application of the well-known legal principle, “express mention or enumeration of one thing, consequence or class is equal to the express

⁵⁸ *Harlingen*, 311 S.W.3d at 619–20 (The court’s analysis did not depend on the transmission facility being located in ERCOT.).

⁵⁹ OPUC Brief at 3.

⁶⁰ *Harlingen*, 311 S.W.3d at 620–21, citing PURA §§ 31.002(6), 37.056(a), 37.154(a).

⁶¹ TIEC’s Brief at 5, citing *In re Clark*, 977 S.W.2d 152, 156 (Tex. App.—Houston [14th Dist.], 1998) (orig. proceeding).

⁶² SPS’s Initial Brief at 10 (Jun. 21, 2017).

⁶³ *Id.* at 10–11.

exclusion of all others,”⁶⁴ provides no support for TIEC’s position. The one thing subsection (d) does is to *grant authority* to the Commission to grant a CCN under section 37.051 for a facility used as part of the transmission system serving the ERCOT power region solely for the transmission of electricity.

The 2009 amendments are silent as to the Commission’s authority under other relevant and applicable sections of PURA. What was not included in the 2009 amendments was the *denial of authority* or the *removal of authority* for the Commission to act under any other provision of PURA. That is, subsection (d) deals only with the authority of the Commission to grant a CCN under section 37.051. That provision has no effect on the Commission’s authority under sections 37.056 or 37.154, which, as discussed previously, includes the authority to issue a CCN or approve the transfer of rights to an electric utility or other person that will provide only transmission service outside of ERCOT.

c. Failed legislation

Entergy notes that a bill to amend section 37.051 “to include transmission-only utilities located ‘wholly or in part within Texas’ was considered in 2017” by the Legislature,⁶⁵ but the bill failed to clear the committee in the House. Entergy argues that this failure “is indicative of the Texas Legislature’s desire to limit the initial granting of CCNs to transmission-only utilities solely to those within the ERCOT region.”⁶⁶ This failure does not indicate any such desire. As the Texas Supreme Court has stated: “[W]e attach no controlling significance to the Legislature’s failure to enact [legislation],”⁶⁷ and “discerning legislative intent from failed bills would be mere ‘inference’ that ‘would involve little more than conjecture.’”⁶⁸

d. Specific over general

Contrary to assertions made by SPS, a specific provision controls over a general provision only to the extent the two provisions are irreconcilably in conflict.⁶⁹ PURA § 37.051(d) is not

⁶⁴ *In re Clark*, 977 S.W.2d at 156.

⁶⁵ Entergy’s Brief at 6, citing to H.B. 4080, 85th Leg., R.S. (2017).

⁶⁶ *Id.*

⁶⁷ *Texas Employment Comm’n v. Hoberg*, 440 S.W.2d 38, 42 (Tex. 1969).

⁶⁸ *Entergy*, 282 S.W.3d at 443, quoting *Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex. 1983).

⁶⁹ *Texas Indus. Energy Consumers v. CenterPoint Energy Houston Elec., LLC*, 324 S.W.3d 95, 107 (Tex. 2010).

irreconcilable with either section 37.056 or section 37.164 within the scope of the issue addressed here: the Commission's authority to grant CCNs for transmission facilities outside of ERCOT. Section 37.051(d) simply does not address the Commission's authority to grant CCNs outside of ERCOT; it only addresses authority to issue CCNs for transmission facilities located in ERCOT. Thus, it is easy to give effect to both provisions.

e. Service-area requirement

SPS also misconstrues the amendment to section 37.151, which excepted a utility granted a certificate under Section 37.051(d) from having to serve every customer in its certificated service area and to provide continuous and adequate service in that area. SPS first argues that the *Harlingen* court's decision that section 37.151 only applies to utilities that have a service area⁷⁰ was defective because "it ignore[d] the 2009 amendment to PURA."⁷¹ SPS claimed that if the *Harlingen* court was correct, then "it would have been unnecessary for the Legislature to add the [language exempting certificate holders under section 37.051(d)] from serving every customer in its service area."⁷² So the *Harlingen* court had to be wrong, argues SPS, because the Legislature is never presumed to do a useless act.⁷³

However, it is SPS's analysis on this issue that is defective. As SPS itself points out earlier in its brief, the *Harlingen* court's decision "was decided based on chapter 37 as it existed *before* the 2009 amendments to PURA"⁷⁴ Therefore, the court's analysis cannot be defective because it ignored the 2009 amendments; the court's analysis would have been defective if it had considered the 2009 amendments in construing the pre-2009 law. Further, the addition of this language in section 37.151 properly reflected the addition of section 37.051(d) by the same act. The 2009 amendments also were necessary to overcome the district court's decision that the Commission did not have authority to issue a CCN to a transmission-only utility without a certificated service area. The district court's decision was based in part on the argument that the

⁷⁰ *Harlingen*, 311 S.W.3d at 619.

⁷¹ SPS's Initial Brief at 17.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ SPS's Initial Brief at 16 (emphasis in original), citing to *Harlingen*, 311 S.W.3d at 615, n.2 (where the court states it is reviewing "the pre-2009 versions.").

pre-2009 version of section 37.151 required every utility that obtained a certificate to have a certificated service area. Adding the language to section 37.151 was not a useless act.

As explained earlier, the 2009 amendments occurred after the district court's decision significantly affected the CREZ plan because the Commission had selected entities that would provide only transmission service without a certificated service area in ERCOT. Adding this language to section 37.151 ensured that the renewable energy goals established by the Legislature could be accomplished, notwithstanding the district court's decision. That is, the Commission could issue a CCN for transmission facilities in ERCOT under section 37.051(d) to a utility that would not have a service area.

4. Conclusion

The Commission has authority under PURA § 37.056 to issue CCNs to transmission-only utilities without a certificated service area outside of ERCOT, and it has authority under PURA § 37.154 to transfer certificate rights to a transmission-only utility without a certificated service area outside of ERCOT. By adopting the 2009 amendments to chapter 37, the Legislature did not intend to limit the Commission's pre-existing authority to issue CCNs outside of ERCOT.

C. Exclusive Right of Construction

Does Southwest Public Service Company (SPS) have the exclusive right to construct transmission facilities within its certificated service area and, if so, may it decline to exercise that right?⁷⁵

SPS does not have the exclusive right to construct transmission facilities within its certificated service area. Such a right would be inconsistent with the Commission's authority to issue CCNs for transmission facilities, which is not limited to only utilities that have a certificated service area in which the facilities would be located. Because the Commission so decides, it does not address whether or not SPS may decline to exercise such a right.

Nowhere does PURA explicitly grant utilities an exclusive right to provide transmission-only service—including the right to construct transmission facilities—within their

⁷⁵ Briefing Order, Issue No. 3.

certificated service areas. Indeed, such an exclusive right would be inconsistent with the Commission's certification authority in PURA.⁷⁶

As discussed in the answer to issue 1,⁷⁷ no one may construct transmission facilities in this state to serve the public without first obtaining from the Commission a CCN. Thus, it is the Commission that decides who may construct transmission facilities and where those facilities may be built in this state through the granting of a CCN.

PURA does not limit an applicant for a transmission CCN to only a utility in whose service area the transmission facilities will be located: any utility or other person may file an application.⁷⁸ In addition, the standards that the Commission must apply when deciding to grant a CCN are listed in PURA § 37.056, or PURA § 37.051(e) for certain entities and facilities. There is no restriction on the Commission's authority in either provision to grant CCNs to only certificated utilities for transmission facilities located within their certificated service area, or to even consider in which service areas the facilities will be located in making its decision. The only provision in PURA that prescribes the entity to which the Commission must grant a CCN is for transmission facilities that are not located within that utility's service area.⁷⁹

As discussed before, the owners of transmission facilities are not limited to providing transmission service in any particular area.⁸⁰ And the Commission recently stated that "[t]he nature and purpose of transmission facilities are to form an integrated, interconnected system designed to transmit power regionally for the state's electric markets to ensure safe, adequate, and reliable service."⁸¹ Thus, a CCN that is granted for a transmission line is for specific facilities, not

⁷⁶ PURA § 37.151. Indeed, such an exclusive right raises a question as to whether it would violate the Texas Constitution's prohibition on the creation of monopolies. Tex. Const. art I., § 26; *see also City of Garland v. Texas Power & Light*, 295 S.W.2d 925, 928-30 (Tex. Civ. App.—Dallas 1956, no writ) (discussing whether an exclusive franchise to provide electric service was an impermissible establishment of a monopoly and examining *Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S.W. 143 (1987) and *Ennis Waterworks v. City of Ennis*, 105 Tex. 63, 144 S.W. 930 (1912)).

⁷⁷ *See supra* Section II.A.

⁷⁸ PURA § 37.053.

⁷⁹ PURA § 37.051(c-2); *see also Application of the City of Garland to Amend a Certificate of Convenience and Necessity for the Rusk to Panola Double-Circuit 345-kV Transmission Line in Rusk and Panola Counties*, Docket No. 45624, Order on Rehearing at 2 (May 23, 2017).

⁸⁰ *Hammack v. Pub. Util. Comm'n*, 131 S.W.3d 713, 722 (Tex. App.—Austin 2004, pet. denied).

⁸¹ *Appeal of CenterPoint Energy Houston Electric, LLC from an Ordinance of the City of League City, Texas and Application for a Declaratory Order*, Docket No. 45259, Order at 9 (Sept. 29, 2017).

for a specific service area. Thus, certificated service areas and CCNs for transmission facilities are distinct, and it is possible for a utility to have a CCN for transmission facilities that are located, wholly or partially, in another utility's certificated service area. In fact, throughout Texas today, utilities have transmission facilities that are located, at least in part, in other utilities' certificated service areas. Some of those transmission facilities are part of the Competitive Renewable Energy Zones (CREZ) projects, but others are not.

Further, the 2009 amendments added language in sections 37.051(a), 37.053(a), and 37.055(a)–(c), changing the entity from *electric utility* to *electric utility or other person* with regard to obtaining or amending a CCN. The inclusion of the term *other person* indicates the Legislature's intent that someone other than incumbent utilities could obtain a CCN for transmission facilities and that incumbent utilities do not enjoy an exclusive right to construct transmission facilities within their certificated service areas. If only incumbent utilities could construct transmission facilities within their certificated service areas, PURA would not permit any person other than an incumbent electric utility to obtain or amend a CCN for transmission facilities.

In addition, PURA § 35.005(b) authorizes the Commission to order transmission service, including the construction of transmission facilities. The authority of the Commission is not constrained in exercising this authority to specific utilities, specific service areas, or otherwise. Further, this authority extends to both municipally owned utilities and electric cooperatives.⁸²

Finally, it is known throughout the electric industry in Texas that the Commission has certificated transmission lines that run across other utilities' certificated service areas since the first certificates were issued by the Commission. And some certificated service areas are served by a utility that does not provide transmission service and does not have the capability to do so.

PURA does not expressly grant SPS an exclusive right to build transmission facilities within its certificated service area, and because such a right is contrary to the express authority of the Commission to issue certificates and to order transmission service, the Commission determines

⁸² See PURA § 35.005 ("In this subchapter, 'electric utility' includes a municipally owned utility and an electric cooperative.").

that SPS does not have such a right. Because the Commission so decides, it does not address whether or not SPS may decline to exercise such a right.

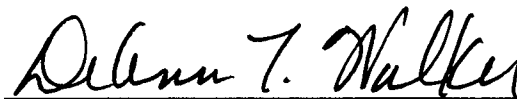
Signed at Austin, Texas the 20th day of October 2017.

PUBLIC UTILITY COMMISSION OF TEXAS


KENNETH W. ANDERSON, JR., COMMISSIONER


BRANDY MARTY MARQUEZ, COMMISSIONER

I respectfully abstain.


DEANN T. WALKER, CHAIRMAN

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