Control Number: 37448

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APPLICATION OF LCRA TRANSMISSION SERVICES CORPORATION TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE GILLESPIE TO NEWTON 345-KV CREZ TRANSMISSON LINE IN GILLESPIE, LLANO, SAN SABA, BURNET, AND LAMPASAS COUNTIES, TEXAS	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

GARLAND'S APPEAL OF ORDER DENYING INTERVENTION

To The Public Utility Commission of Texas:

Pursuant to P.U.C. PROC. R. 22.123, the City of Garland ("Garland") appeals from Order No. 2 denying its Motion to Intervene ("Motion") in this proceeding. Garland was served on November 20, 2009. This appeal is timely filed.

Garland's Motion was denied on the grounds that it had not shown a justiciable interest. For the reasons set forth below, Garland's appeal should be granted and it should be permitted to intervene in this proceeding.

I. Introduction

This certificate of convenience and necessity ("CCN") application proceeding is the last step in the Commission's implementation of the Legislature's directives in PURA § 39.904(g)(1) and (2) to designate CREZs and to develop a transmission plan to serve the CREZs in a manner that is "most beneficial and cost-effective to the customers." The directive to have the most cost-effective transmission facilities applies to this CCN proceeding. Garland has participated in

every step of the process as a transmission customer and provider.[1] In both Docket No. 33672 and Docket No. 35665, Garland advocated that the transmission facilities be the most cost-effective to customers because Garland will be adversely affected if it is not. Just as Garland had a justiciable interest in Docket Nos. 33672 and 35665, Garland has a justiciable interest in this CCN application because Garland will pay for the cost of routing.

This is the ***one and only*** opportunity that Garland has to protect its interests in the "most cost-effective" routing decision and to ensure the Legislature's directive is met. Once the Commission picks a route in this CCN proceeding, Garland cannot contest the cost of the selected route in a rate case. Such an attempt would be an impermissible collateral attack on the order in this case. Garland must participate in this proceeding to protect its interests.

Garland also has a justiciable interest in protecting its statutory rights under PURA § 15.001[2] and APA § 2001.171[3] to appeal the Commission's final order in Docket No. 35665, and if successful, obtain a meaningful remedy. The legislature did not intend that remand be an ineffective remedy. *Southwestern Telephone Company v. Public Utility Commission,* 615 S.W.2d 947, 995 (Tex. Civ. App.—Austin 1981), *writ ref'd n.r.e.*, 622 S.W.2d 82 (Tex. 1981) (per curiam). However, if successful on appeal, Garland is concerned that it will not have an effective remedy if it does not preserve that remedy by intervention in this proceeding because of case law concerning the Commission's limited authority to revoke a CCN.

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[1] Garland was a party in both Docket No. 33672, *Commission Staff's Petition for Designation of Competitive Renewable Energy Zones* and Docket No. 35665, *Commission Staff's Petition for Selection of Entities Responsible for Transmission Improvements Necessary to Deliver Renewable Energy from Competitive Renewable Energy Zones.*

[2] Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 1.00-66.016 (Vernon 2007 & Supp. 2009) ("PURA").

[3] Tex. Gov't Code Ann. § 2001.171 (Vernon 2008) ("APA").

II. Garland has a justiciable interest in this proceeding

Garland is an interested party under PURA § 37.054 and has standing to intervene under P.U.C. PROC. R. 22.103 because it has a justiciable interest in this proceeding. Garland has standing to intervene because it has an interest that is peculiar to Garland and not the public generally. This is the rule in all cases absent a statutory exception to the contrary. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). ***No statutory provision*** states that certain entities may not intervene in a CCN proceeding.

A. As a transmission customer, Garland has a justiciable interest

Customer cost is expressly a factor to consider in a CCN proceeding pursuant to PURA § 37.056(c)(4)(E). Therefore, the Legislature has determined that customers have a valid interest in the costs resulting from the routing and construction of a transmission line. While the statute focuses on lowering customer costs, the construction of the CREZ transmission facilities will not reduce transmission costs, instead ERCOT estimated the cost of such facilities to be at least $5 billion. But, the Legislature directed that the additional CREZ transmission facilities be the most cost-effective to customers. Therefore, it is important to ensure that the increase in costs be controlled and limited. Routing obviously impacts such costs.

As recognized by the Administrative Law Judge ("ALJ"), Garland, as a wholesale transmission service customer of LCRA, has a justiciable interest in a rate case wherein wholesale transmission service rates are set. The result of the ALJ's ruling is that LCRA can insulate itself from ***any type of review or challenge*** to the cost relating to the routing of the new line. Garland cannot challenge the routing cost issue in a wholesale transmission rate case because that would be a collateral attack on the CCN order. Collateral attacks on a Commission

order are not permitted unless the order is void on its face, which would not be the case here.[4] Thus, through this potential "catch 22," LCRA would be insulated from any challenge or argument as to the cost of the new line relating to the proper routing.[5]

The ALJ relies upon an interim 1993 Commission decision, *Petition of the General Counsel to Inquire into the Reasonableness of the Service Practices and Rates of Cherokee County Electric Cooperative Association, Inc., Regarding Switchover Fees,* Docket No. 11351, Examiner's Order No. 8 and Commission's Order on Appeal, 18 P.U.C. BULL. 1478 (Feb. 11, 1993 and March 11, 1993), to hold that Garland's interest is too remote to be justiciable. The reliance on the *Cherokee County* decision is misplaced.

Tex-La Electric Cooperative, Inc., a wholesale supplier to Cherokee County Electric Cooperative, Inc., sought to intervene. Tex-La provided two reasons to support its contention that it had a direct financial interest in the *Cherokee County* case. First, Tex-La argued that Cherokee County might lose more customers if switchovers to a competitive retail supplier were made easier. The loss of customers might reduce the amount of wholesale power that Cherokee would purchase from Tex-La. Tex-La purchased the power it sold to Cherokee County from Texas Utilities ("TU"). The Tex-La purchases were subject to an 80 percent ratchet in the TU tariff. Tex-La contended that because it would still be subject to the ratchet, the decision in the *Cherokee County* case had a potential financial impact on Tex-La. Tex-La's request to intervene on this basis was denied because the impact was too remote to be a justiciable interest. Second, Tex-La argued that it had a financial interest because the loss of customers might impact

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[4] *See, Coalition of Cities for Affordable Utility Rates v. Public Utility Commission,* 798 S.W.2d 560, 564 (Tex. 1990) (PUC order must be considered final unless PUC has statutory power to reconsider).

[5] When it suits LCRA's interest, the impact on customer rates is an important factor. At page 4 of its Motion for Reconsideration of Order No. 2 in this proceeding, LCRA argues that it should not be required to incur the expense of providing corrected maps because of the impact on ratepayers.

Cherokee County's financial condition and ability to meet its financial obligations. This contention was also rejected as too remote because this was an interest that any creditor might have.

The Commission decision in *Cherokee County* does not support exclusion of Garland in this proceeding for the simple reason that the rate impact on Garland is not remote — the routing cost of the transmission line will impact the transmission rates Garland is required to pay. In this proceeding, Garland stands in the position of Cherokee County, not Tex-La, because it is the purchaser of wholesale transmission from LCRA.

A justiciable interest in a CCN proceeding due to the impact on rates was recognized in *El Paso Electric Company v. Public Utility Commission*, 917 S.W.2d 846 (Tex. App.—Austin 1995), *writ dismissed by agreement,* 917 S.W.2d 872. The issue in that rate case appeal was whether the City of El Paso was entitled to reimbursement of attorneys' fees incurred in an earlier CCN proceeding. The court held that such reimbursement was statutorily available only for expenses incurred in a proceeding initiated with a Statement of Intent to Change Rates. The court impliedly recognized the standing of a city to intervene in CCN proceedings because the results have an impact on rates:

> While we sympathize with the City's desire and ***arguable obligation to conscientiously participate in other proceedings that may affect rates***, we are unable to contravene the mandate of unambiguous statutory language or fill alleged gaps in legislation.

El Paso Electric at 863 (emphasis added). In this statement, the court recognized that CCN proceedings affect rates. Garland has a justiciable interest because of the rate impact of routing decisions.

B. P.U.C. PROC. R. 22.52(a)(3) and P.U.C. PROC. R. 22.103 do not support denial of Garland's Motion

The ALJ cites a notice rule, P.U.C. PROC. R. 22.52(a)(3), in support of denial of Garland's intervention. The allegation is that the notice rule would somehow be a nullity if Garland is granted intervention. The notice rule does not create a limit on who can become a party to a CCN proceeding. It has nothing to do with the persons or entities that can be parties to a CCN proceeding and does not purport to speak to who can intervene. Instead, this rule specifies who must at a minimum be given notice by the CCN applicant. The rule plainly does not state that only those landowners within a specified distance of the proposed line can intervene.

The ALJ also expresses the concern that if Garland's motion to intervene is granted, P.U.C. PROC. R. 22.103 would also be a nullity, giving every electric customer in ERCOT standing in a CCN case.[6] Without conceding that an ERCOT retail ratepayer would in all cases not have such standing,[7] Garland has shown that it has an interest that is different than any retail ERCOT ratepayer or any other entity in ERCOT. Garland is the only wholesale transmission customer who has also appealed the final order in Docket No. 35665. Thus, Garland has shown an interest that is peculiar to Garland and not the public generally. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). Garland has shown that it has a justiciable interest in accordance with P.U.C. PROC. R. 22.103.

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[6] Given the expense of participation in CCN proceedings, the concern that entities would intervene without any justiciable interest is puzzling.

[7] The *El Paso Electric* decision appears to indicate that retail ratepayers would have standing. In addition, PURA § 37.056(c)(4)(E) expressly includes consideration of the impact on customer costs. Such customers would include retail ratepayers.

C. Because of the unusual and perhaps unique situation of the appeal of Docket No. 35655, Garland has an additional justiciable interest

Garland is appealing the final order in Docket No. 35655. Case law indicates that the Commission can only revoke a CCN for the reasons listed in PURA § 37.059 and has no implied power to revoke one for any other reason. *Denton County Electric Cooperative, Inc. v. Public Utility Commission*, 818 S.W.2d 490 (Tex. App.—Texarkana 1991, writ denied). It is thus entirely possible that the only way that Garland can maintain its rights to be designated to build a new CREZ line is to intervene in this and other CCN proceedings filed pursuant to the final order in Docket No. 35655 and exercise its right to appeal a final decision. If Garland did not, then those CCN orders would be final and arguably non-appealable even if Garland later succeeded in overturning the final order in Docket No. 35655.

To suggest that this is not a justiciable interest is nothing more than an attempt to foreclose Garland's rights and amounts to a denial of due process. Neither LCRA nor the Commission, during argument in the district court, would affirm to the judge that the court had the jurisdiction to set aside any of the CCN orders if the final order in Docket No. 35665 were overturned. Even if they had, the parties cannot grant or agree to jurisdiction, which issue may be brought up for the first time on appeal. Garland would be deprived of its rights pursuant PURA § 15.001 and APA § 2001.171 to an appeal and effective remedy if its intervention is denied. Because of Garland's interest in protecting its statutory rights, Garland has a justiciable interest in this proceeding.

WHEREFORE, premises considered, Garland requests that its appeal of Order No. 2 denying Garland's Motion to Intervene be granted and that Garland be permitted to intervene in this proceeding. Garland further prays for any additional relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lambeth Townsend, attorney, certify that a copy of this document was served on all parties of record in this proceeding on this 30th day of November, 2009, in the following manner: hand delivered, emailed, sent via facsimile, or mailed by U.S. First Class Mail.

LAMBETH TOWNSEND