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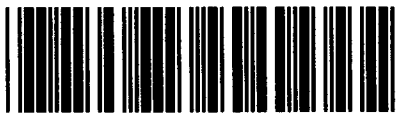

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SOAH DOCKET NO. 473-10-1097
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APPLICATION OF LCRA TRANSMISSION SERVICES CORPORATION TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE GILLESPIE TO NEWTON 345-KV CREZ TRANSMISSON LINE IN GILLESPIE, LLANO, SAN SABA, BURNET, AND LAMPASAS COUNTIES, TEXAS	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

GARLAND'S REPLY TO STAFF'S AND LCRA'S OBJECTIONS TO GARLAND'S MOTION TO INTERVENE

City of Garland ("Garland") files this reply to Staff's and LCRA's objections to Garland's motion to intervene. Garland was served by Staff on November 6, 2009 after 3 p.m. Garland was served by LCRA on November 10, 2009. This reply is timely filed.

I. Introduction

This 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 has 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

[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.*

Nos. 33672 and 35665, Garland has a justiciable interest in this CCN application because Garland will pay for the cost of routing.

Contrary to the arguments of Staff and LCRA, 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.

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.

Staff and LCRA agree that Garland has a justiciable interest in LCRA's wholesale transmission rates. Staff Objections at page 4 [pages are not numbered]; LCRA Objections at page 4. What Staff and LCRA are saying is that LCRA can insulate itself from ***any type of review or challenge*** to the cost relating to the routing of the new line.

This is easy to see and explain. Assume route A costs $5 million more than route B and that route A is ultimately selected. Once these costs are set forth as a part of LCRA's rate case, Garland cannot challenge the routing cost issue 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.[2] Thus, through this potential "catch 22," LCRA has totally insulated itself from any challenge or argument as to the cost of the new line relating to the proper routing.

The only remaining argument is that this would not be a big enough cost item to be challenged. Since when does something that could run into the millions of dollars not become significant enough? While the ultimate impact on the rate may not be large, it is not a basis for denying intervention here.

Staff relies on the decision 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 846 to support its position that Garland's intervention should be denied. The decision actually supports Garland's intervention. 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

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[2] *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).

proceeding initiated with a Statement of Intent to Change Rates. The court impliedly recognized the standing of a city to intervene in such cases because the results have an impact on rates:

> While we sympathize with the City's desire and ***arguable legal 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. Here, Garland is participating because of the rate impact of routing decisions.

Staff also cites a Commission decision that denied a cooperative's request to intervene in a case concerning another cooperative because the rate impact was too remote to be a justiciable interest.[3] The facts in that case may have supported the exclusion of Tex-La. However, that Commission decision 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.

B. Reliance on P.U.C. PROC. R. 22.52(a)(3) is misplaced

Both Staff and LCRA cite 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 creates a limit on who can become a party to the proceeding, and therefore Garland cannot be a party. Nothing could be further from the truth. The notice rule has nothing to do with the persons or entities that can be parties to a CCN proceeding and does not even purport to speak to who can intervene. Instead, this rule specifies who must at a minimum be given notice. Any attempt to cite this as authority

[3] *Petition of 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, Examiners Order No. 8 and Commission's Order on Appeal, 18 P.U.C. Bull. 1478 (Feb. 11, 1993 and March 11, 1993).

for the proposition that only those landowners within a specified distance of the proposed line can intervene is a complete and total misreading of the rule. It simply does not say that.

C. Due to 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 overturn a CCN order for the reasons listed in PURA § 37.059 and has no implied power in this regard. *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 granted a right 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. The actions of LCRA and Staff here are nothing more than a not-so-transparent attempt to cut off any and all appeal rights of Garland.

Garland cannot be deprived of its rights by denying the intervention here. In other words, Garland has a justiciable interest in this proceeding.

III. Garland has not intervened to delay matters

The allegation that Garland has intervened to prevent a timely resolution of this docket and to delay matters is nothing more than pure speculation and an accusation that Garland is not being truthful. How Garland would allegedly accomplish such a delay by its intervention is not explained. It is nothing more than a scare tactic that has no basis in fact and certainly cannot be proved. Moreover, this same argument could be used against every intervenor. If applied across the board, the logical result is that no person or entity could intervene because it ***might*** cause a potential delay.

If the allegation is that an appeal by Garland will delay matters, then the proceeding before the Commission is not being delayed. PURA and the APA contemplate the right of appeal. Intervention cannot and should not be denied because a party may contemplate exercising its statutory right to appeal. Once again, this argument is true for any intervenor and would result in no interventions being allowed.

This "delay" hypothesis has but one way to be tested — let Garland intervene and later rule against Garland should it suggest a procedure that would delay matters. Any other result would give credence to rank speculation. Alternatively, if this is grounds for denying intervention, then it must be applied to all intervenors — leaving a proceeding with the applicant as the only party.

WHEREFORE, premises considered, Garland requests that Staff's and LCRA's objections to Garland's intervention be overruled and that Garland's motion to intervene be granted. Garland further prays for any additional relief to which it may be entitled.

Respectfully submitted,

BRAD NEIGHBOR
State Bar No. 14869300
City Attorney
CITY OF GARLAND
200 North 5th Street, Suite 416
Garland, Texas 75040
Telephone: (972) 205-2380
Facsimile: (972) 205-2389

ATTORNEY FOR THE
CITY OF GARLAND

LLOYD GOSSELINK
ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
Telephone: (512) 322-5830
Facsimile: (512) 472-0532

LAMBETH TOWNSEND
State Bar No. 20167500

JOYCE BEASLEY
State Bar No. 01987300

ATTORNEYS FOR THE CITY OF GARLAND

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 13th day of November, 2009, in the following manner: hand delivered, sent via facsimile, or mailed by U.S. First Class Mail.

LAMBETH TOWNSEND