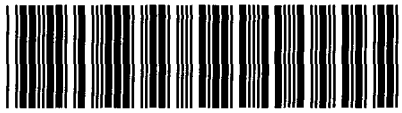

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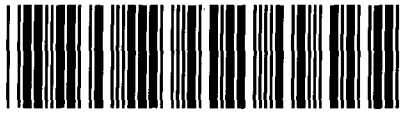

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BRIEF OF SOUTHERN CROSS TRANSMISSION LLC IN RESPONSE TO THE COMMISSION'S BRIEFING ORDER

Table of Contents

394

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BRIEF OF SOUTHERN CROSS TRANSMISSION LLC IN RESPONSE TO THE COMMISSION'S BRIEFING ORDER

The Commission requested briefing regarding whether the Commission may order the SCT DC Tie to operate below ERCOT's current most severe single contingency ("MSSC") of 1,375 MW until ERCOT completes any required studies and implements any new standards and protocols. Southern Cross Transmission LLC ("SCT") notes that Chairman Nelson's August 17 memo also appears to contemplate a separate Commission proceeding in which the Commissioners 'can specify the exact efforts we require ERCOT to undertake

Introduction

SCT is unequivocally committed to operating its DC tie in a manner that will maintain the reliability of the ERCOT system. SCT is equally committed to protecting ERCOT and utilities in ERCOT from becoming subject to FERC's plenary jurisdiction. SCT understands the level of concern about this issue, but section 201(b)(2) of the Federal Power Act settles the jurisdictional question and only an act of Congress—not some discretionary act by FERC—can change that.

With respect to the specific briefing order issue, the SCT DC Tie will not be energized before mid-2020 or in operation before 2021, which provides ERCOT approximately four years to analyze and resolve the MSSC issue raised by the Commission's briefing order before there would be any flows on the tie in excess of the existing MSSC. SCT respectfully submits that four years allows considerable time to address and resolve concerns about flows over the tie in excess of the existing MSSC before such flows could become an operational issue for ERCOT

In addition, the PFD already proposes conditions that require the ERCOT issues, including the MSSC-related issues, to be resolved before the tie is energized.[1] It is therefore not clear when SCT could actually operate under the ceiling, unless the Commission interprets the proposed conditions to allow SCT to operate the line before the ERCOT issues are resolved.[2] SCT has requested setting reasonable completion dates for ERCOT so SCT can energize the tie by mid-2020. SCT submits that there is no need to limit SCT's operations to the current MSSC of 1,375 MW

However, in the unlikely event that the MSSC issue has not been resolved by ERCOT when the SCT DC Tie becomes operational, the briefing issue cannot be viewed in a vacuum. It is not possible to determine whether the Chairman's proposal would meet applicable legal requirements without considering other issues, because the evidence, findings and conclusions must support the Commission's order. and the order must enable the parties to determine whether they are aggrieved by it.

SCT believes that in light of the issues raised by the parties, the evidentiary record before the Commission, and applicable law, the proposal to restrict the SCT DC Tie to 1,375 MW and to open a separate proceeding for the Commission to specify what efforts ERCOT shall undertake is fatally flawed:

- In light of the 185-day deadline in section 39.051(c-2) of PURA, the Commission's authority to prescribe conditions does not authorize deferral to a separate proceeding of decisions that would determine if and when the SCT Project will be built and interconnected.
- The proposal does not include any completion dates for ERCOT's resolution of the issues and would therefore result in an unlawful conditional order.
- There is no record evidence that supports ordering the SCT DC Tie to operate below the 2.000/2,100-MW designed capacity of the project, particularly in light of the fact that ERCOT has never suggested that it cannot complete all the required studies within the nearly four years between now and the planned energization of the project.

[1] PFD at Ordering Paragraphs 13-15 & 22-26.

[2] One of the ERCOT issues, creating a new market participant category for SCT, must be determined before SCT can become a member of ERCOT and interconnect.

- Postponing the decision on the critical issue of a market participant category for SCT would effectively prevent SCT from obtaining financing necessary to construct and operate the SCT DC Tie before the ERCOT tasks are completed.

Bifurcating the issues into multiple proceedings would result in an improper conditional order.

Chairman Nelson's August 18 memo contemplates a separate Commission proceeding as a precursor to ERCOT's tackling the technical issues identified in the PFD. The need to refer several matters to ERCOT was considered in the hearing and discussed in the PFD, along with the possibility of a compliance docket to monitor the progress of the stakeholder process at ERCOT SCT has supported resolving all these matters—other than the cost allocation issues—at ERCOT and it also supports ERCOT's proposal that the Commission establish a compliance docket to report the progress toward achieving various milestones.[3]

SCT is concerned, however, that a separate Commission proceeding would run afoul of the well-known restrictions on the Commission's ability to issue conditional orders. The Texas Supreme Court was highly critical of a Commission order that prescribed conditions on a CCN granted to Texas-New Mexico Power Company (TNMP) for a power plant.[4] In particular, one condition required TNMP to obtain 'all necessary permits' before it built the plant. As the Court noted, the condition put TNMP in a 'Catch-22 predicament' because some of the permits could not be issued until construction had begun or was completed.

SCT would be in the same position as TNMP if the Commission does not establish completion dates for the ERCOT stakeholder process. For example, Ordering Paragraph 13 in the PFD would not require ERCOT to determine a new market participant category for SCT until the project is ready to be energized. Chairman Nelson's proposal would apparently leave open the timing of that determination for the Commission to decide in a separate proceeding. But without a market participant category, SCT cannot obtain financing to construct the project. Such a final order, prescribing conditions that could make it impossible for SCT to proceed with the project, would be an improper conditional order.

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[3] ERCOT's Reply Brief at 3.

[4] *Texas-New Mexico Power Co. v. Texas Industrial Energy Consumers*, 806 S.W.2d 230, 231-32 (Tex. 1991).

Moreover, since early in the Commission's history. Texas courts have consistently held that it, like other agencies, lacks statutory authority to modify orders that have become final.[5] In the River Bend nuclear power plant rate case, for example, the Commission attempted to defer ruling on whether a portion of the utility's investment in the plant could be included in its rate base, even though the issue had been fully litigated.[6] In two appellate opinions, the Texas Supreme Court reversed the Commission, observing that '[a]ll parties were entitled to a straightforward decision from the PUC the first time that this case was presented.'[7] The Court reiterated its holdings in previous cases that without specific statutory authorization, Commission may not bifurcate issues into successive, multiple proceedings.[8] The proposal for a separate proceeding in which the Commission would determine how soon the ERCOT issues will be resolved would result in multiple, successive decisions of the type that the courts forbade.

Section 39.051(c-2) of PURA requires the Commission to approve the application filed by the City of Garland ("Garland") no later than the 185th day after filing and allows it to prescribe reasonable conditions to protect the public interest that are consistent with the FERC final order. Under the court rulings cited above, it would not be reasonable for the Commission's final order in this case to condition approval of the application on its later resolution of issues necessary to interconnect the SCT DC Tie.

For example, there is a consensus among the parties to refer to ERCOT the issues listed in the Chairman's memo. But there is little agreement on the issue of a timeline for ERCOT's actions, i.e. firm dates as urged by SCT or target dates for resolving the issues and adopting and

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[5] *Public Utility Comm'n v. Brazos Elec. Power Co-op.* 723 S.W.2d 171, 173 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (holding that PUCT cannot declare a final order that granted a CCN to be null and void for lack of proper notice of the application).

[6] *Coalition of Cities for Affordable Utility Rates v. Public Utility Comm'n*, 798 S.W.2d 560, 562 (Tex. 1990) (*River Bend 1*); *Gulf States Utilities Co. v. Public Utility Comm'n*, 947 S.W.2d 887, 887-88 (Tex. 1997) (*River Bend 2*).

[7] *River Bend 2* at 892 (quoting *River Bend 1* at 565).

[8] 947 S.W.2d at 891. Deferring decisions to multiple, successive orders is distinguishable from properly severing issues. Claims are properly severable if (1) the controversy involves more than one cause of action; (2) the severed claim would be the proper subject of an independent lawsuit; and (3) the severed claim is not interwoven with remaining action that they involve the same facts and issues. *Guaranty Federal Savings Bank v. Horseshoe Operating Co.* 793 S.W.2d 652, 658 (Tex. 1990). In addition, the Court in *River Bend 1* held that since a case may not be severed after it has been submitted to the trier of fact, the Commission could not have properly severed the prudence of investment issue as it did even if it was not interwoven with the other facts and issues. *Coalition of Cities for Affordable Utility Rates v. Public Utility Comm'n*, 798 S.W.2d 560, 564 (Tex. 1990). The Court characterized the Commission's deferral of its decision on the prudence issue to be 'an improper post-trial attempt to split a cause of action. *Id.*

implementing new protocols as suggested by ERCOT According to the *River Bend 2* case, the Commission may not defer the critical question of a timeline for ERCOT's actions to a separate proceeding. *To do so would be to impose conditions to be determined later* invalidly amending the final order after the 185-day statutory deadline for Commission approval of the application.

By contrast, several parties have argued that the Commission should, as conditions to approving the application, impose on SCT the costs of transmission line upgrades and ancillary services made necessary by the SCT DC Tie. SCT, of course, has urged the Commission not to prescribe such conditions.[9] Moreover, the rule in the *River Bend* case does not prevent the Commission from deferring a decision on them to a rulemaking project, because (1) a decision on these issues is not necessary for the construction and interconnection of the SCT DC Tie and (2) the issues of allocating the costs of upgrades and ancillary services could not be fully litigated in this case.[10]

From the outset, SCT has understood that ERCOT would need to modify its modeling and change bylaws and protocols in order for the SCT DC Tie to interconnect. SCT does not consider such actions to be improper conditions so long as (1) they are necessary to implement the Commission's final order *and* (2) the compliance docket and stakeholder process at ERCOT are not used to amend or augment the conditions prescribed in the Commission's order. That is to say, the stakeholder process may not properly be used to relitigate issues, to defer or amend Commission decisions, to unreasonably delay construction and interconnection, or otherwise to effectively deny Garland's application.

With a few modifications, the recommended findings of fact, conclusions of law, and ordering paragraphs in the PFD would allow ERCOT to address the technical issues consistent with these requirements. Creating a new Commission proceeding to further specify the efforts ERCOT shall undertake would result in an improper conditional order and certainly has the potential to effectively deny Garland's application.

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[9] SCT has provided the Commission with a creditable study—actual evidence—that shows $162 million in customer benefits, $175 million in production cost savings, and $65 million in new export charge revenue. TIEC declared that the SCT Project would provide 'de minimis' benefits to ERCOT customers, without performing any study or providing any evidence that supports its claim or explains how it gets from millions of dollars in annual benefits to 'de minimis. In addition, PURA § 35.004(d) requires using the postage stamp method for reliability upgrades.

[10] Such conditions would affect persons who did not receive notice to intervene in this case to litigate the issue.

The no evidence showing that a 1,375-MW operating limit would be helpful or necessary.

The question of prescribing an operating limit on the SCT DC Tie should first be analyzed by the technical experts in the ERCOT stakeholder process. Rather than setting arbitrary policies today to prescribe how the system will be operated, it would be far better to give the engineers time to identify and understand the various technical issues and their relationships to other system planning and operating considerations. At this point, no one has determined that there is a problem that must be solved.

The record does not indicate any definite amount of ancillary services that may be needed as a result of the SCT DC Tie operations. Indeed, the record does not support determinations that more ancillary services will definitely be required, what kinds of ancillary services might be required, or when, if any, additional ancillary services might be required. Should the determination of the supply-side MSSC also be a dynamic number that changes from period to period, or a static number set annually?

The bi-directional SCT DC Tie will be capable of importing up to 2,000 MW and exporting up to 2,100 MW Although SCT assumes the possible operating limit would apply to imports, it is unclear whether the operating limit would also apply to exports. It is also unclear from the record evidence whether an actual demand-side MSSC exists today in ERCOT's modeling practices. It may be merely a dynamic number that changes from one low load period to another and becomes irrelevant when total system demand passes the point at which a large and diverse array of dispatchable generation resources are online.

Parties importing or exporting power already pay to use the ERCOT transmission system.

Implicit in Chairman Nelson's suggestion to consider ERCOT issues in a separate Commission proceeding and specifically mentioned by Commissioner Anderson during the open meeting is the question of whether exports and imports pay their share of transmission and ancillary services costs. P.U.C. Subst. R. 25.192(e) requires all QSEs *exporting* power from the ERCOT region to pay transmission rates for using the ERCOT system from source (one or more generators in ERCOT) to sink (the DC tie Load Zone). Similarly, P.U.C. Subst. R. 25.192(b) and 25.193 ensure that all consumers of power *imported* across a DC tie pay for using the ERCOT transmission system from source (the DC tie resource node) to sink (the customer's Load Zone). In addition, QSEs involved in import and export transactions pay ERCOT settlement charges that

include payments for ancillary services along with other ERCOT charges. Current rules therefore already adequately compensate TSPs, and ultimately ERCOT ratepayers, for use of the ERCOT transmission system for transactions over DC ties, whether power is exported or imported.

The estimated $65 million in new export charges—as well as settlement charges—that will be paid by QSEs are another reason that the Commission should not impose charges on using the SCT DC Tie that are not imposed on using other ties. These payments will offset export-related transmission costs. No party disputed these payments.

Conclusion

First, SCT seeks specific completion dates for stakeholder resolution on issues related to market participant category and other matters critical to interconnecting the tie (i.e. most of the matters that the PFD recommends referring to ERCOT). To that end, SCT has proposed the following dates:

June 1, 2017	SMFPA/Market Participant Category (OP 13)
June 2020	Ramp Rate Restrictions (OP 15)
June 2020	Outage Coordination (OP 16)
June 2020	Transmission planning (OP 21A)
June 2020	Modeling (OP 22)
January 2021	Coordination Agreement (OP 14)

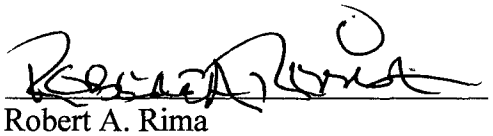
Second, if the Commission wishes to consider the question of cost allocation, SCT would request the opportunity to present its position in the normal course of Commission review in Project No. 46203 or a separate rulemaking proceeding.

Third, while SCT has no objection to a compliance docket in which the Commission may monitor the ERCOT and its stakeholder process, the Commission should not initiate a new proceeding to scope items for ERCOT's stakeholder process.

In sum, SCT does not believe that the language in section 39.051(c-2) authorizing conditions allows the Commission to impose conditions that defer to a separate proceeding decisions that would effectively determine if and when the SCT Project can be built and interconnected. Rather, SCT believes it is entitled to a straightforward final order from the Commission no later than the 185th day after filing that informs Garland and SCT of what they must do to construct and interconnect a project in accordance with the legislature's direction in section 39.051(c-2). To meet the *River Bend* requirements, the final order in this proceeding must resolve all of the issues necessary to allow Garland and SCT to proceed without further

decisions by the Commission, including reasonable completion dates for issues referred to ERCOT. An order based on the PFD—modified as requested by SCT—would meet these legal requirements, whereas the proposed separate Commission proceeding to further consider issues would not meet them. Allowing SCT to operate as proposed under the current 1,375-MW MSSC limit would not help cure the deficiencies in the Proposal for Decision.

Respectfully submitted,



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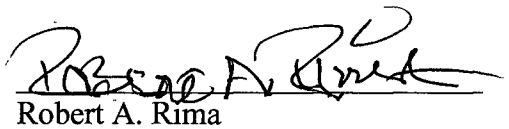
CERTIFICATE OF SERVICE

I certify that on August 22, 2016, a true and correct copy of this document was served on all parties via the Public Utility Commission of Texas Interchange website.



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