Control Number: 45624

Item Number: 410

Addendum StartPage: 0

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PUC DOCKET NO. 45624

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	§	**BEFORE THE**
	§	**PUBLIC UTILITY COMMISSION**
	§	**OF TEXAS**

MOTION FOR REHEARING
OF SOUTHERN CROSS TRANSMISSION LLC

TABLE OF CONTENTS

410

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MOTION FOR REHEARING
OF SOUTHERN CROSS TRANSMISSION LLC

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

Southern Cross Transmission LLC (SCT), pursuant to the Administrative Procedure Act, Tex. Gov't Code §§ 2001.145 and 2001.146 and PUCT Proc. Rule 22.264 timely files this, its Motion for Rehearing (Motion) of the Commission's Final Order dated September 8, 2016. In support of its Motion, SCT respectfully shows as follows:

EXECUTIVE SUMMARY

In two amendments to the Public Utility Regulatory Act (PURA) in 2015, the legislature required persons, including electric utilities and municipally owned utilities, to obtain a Certificate of Convenience and Necessity (CCN) to interconnect a facility that allows power to be imported into or exported out of the ERCOT grid. Recognizing that SCT had already obtained an order from FERC directing Garland to interconnect the SCT Project and Oncor and CenterPoint to provide transmission service, the legislature included a provision requiring the PUCT to approve Garland's CCN within 185 days from filing and allowed the Commission to prescribe reasonable conditions to protect the public interest that are consistent with SCT's FERC interconnection order. The legislature did not expand the Commission's authority in the new amendments to PURA, and any condition the Commission imposes in its order granting Garland's application for a CCN must therefore be authorized by other PURA provisions.

SCT is a FERC-regulated interstate transmission company that does not and will never own facilities in Texas. The SCT Project is a 400-mile HVDC transmission line that will interconnect with Garland's facilities at the Texas state line bordering with Louisiana. SCT's

sole business will be to own and operate an interstate transmission line, and it will not engage in energy transactions across the SCT DC Tie.

The Commission's authority over SCT is limited. SCT is not and will never be subject to the Commission's jurisdiction as an electric utility, transmission service provider (TSP), or buyer or seller of electricity within Texas under PURA. Once SCT becomes a market participant and executes a market participant agreement with ERCOT, SCT will be bound to follow the ERCOT protocols generally applicable to ERCOT market participants and specifically applicable to operators of DC Ties. The Commission can enforce rules and orders relating to the reliability of the ERCOT grid, including the ERCOT protocols, and it can resolve disputes between ERCOT and SCT. The Commission can impose administrative penalties for violations of PURA or a Commission rule or order. However, no provision of PURA authorizes the Commission to impose costs directly on SCT as has been ordered in the instant case.

Without regard to the Commission's lack of statutory authority to impose costs on SCT, its final order is erroneous for numerous other reasons. As discussed more fully below, the Commission's key errors include:

- The Commission's decision to directly assign costs to SCT is an impermissible burden on interstate commerce and contravenes the FERC's directive that ERCOT transmission owners provide transmission service to users of the SCT DC Tie at rates that are just and reasonable and not unduly discriminatory.
- The Commission's decision to directly assign transmission upgrade costs to SCT and users of its DC tie is contrary to PURA § 35.004 (requiring the use of the postage stamp method to recover transmission costs) as well as unreasonably discriminatory under PURA §§ 39.001 and 39.203.
- The Commission's decision to directly assign transmission upgrade costs to SCT or the users of the SCT DC Tie failed to articulate a rational connection between its decision and the evidence relevant to the ALJs' findings of fact that it modified, deleted, or added, as required by PUCT Substantive Rule 22.262 and Government Code section 2003.049(h).
- The Commission's decision to directly assign ancillary service costs associated with the Garland project or the Southern Cross DC tie to SCT and entities using the SCT tie is contrary to PURA §§ 35.004, 39.001, and 39.203, which require that transmission service be provided at reasonable prices with terms and conditions that are not discriminatory or anticompetitive.

- The Commission's absolute prohibition against any utility's recovering costs related to the Rusk substation (and its decision to instead impose those costs on SCT) in the absence of a request for cost recovery and without determining whether such a request meets statutory standards for cost recovery constitutes a deprivation of due process and a taking of property for public use without just compensation in violation of both the Texas and U.S. Constitutions. It is also contrary to the fundamental ratemaking principles in PURA.
- The Commission's decision to require that SCT obtain "all necessary regulatory approvals in Louisiana" before Garland can seek condemnation in Texas is not supported by substantial evidence—in fact, there is no evidence—in the record.

For the foregoing reasons—as well as the fact that in several instances the Commission's order is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion—SCT respectfully requests that the Commission modify, correct, and reform its decision so that SCT's rights are not substantially prejudiced.

I. Point of Error No. 1: The Commission's decision to (a) allocate costs to SCT, (b) directly assign incremental and ancillary service costs to imports and exports over the SCT tie, and (c) prohibit utility recovery of costs associated with the Garland project or the SCT DC Tie discriminates against interstate commerce. (Order at 3, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 70A, 83A, 91A, 107, 119, 119A-119E, Ordering Paragraphs 33, 34, 35, and 42)

Where Congress has power over interstate commerce under Article 1 of the United States Constitution, by implication, states may not discriminate against interstate commerce nor may they unduly burden interstate commerce. This well-established doctrine is known as the dormant Commerce Clause. To determine whether a state agency order violates the dormant Commerce Clause, a court first determines whether the order discriminates on its face against interstate commerce.[1] In this context, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Discriminatory laws motivated by simple economic protectionism are subject to a virtually *per se* rule of invalidity, which can only be overcome by a showing that there is no other means to advance a

[1] *United Haulers Ass'n, Inc. v. Oneida Herkimer Solid Waste Management Authority*, 550 U.S. 330, 331 (2007) (citations and internal quotation marks omitted).

legitimate local purpose.[2] A finding that an order constitutes "economic protectionism" may be made on the basis of either discriminatory purpose or discriminatory effect.[3]

The following ordering paragraphs in the order impose discriminatory costs on SCT:

OP 31. Prohibits any utility from recovering in cost of service any costs related to the Rusk or Panola substations or the Rusk-to-Panola line.

OP 32. Requires SCT to pay all ERCOT costs for studies, protocol revisions, and other activities required by the SCT project.

OP 33. Imposes on SCT any additional costs due to the SCT project, including transmission upgrade costs, ancillary services costs, and costs of negotiating coordination agreements.

OP 34. Assigns to exports over the SCT Tie any incremental transmission and ancillary services costs required to support exports.

OP 35. Prohibits any utility from recovering in cost of service any costs associated with the SCT project.

Imposing the above costs on flows over the SCT DC Tie will artificially raise the cost of exports and imports, lower the potential margin on them, and place QSEs scheduling those flows at a competitive disadvantage. The order makes no findings of fact to support the above ordering paragraphs, which allocate costs to Southern Cross without a determination of the net economic benefits of the DC Tie project. The Commission has not imposed such costs on the existing DC ties.

In its discussion, the Commission notes that "existing regulatory requirements, protocols, and standards are inadequate to deal with the import and export of power at the levels proposed by Southern Cross Transmission."[4] The Commission then concludes that it is in the public interest to immediately begin the process of updating rules, protocols and standards to ensure that "cost responsibilities are properly placed on market participants."[5] Without any additional explanation, the Commission next concludes that "the public interest demands that ERCOT ratepayers should not bear any of the costs associated with this transmission line or the Southern

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[2] *Id.*

[3] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

[4] Order at 2.

[5] Order at 2-3.

Cross DC tie."[6] The Commission has failed to provide any lawful reason for these conclusions, which unreasonably discriminate against interstate commerce.

II. Point of Error No. 2: The Commission's decision to assign costs to SCT exceeds its statutory authority and is inconsistent with SCT's FERC interconnection order. (Order at 3, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 70A, 83A, 91A, 107, 119, 119A, 119B, Ordering Paragraphs 33, 34, 35, and 42)

The Commission has no statutory authority to impose costs on SCT, which is not and will never be either an electric utility as defined in PURA § 31.002 or a buyer or seller of electricity in ERCOT regulated under PURA. Although PURA § 37.051(c-2) authorizes the Commission to impose reasonable conditions to protect the public interest, the provision does not implicitly expand the Commission's regulatory authority. There must be specific express authority in PURA for any conditions imposed.[7]

Nothing in PURA authorizes the Commission to assign any of the following cost responsibilities to SCT, which is not and will never be a user of the ERCOT transmission system:

- ERCOT studies, protocol revisions, and any other ERCOT activities provided in Ordering Paragraph No. 33;
- Transmission upgrade costs, ancillary service costs, and the cost of negotiating and executing any coordination agreement as provided in Ordering Paragraph No. 34;
- Any incremental transmission and ancillary services costs required to support imports and exports as provided in Ordering Paragraph No. 35; or,
- The use of the ERCOT transmission system as provided in Ordering Paragraph No. 42.

All of the Commission's authority to impose costs on entities is expressly limited to entities specified in PURA. SCT does not fall within any class of such entities.

Indeed, FERC has exclusive jurisdiction to allocate transmission costs to SCT. The Commission's order presumably would require Texas electric utilities to recover intrastate transmission costs through interstate rates charged to entities using SCT's tie, which is contrary

[6] Order at 3.

[7] *Public Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001) (holding that an agency may not exercise what is effectively a new power or a power contradictory to the statute on the theory that such a power is expedient for administrative purposes).

to the exclusive authority of FERC under section 212 of the Federal Power Act to approve interstate transmission rates. The Commission's order therefore conflicts with the limitation in PURA § 37.051(c-2) requiring that its conditions be consistent with SCT's FERC interconnection order.

III. Point of Error No. 3. The Commission's decision to directly assign transmission upgrade costs to SCT is contrary to the limitations on the recovery of transmission service costs mandated by PURA § 35.004 and is arbitrary and capricious. (Order at 3, Findings of Fact 59, 119B, 59, Ordering Paragraphs 34 and 42)

PURA § 35.004(d) provides that the price of wholesale transmission services within ERCOT shall be based on the postage stamp method, under which a transmission-owning utility's rate is determined based on ERCOT utilities' combined annual cost of transmission divided by ERCOT's total demand. Under this provision, the cost of transmission upgrades in ERCOT is required to be included in postage stamp transmission rates that are allocated to each utility based on its share of ERCOT's total demand. Substantive Rule 25.192 implements this requirement. The Commission's decision to directly assign transmission upgrade costs to SCT and/or to entities using the SCT tie is fundamentally inconsistent with and contrary to the postage stamp method required by PURA § 35.004(d).

Directly assigning transmission upgrade costs to SCT and/or entities using the SCT tie would also double-charge and double-recover transmission costs under the current rules, since the cost of using the ERCOT system will already be charged to and recovered from load served by import and export transactions over the SCT tie under the postage stamp method. Import transactions over the SCT tie will serve ERCOT load, and under the postage stamp method the cost of ERCOT transmission for those transactions is already properly allocated to and collected from the ERCOT loads that benefit from the transactions.[8] Substantive Rule 25.192(e) and (f) already specifically assign ERCOT transmission costs to DC tie export transactions and credit the revenues back to ERCOT load. SCT's uncontroverted evidence shows that such export tariff transactions over the SCT tie will produce more than $60 million annually in contributions to ERCOT transmission costs.[9] Assigning transmission upgrade costs to SCT and/or to entities

[8] Imports over the SCT tie will generally serve ERCOT loads at a lower cost than native generation, assuming the transactions are economically rational.

[9] SCT Ex. 3 (Wolfe Direct) at Exhibit EW-2, p. 3.

using the SCT tie—in addition to the charges under the Commission's existing transmission cost recovery rule—would double charge and double recover transmission costs. That result is contrary to PURA § 35.004 and arbitrary and capricious.

IV. Point of Error No. 4: The Commission's decision to directly assign incremental transmission costs to imports and exports over the SCT DC Tie is contrary to the postage stamp method mandated by PURA § 35.004(d) and Substantive Rule 25.192. (Order at 3, Finding of Fact 119C, Ordering Paragraph 35)

Ordering Paragraph 35 requires that incremental transmission service costs required to support imports or exports over the SCT DC Tie be assigned directly to those imports or exports. The practical effect of this requirement is to include the costs in the rates charged to the Qualified Scheduling Entities (QSEs) that schedule flows over the SCT DC Tie.

As explained in Point of Error No. 2, however, section 35.004(d) of PURA mandates the postage stamp method of pricing transmission service. Under that provision, a TSP's rate must be based on the ERCOT utilities' combined annual costs of transmission-owning utilities divided by the total demand in ERCOT. Substantive Rule 25.192(c) prescribes the FERC expense accounts and plant accounts that are included in the transmission cost of service used to set each TSP's rate according to the postage stamp method. The direct assignment of incremental transmission service costs to QSEs pursuant to Ordering Paragraph 35 violates both section 35.004(d) and Substantive Rule 25.192.

V. Point of Error No. 5: The Commission's decision to directly assign transmission upgrade costs to SCT is contrary to the limitations in PURA § 39.203(e), which authorizes the Commission to require an electric utility or transmission and distribution utility to construct or enlarge facilities. (Order at 3, Findings of Fact 59, 119B, Ordering Paragraph 34)

Ordering Paragraph 34 requires SCT to bear the cost of any transmission upgrades associated with the Garland project or the SCT DC Tie. Such a requirement falls completely outside the framework established by the legislature for the construction and recovery of the cost of transmission facilities by utilities to ensure safe and reliable service and to reduce transmission constraints within ERCOT.

Ordinarily, necessary transmission system upgrades are identified by a TSP or through the ERCOT planning process, and a TSP files an application pursuant to Chapter 37 of PURA, requesting Commission approval of the proposed transmission line. Alternatively, if no utility

requests authorization to build facilities deemed necessary, section 39.203(e) provides that the Commission may require "an electric utility or a transmission and distribution utility" to construct the facilities. Either way, the cost of such facilities would be included in the utility's rate base pursuant to Substantive Rule 25.192(c), subject to the Commission's approval in the utility's next rate case. Assigning transmission upgrade costs to SCT—which is neither an electric utility nor a transmission and distribution utility in Texas under PURA—violates this regulatory scheme. Furthermore, there are no provisions in PURA or Commission rules that specifically authorize the Commission to order SCT or any other entity to bear the cost of transmission facilities constructed or upgraded by an electric utility, transmission and distribution utility, or anyone else.

The framework under PURA and Rule 25.192(c) is clear: TSPs may apply for authority to construct necessary facilities, or, if no utility applies, the Commission has express authority to order a TSP or a distribution utility to construct the facilities. In either event, the reasonable cost of such facilities is recoverable only through rates by the utility that constructed them. The Commission may not require SCT to pay for facilities constructed by another utility.

VI. Point of Error No. 6: The Commission failed to articulate a rational connection between the facts and its decision to require SCT to bear all costs associated with the Garland project and the SCT DC Tie. (Order at 3, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119–119E, Ordering Paragraphs 32–36 and 42)

On page 3 of the order, the Commission determined that "the public interest demands" that ERCOT ratepayers not bear any costs associated with the Garland project or the DC Tie. In addition, the Commission modified, deleted, and added to the ALJs' findings of fact and ordering paragraphs to assign the costs to SCT. In each of the findings, the Order simply recites that it is "reasonable, protective of the public interest, and consistent with the FERC Order that . . . ." The Order does not explain the rationale for or identify any evidentiary support for any of the findings of fact that it modified, deleted, or added requiring SCT to bear the costs.

The Commission's ultimate findings that it is reasonable, in the public interest, and consistent with the FERC order to require SCT to bear all costs associated with the Garland project and the SCT DC Tie are not sufficient to support its order. Because these findings recite only statutory standards, the Commission is required to support them with underlying findings. Tex. Gov't Code § 2001.141(d); *CenterPoint Energy Entex v. Railroad Commission,* 213 S.W.3d

364, 370-71 (Tex. App.—Austin 2006, no pet.). There are no such underlying findings in the Commission's order.

In addition, the order is flawed because it does not identify any rational connection between the facts and the Commission's decision. There is a disconnect between the evidence and the Commission's determination, without an explanation, that SCT should bear all costs associated with the Garland project and the SCT DC Tie. Moreover, the Commission cannot marshal the facts in evidence to support its preferred end result. Indeed, the ALJs concluded that there is insufficient evidence to support imposing the costs on SCT.[10] It is arbitrary and capricious for an agency to fail to make apparent a rational connection between the facts and its decision.[11]

VII. Point of Error No. 7: The Commission's decision to require SCT to pay all costs of ERCOT activities required by the Garland project or the SCT DC Tie is not rationally based on the evidence. (Order at 3, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119, 119A, Ordering Paragraphs 33 and 34)

Staff presented no evidence to support its recommendation that SCT be required to bear the cost of ERCOT studies and modifications to its rules, procedures, and processes. As noted above, the ALJs found there is an insufficient record to support imposing the costs on SCT, noting that ERCOT may determine that SCT's claimed benefits are not overstated.[12] Significantly, the ALJs also concluded that that there are reasons *not* to impose such costs on the company (namely, that doing so would create incentives for opposing parties to create obstacles to resolving the matter at ERCOT).

The Commission nevertheless ordered SCT to pay all these costs. The Commission erred by making findings that are not reasonably supported by the evidence.[13]

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[10] PFD at 50.

[11] *Flores v. Employees Retirement System,* 74 S.W.3d 532, 542 (Tex. App. – Austin 2002), pet. denied (*Flores*).

[12] PFD at 50.

[13] *Flores*, 74 S.W.3d at 541.

VIII. Point of Error No. 8: The Commission's requirement that SCT bear ERCOT's costs associated with the Garland project and the SCT DC Tie violates PURA § 39.151(e), which requires that ERCOT charge wholesale buyers and sellers a reasonable and competitively neutral administration fee to fund its budget. (Order at 3, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119, 119A, Ordering Paragraphs 33 and 34)

The Commission determined that SCT should bear costs incurred by ERCOT for studies, protocols, operating guides, and system changes associated with the Garland project and the SCT DC Tie. To implement this decision, the Commission modified, deleted, and added findings of fact and ordering paragraphs to require SCT to bear such costs. In doing so, the Commission exceeded its statutory authority to impose charges to fund activities such as these, which are properly included in ERCOT's budget.

The legislature prescribed a method by which ERCOT's budgeted activities are to be funded. Section 39.151(e) of PURA provides that "the commission shall authorize [ERCOT] to charge to wholesale buyers and sellers a system administrative fee, within a range determined by the commission, that is reasonable and competitively neutral to fund [ERCOT's] approved budget." Substantive Rule 25.363, which implements this statutory provision, requires ERCOT to maintain a standard chart of accounts and submit annual budgets for approval. PURA and the rule thus require that the system administrative fee be set to fund ERCOT's approved budget. PURA specifies that the fee is to be collected from wholesale buyers and sellers—a class of market participants that does not include SCT.[14] In addition, the system administrative fee must be "reasonable and competitively neutral." The Commission's requirement that SCT bear costs not imposed on existing DC ties necessarily fails that test.

Under Substantive Rule 25.363(g), ERCOT may charge reasonable user fees for services it provides to a market participant or other entity. The costs imposed by the Commission's order, however, are not for services ERCOT would provide to SCT. Moreover, it has not been ERCOT's practice to charge individual market participants for costs such as the cost of bylaw and protocol revisions, contract negotiations, and the studies that the Commission has ordered SCT to pay. Rather, ERCOT has paid for such activities out of its approved budget. The

[14] Pursuant to ERCOT's current fee schedule, the system administration fee is charged to all QSEs—including those scheduling flows over the SCT DC Tie—based on load represented.

Commission's special assessment in this case is inconsistent with the Commission's rule and the method prescribed by the legislature and therefore exceeds the Commission's statutory authority.

IX. Point of Error No. 9: The Commission violated SCT's due process rights by failing to give proper notice to SCT that it would require SCT to bear the costs of ERCOT activities required by the Garland project or the SCT DC Tie. (Order at 3, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119, 119A, Ordering Paragraphs 33 and 34)

As noted in Point of Error No. 8, the Commission's current rules and the current practice at ERCOT would not require SCT to bear the cost of ERCOT activities required as a result of the Garland project and the SCT DC Tie. The imposition of these costs is therefore a departure from the Commission's previous practice, and SCT had no notice that the Commission might impose these costs on it. The preliminary order, in which the Commission specified the issues to be addressed in the hearing, did not raise the issue of requiring SCT to bear the costs of these ERCOT activities.

An agency must respect the due process rights of parties in contested cases.[15] Parties are deprived of procedural due process when an agency adopts a new policy in the course of a contested case hearing without giving the parties pre-hearing notice.[16] Furthermore, an agency must explain its reasoning when it departs from its earlier policy or appears to be inconsistent in its determinations.[17] In this case, the Commission's failure to give proper notice violates SCT's due process rights.

X. Point of Error No. 10: The Commission's decision to allocate costs to SCT and directly assign incremental transmission and ancillary service costs to imports and exports over the SCT DC Tie is discriminatory in violation of PURA § 39.001(c). (Order at 3, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 70A, 83A, 91A, 107, 119, 119A-119E, Ordering Paragraphs 33, 34, 35, and 42)

When the Texas Legislature passed SB7 in 1999 restructuring the electric industry in Texas, it specifically found that electric services and their prices should be determined by customer choices and the normal forces of competition. The Legislature included the fundamental tenet that regulatory authorities—which includes the Commission—may not

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[15] *Oncor Elec. Delivery Co. v. Public Util. Comm'n*, 406 S.W.3d 253, 268 (Tex. App.—Austin 2013, no pet.) (*Oncor*).

[16] *Oncor*, 406 S.W.3d at 269.

[17] *Oncor*, 406 S.W.3d at 267.

discriminate against any participant or type of participant in the competitive market. See PURA §39.001(a) and (c). Consistent with this legislative mandate, the costs of transmission upgrades are paid by all load on an equitable basis through postage stamp rates under PURA § 35.004(d). None of these costs are assigned based on the source of the supply.

The SCT DC Tie will be located outside of Texas. SCT will connect to the ERCOT grid at the Texas-Louisiana border and will be a market participant in ERCOT, but it will not itself use the ERCOT grid. By imposing specific transmission costs on SCT and/or QSEs using the SCT tie, the Commission will treat SCT and those QSEs unfairly and unequally relative to the existing DC ties or those engaged in transactions over the existing DC ties. The Commission has here allocated costs to SCT and directly assigned incremental and ancillary service costs to it. However, the Commission has not directly assigned transmission costs to the existing DC tie, the existing most severe single contingency (MSSC), or any individual market participant, but instead assigns them to the loads that directly benefit from such transmission infrastructure and ancillary services.

Ordering SCT to pay all costs incurred by ERCOT and to pay for the use of the ERCOT grid is discriminatory. The Commission does not directly assign such cost responsibility to any other individual market participants. Indeed, the Commission has never imposed such costs on the existing DC ties or on entities using those ties. As a result, the Commission's decision to assign costs to SCT and the QSEs importing and exporting over the SCT DC Tie violates PURA § 39.001.

XI. Point of Error No. 11: The Commission's decision to allocate costs to SCT based in part on export flows across the SCT DC Tie violates Substantive Rule 25.192(e). (Order at 3, Finding of Fact 70A, Ordering Paragraphs 35 and 42)

Operating paragraphs 34 and 42 implement the Commission's Finding of Fact 70A to require that all flows across the SCT DC Tie be accounted for in order to ensure that SCT "pays for its use of the ERCOT grid." As noted above, SCT will not use the ERCOT grid. In addition, requiring SCT to pay for transmission service to export power from ERCOT violates Substantive Rule 25.192.

Rule 25.192(e) specifies that transmission charges for exports of power from ERCOT be assessed in accordance with its provisions and with ERCOT protocols. Paragraph 25.192(e)(3) of

the rule clearly makes the entity that schedules an export (normally, a QSE) solely responsible for paying transmission service charges:

> Rule 25.192(e)(3): The DSP or an entity scheduling the export of power over a DC tie is solely responsible to the TSP for payment of transmission service charges under this subsection.

Since a DSP or exporting QSE will be solely responsible for paying transmission service charges, the Commission may not make SCT pay the charges without violating its own substantive rule. Texas courts have made it clear that an agency is bound to follow its own rules.[18]

XII. Point of Error No. 12: The Commission's decision to directly assign ancillary service costs to SCT and entities using the SCT DC Tie is unreasonably prejudicial, discriminatory, and anticompetitive in violation of PURA § 35.004(e). (Order at 3, Finding of Fact 119C, Ordering Paragraphs 34 and 35)

Section 35.004(e) of PURA requires the Commission to ensure that ancillary services are available at "reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive." In addition, it provides that ERCOT's "acquisition of generation-related ancillary services on a nondiscriminatory basis on behalf of entities selling electricity at retail" meets the requirements of the subsection.

The Commission's decision to directly assign ancillary service costs to SCT and/or to entities using the SCT tie is contrary to PURA § 35.004(e) for two reasons. One, the decision establishes ancillary service terms and prices that are unreasonably prejudicial, discriminatory, and anticompetitive. And two, direct assignment of ancillary service costs to SCT or to entities using the SCT tie is inconsistent with the method established in § 35.004(e) for ancillary services procurement and assignment in ERCOT.

A. Direct Assignment is Unreasonably Prejudicial, Discriminatory, and Anticompetitive

To order that ERCOT ratepayers should not bear any of the costs of additional ancillary services and that SCT and entities using its DC Tie must pay all of the costs is discriminatory because the Commission does not assign such cost responsibility to any other market participants—including the existing DC ties or the existing most severe single contingency—for

[18] *Flores*, 74 S.W.3d at 542.

the ability to participate in the ERCOT market. QSEs importing or exporting power over the SCT DC Tie will pay for their use of the ERCOT system in accordance with current statutes, rules, and ERCOT protocols. The Commission's decision is prejudicial and anticompetitive because the additional ancillary services costs imposed on exports and imports over the SCT DC Tie will make them more expensive relative to flows entirely within ERCOT or over the existing DC ties.

The Commission's differential treatment of flows over the SCT DC Tie will thus artificially raise the costs of those flows, incrementally lower the potential margin on those imports and exports, and place QSEs scheduling the flows at a competitive disadvantage relative to QSEs negotiating sales or purchases of power entirely within ERCOT or over other DC ties. The Commission's imposition of ancillary service costs on QSEs using the SCT DC Tie will discriminate against SCT and those QSEs.

B. Direct Assignment is Inconsistent with the Method Established in § 35.004(e) for Ancillary Services Procurement and Assignment in ERCOT

PURA § 35.004(e) prescribes the method for ensuring the nondiscriminatory acquisition of ancillary services by ERCOT on behalf of entities selling electricity at retail. The Commission's order directly assigning specific ancillary services costs to SCT and/or to entities using the SCT tie does not comply with this statutorily-prescribed method for ancillary services procurement and assignment in ERCOT.

Historically, the Commission and ERCOT have complied with § 35.004(e) by assigning the costs of ancillary services to QSEs based on their load-ratio share, and DC tie exports have been allocated their proportionate share of the costs. *See* ERCOT Protocol 4.2.1.2(1). Assigning such responsibility based on each QSE's share of ERCOT's total load (plus load served by DC tie exports), the method complies with the statutory requirement to acquire such services on behalf of entities selling electricity at retail, because the QSEs represent the retail entities for which ancillary services are acquired and to which ancillary services responsibility is properly assigned.

However, the Commission's order to directly assign certain ancillary service costs to SCT or to entities using the SCT tie does not comply with the statutory requirement. SCT will provide only transmission services, and will not buy or sell electricity in ERCOT or be

represented by QSEs buying or selling electricity in ERCOT. The assignment of ancillary services cost responsibility to SCT is plainly inconsistent with § 35.004(e). Assigning specific ancillary services costs to entities transacting over the SCT tie (in addition to the share of those costs already assigned to such entities under ERCOT protocols) would also be inconsistent with the statutory mandate.

XIII. Point of Error No. 13: The Commission erred in deciding that all costs related to the Garland Project or the SCT DC Tie that would otherwise be borne by ERCOT ratepayers shall instead be borne by SCT because the Commission failed to cite permissible grounds and state its reasons for changing the ALJs' proposed findings of fact and conclusions of law. (Order at 3, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 70A, 83A, 91A, 107, 119, 119A-119E, Ordering Paragraphs 32, 33, 34, 35, and 42)

The ALJs concluded that the record evidence does not resolve the issue of whether ERCOT ratepayers will derive sufficient benefits from the Garland project and the SCT DC Tie that would justify their paying for any resulting system upgrades.[19] Moreover, they concluded that the disagreement in this case over highly technical facts and potential discrepancy in facts requires that the issue be resolved by experts at ERCOT rather than here.[20] The ALJs therefore found that (1) ERCOT should first assess the benefits from the SCT DC Tie, and then (2) the Commission and ERCOT should decide whether the current method of recovering transmission costs should be amended or upgrade costs should instead be assigned to SCT and entities using the SCT DC Tie.[21] Without discussing the evidence or otherwise justifying its rejection of the ALJs' findings, the Commission order modified, deleted, and added to the ALJs' findings of fact to instead directly assign costs to SCT.

Texas Government Code section 2003.049(g) specifies the following conditions under which it is permissible for the Commission to change an ALJ's finding of fact or conclusion of law:

> [T]he commission may change a finding of fact or conclusion of law made by the administrative law judge or vacate or modify an order issued by the administrative law judge only if the commission:
>
> (1) determines that the administrative law judge:

[19] PFD at 45, Proposed Finding of Fact 57.

[20] PFD at 40-46.

[21] PFD, Proposed Findings of Fact 58 and 59.

(A) did not properly apply or interpret applicable law, commission rules or policies, or prior administrative decisions; or

(B) issued a finding of fact that is not supported by a preponderance of the evidence; or

(2) determines that a commission policy or a prior administrative decision on which the administrative law judge relied is incorrect or should be changed.

In addition, section 2003.049(h) requires that the Commission "state in writing the specific reason and legal basis for its determination under Subsection (g)." Substantive Rule 22.262 echoes these limitations. The Commission must therefore articulate in writing why it changes proposed findings of fact and conclusions of law.

The Commission does not cite any of the permissible grounds under the statute for changing the findings of fact and conclusions of law regarding the costs of ERCOT activities and costs related to any system upgrades, etc. required to accommodate the Garland project and the SCT DC Tie. Indeed, the Commission gave *no* substantive explanation of its reasons for changing the ALJs' contrary proposed finding of fact that the record does not support such a finding. In addition, the Commission simply ignored the ALJs' supporting discussion of the findings of fact in the proposal for decision. The Commission's order violates both its own rule and Texas Government Code section 2003.049, which this agency is bound to follow.[22]

XIV. Point of Error No. 14: The Commission's decision to prohibit any utility from recovering any costs related to the SCT DC Tie or the Garland Project (including the Rusk substation) violates the postage stamp method mandated by PURA § 35.004(d). (Order at 3, Findings of Fact 119D and 119E, Ordering Paragraphs 32 and 36)

Ordering Paragraph 32 prohibits any utility from recovering in its transmission cost of service costs related to the Rusk or Panola substations. The practical effect of this prohibition is to deny Oncor the right to recover the cost of the Rusk substation in its rates. SCT will pay the cost of Rusk substation because it has a contractual obligation to reimburse Oncor for any costs of the substation that are not recoverable in rates. Ordering Paragraph 36 prohibits any utility (which includes Oncor) from recovering costs associated with the Garland Project or the SCT DC Tie. It thus precludes the recovery of costs covered by Ordering Paragraph 32 plus any other costs associated with the project.

[22] *Flores*, 74 S.W.3d at 542.

Substantive Rule 25.192—which implements the postage stamp method mandated by PURA § 35.004(d)—specifies the costs that are to be included in ERCOT transmission cost of service for the purpose of setting rates for transmission service. By excluding costs that would otherwise be included in the calculation of Oncor's transmission cost of service, the Commission violates both the substantive rule and the statute.

XV. Point of Error No. 15: The Commission erred in its decision to prohibit any utility from recovering any costs related to the SCT DC Tie or the Garland Project (including the Rusk substation) because did not adequately explain its decision or provide a rational connection between its decision and the facts. (Order at 3, Findings of Fact 119D and 119E, Ordering Paragraphs 32 and 36)

Ordering Paragraph 32 prohibits any utility from recovering in its transmission cost of service costs related to the Rusk substation. The practical effect of this prohibition is to deny Oncor the right to recover the cost of the Rusk substation in its rates. Ordering Paragraph 36 prohibits any utility from recovering costs associated with the Garland Project or the SCT DC Tie. The Commission reversed the findings of the ALJs without explanation other than to state that it is reasonable, in the public interest, and consistent with FERC Order that no utility recover any costs associated with Rusk substation. In so doing, the Commission failed: (1) to make required underlying findings of fact as required by Texas Government Code section 2001.141(d); (2) to provide a rational connection between its decision and the evidence, as required by the principles articulated in *Flores*;[23] and (3) to articulate the specific reasons it changed the ALJs' proposed findings and conclusions on this issue, as required by Texas Government Code section 2003.049.

XVI. Point of Error No. 16: The Commission's decision to prohibit any utility from recovering any costs related to the Rusk substation constitutes a deprivation of property without due process in violation of the Fourteenth Amendment of the United States Constitution and article 1, section 19 of the Texas Constitution. (Order at 3, Findings of Fact 119D and 119E, Ordering Paragraphs 32 and 36)

The due process clause of the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 19, of the Texas Constitution provide a guarantee of fair procedure. The due process clauses also proscribe arbitrary state action. The Commission's Order denying utility recovery of the cost of the Rusk substation without a hearing violates these guarantees.

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[23] 74 S.W.3d 532.

Oncor is not a party to this proceeding. Pursuant to a lawful order of the FERC, Oncor is obligated to provide transmission service for the SCT Project, which will require it to construct the Rusk substation. Oncor will own the Rusk substation. PURA Chapter 36 establishes the procedure for establishing a utility's rates. The Commission's order denies Oncor the opportunity to request recovery of the cost of the Rusk substation in its rates. It is improper for the Commission to conclude in this proceeding that the Rusk substation is not properly includible in Oncor's rate base. Because of SCT's agreement to reimburse Oncor in the event that Oncor is denied recovery of the cost of the Rusk substation in a rate proceeding, SCT is an aggrieved party and has been denied its due process rights.

XVII. Point of Error No. 17: The Commission erred in prohibiting Garland, SCT, Rusk Interconnection, and their affiliates from seeking condemnation until SCT obtains "all necessary regulatory approvals in Louisiana" because the Order is inconsistent with the Commission's decision in its August 25, 2016 open meeting. (Order at 5, Finding of Fact 120A, Ordering Paragraph 20)

In the August 25, 2016 open meeting, SCT understood the Commissioners to decide that the required regulatory approvals pertained only to state agency (i.e., Louisiana Public Service Commission) approval necessary to site and construct the facilities in Louisiana.[24] In a discussion with the Commissioners, SCT stated that the company would accept such a condition.

Ordering Paragraph 20, however, requires SCT to obtain "all necessary regulatory approvals in Louisiana" before seeking condemnation of any land in Panola County, Texas. As SCT explained in the open meeting, some of the regulatory permits arguably required by the phrase "all necessary regulatory approvals" cannot be obtained until after construction of the Louisiana facilities is completed. As a result, Ordering Paragraph 20 effectively requires SCT to complete all construction in Louisiana before seeking condemnation in Texas. This more stringent condition is not consistent with the decision apparently reached in the open meeting.

To make Ordering Paragraph 20 consistent with SCT's understanding of what the Commissioners intended to order, it should be revised as follows:

> Southern Cross Transmission must provide evidence that it has obtained all necessary regulatory approvals from the Louisiana Public Service Commission to site and construct the facilities in Louisiana for the Southern Cross DC Tie and all related interconnection facilities before Garland, Southern Cross Transmission,

[24] See, for example, the discussion in the Open Meeting transcript at 11:10-12 and 12:3-13.

Rusk Interconnection, and their affiliates are permitted to seek condemnation of any landowner's land in Panola County for the Garland project, so long as the landowner provides access to the land for surveying and design purposes.

If the Commission adopts this revision, SCT will waive the following point of error.

XVIII. Point of Error No. 18: As currently worded, the language prohibiting Garland, SCT, Rusk Interconnection, and their affiliates from seeking condemnation until SCT obtains "all regulatory approvals" in Louisiana is not adequately explained and is not rationally supported by the evidence. (Order at 5, Finding of Fact 120A, Ordering Paragraph 20)

The ostensible purpose of the condition is to protect the landowners' land from intrusion by a transmission line project that is later abandoned. The ALJs concluded, however, that there is no evidence that the agreement reached by SCT and Garland with the Panola Landowners Group do not adequately protect the interests of the landowners.[25] That agreement prevents SCT, Rusk, and Garland from seeking to condemn any land before SCT secures funding for the entire project. SCT, Garland, and Rusk proposed the agreement as a condition to the projects, which condition was included in the PFD as Ordering Paragraph 17.

Staff recommended, in addition, that SCT be required to show (1) that it has obtained all regulatory approvals in Louisiana for the SCT DC Tie and (2) it has constructed at least 75% of the SCT DC Tie. Staff offered no supporting testimony or evidence in the hearing to support the two additional conditions. Staff's Statement of Position and Initial Brief provide little or no supporting rationale.[26] Accordingly, the ALJs determined that Staff had failed to prove that the additional conditions would be reasonable.[27]

A similar situation occurred in a previous case, in which the Commission approved a Texas-New Mexico Power Co. (TNP) certificate of convenience and necessity for a power plant, but conditioned the certificate on TNP's receiving "all necessary permits from other state and federal agencies" for the construction and operation of the plant.[28] The Supreme Court sharply criticized the Commission, noting that some of the permits could not be applied for and issued

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[25] PFD at 9.

[26] Staff's Statement of Position at 13; Staff's Initial Brief at 24-25.

[27] PFD, Proposed Finding of Fact 121.

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

until construction had begun or been completed.[29] Accordingly, the Court remanded the case to the district court for review.

The Commission Order articulates no logical rationale for imposing a more stringent requirement that SCT obtain all regulatory approvals, which would significantly delay energization of the project.[30] Moreover, the Commission did not articulate any of the permissible grounds for changing the ALJs' proposed findings of fact. And the Commission simply ignored the ALJs' supporting discussion of their findings in the proposal for decision. As a result, Ordering Paragraph 20 violates both the Commission's own rule and Texas Government Code § 2003.049(h).

The Commission further erred by making findings that are not supported by any evidence.[31] Staff provided no evidence in support of the additional conditions. Moreover, the ALJs noted evidence showing that the SCT line will be highly likely to be built once the company obtains project funding.[32] As a result, there is a clear disconnect between the evidence and the Commission's determination—without an explanation—that SCT should obtain all regulatory approvals before seeking condemnation of any land in Panola County. It is arbitrary and capricious for an agency to fail to make apparent a rational connection between the facts and its decision.[33]

XIX. Point of Error No. 19. The conditions imposed by the Commission are unreasonable and thus contrary to PURA § 37.051(c-2), which permits only reasonable conditions to protect the public interest. (Findings of Fact 42A, 44A, 48B, 59, 62, 70, 70A, 83A, 91A, 107, 119, 119A–119E, and 120A, Ordering Paragraphs 20, 32–36, and 42)

Ignoring statutory limits on the Commission's authority, discriminating against interstate commerce, assigning costs to SCT and entities using its tie that no market participant has previously been charged and that are contrary to PURA and Commission rules, prohibiting the recovery of the cost of a facility without hearing evidence in a ratemaking proceeding, and requiring SCT to obtain regulatory approvals in Louisiana without any evidence supporting such

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[29] *Id.* at 232.

[30] Ordering Paragraph 20 is not supported by Finding of Fact 120A, which would not require regulatory approvals beyond those *necessary to construct* the SCT facilities in Louisiana.

[31] *Flores*, 74 S.W.3d at 541.

[32] PFD at 50.

[33] *Flores*, 74 S.W.3d at 543.

a requirement cannot be reasonable. Such conditions exceed the Commissions statutory authority to impose reasonable conditions pursuant to PURA § 37.051(c-2).

CONCLUSION

For the foregoing reasons, the Commission should delete—or at least reverse its modifications to—all findings of fact and ordering paragraphs stating or ordering (1) that costs should be assigned to SCT or entities importing or exporting over the SCT DC Tie; (2) that no utility shall recover costs for the Rusk substation; and (3) that SCT is required to obtain "all necessary regulatory approvals in Louisiana" before seeking condemnation in Panola County. SCT will waive its no-evidence point of error against the broad language requiring "all necessary regulatory approvals in Louisiana" if the language is replaced with "all necessary approvals from the Louisiana Public Service Commission to site and construct the facilities." The Commission should also restore Finding of Fact 57.

Finally, SCT requests that the Commission grant SCT such other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 3, 2016, a true and correct copy of this document was served on all parties via the Public Utility Commission of Texas Interchange website.

Robert A. Rima