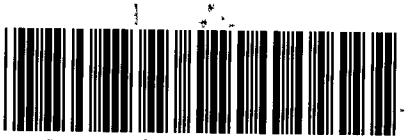

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APPLICATION OF THE CITY OF GARLAND TO AMEND A CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE RUSK TO PANOLA DOUBLE-CIRCUIT 345-KV TRANSMISSION LINE IN RUSK AND PANOLA COUNTIES	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

COMMISSION STAFF'S BRIEF

Respectfully Submitted,

PUBLIC UTILITY COMMISSION OF TEXAS
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COMMISSION STAFF'S INITIAL BRIEF

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this Brief. In support thereof, Staff shows the following:

I. BACKGROUND

On September 8, 2016, the Commission issued an order (Order)[1] in this proceeding adopting the Proposal for Decision (PFD), except as modified in the Order. On October 3, 2016, Southern Cross Transmission LLC (Southern Cross) and Texas Industrial Energy Consumers (TIEC) filed Motions for Rehearing. On December 1, 2016, the Commission granted rehearing to reconsider its decision in this proceeding. The Commission also issued an Order Requesting Briefing asking the parties to respond to three specific questions. The Order Requesting Briefing required Staff to file initial briefs on December 14, 2016. Therefore, this Initial Brief is timely filed.

II. ARGUMENT

The Commission is tasked with the responsibility of fostering a viable competitive market while protecting the public interest to ensure the reliability of the market as a whole. The Commission's Order does not violate the dormant commerce clause of the U.S. Constitution or the Federal Energy Regulatory Commission's (FERC) interconnection order.[2] In addition, the Commission's assignment of specific costs in the Order are well within the authority granted to

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[1] *Application of the City of Garland to Amend A Certificate of Convenience and Necessity for the Rusk to Panola Double-Circuit 345-kV Transmission Line in Rusk and Panola Counties*, Docket No. 45624, Order (Sep. 8, 2016).

[2] *Southern Cross Transmission LLC, et al*, 147 FERC ¶ 61,113 (2014), Garland Ex. 1 at Attachment 4 (FERC Order).

the Commission by Public Utility Regulatory Act (PURA)[3] and Commission rules. Therefore, Staff continues to support the Commission's decision in this proceeding.

A. The Order does not violate the dormant commerce clause of the U.S. Constitution.

Article 1, Section 8, Clause 3 of the United States Constitution gives Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[4] This clause is known as the Commerce Clause.[5] In an opinion authored by Chief Justice Marshall in 1824, the United States Supreme Court interpreted the grant of authority contained in the Commerce Clause as exclusive, stating that "no part of it can be exercised by a State."[6] Since that time, the federal courts have used the Commerce Clause to strike down state and local laws that place an undue burden on interstate commerce. In modern cases, the Commerce Clause is frequently called the dormant Commerce Clause or the negative Commerce Clause when used in this way.[7]

While the Commerce Clause is a grant of exclusive authority to Congress,[8] "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."[9] Adding to the confusion, the jurisprudence surrounding the dormant commerce clause is ill-defined and frequently contradictory. In *Comptroller of Treasury of Maryland v. Wynne*, the late Justice Scalia observed:

> Another conspicuous feature of the negative Commerce Clause is its instability. Because no principle anchors our development of this doctrine—and because the line between wise regulation and burdensome interference changes from age to economic age—one can never tell when the Court will make up a new rule or throw away an old one. "Change is almost [the doctrine's] natural state, as it is the natural state of legislation in a constantly changing national economy."

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[3] Tex. Util. Code Ann. §§ 11.001-58.303 (West 2016), §§ 59.001-66.017 (West 2007 & Supp. 2015) (PURA).

[4] U.S. CONST. art. 1, § 8, cl. 3.

[5] *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1794 (2015).

[6] *Gibbons v. Ogden*, 22 U.S. 1, 2 (1824).

[7] Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787, 1794, 191 L. Ed. 2d 813 (2015).

[8] *Id.*

[9] *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945).

Despite the murkiness, there exists a vague set of rules for evaluating dormant Commerce Clause cases.

Under current precedent, to determine whether or not a state law (or agency order) violates the dormant Commerce Clause, courts use a two-part test.[10] First, the court must determine whether or not the order is discriminatory on its face.[11] In other words, the court must determine whether the law favors in-state interests over out-of-state interests.[12] If the order is facially discriminatory, the order is examined using strict scrutiny.[13] The order is only permissible if the state can show that the discrimination serves a legitimate local purpose and that the order is the least discriminatory means of achieving that purpose.[14] If the order is not facially discriminatory, the order is examined using a balancing test, weighing the local purpose against the discriminatory effects of the order.[15] Under the facts of this case, the dormant Commerce Clause is inapplicable under either test.

Because of the massive DC Tie Southern Cross seeks to connect to the grid, ERCOT will be forced to incur costs that were not incurred during the construction of other DC Ties. Specifically, ERCOT must perform multiple studies and protocol revisions, execute coordination agreements, and potentially acquire additional ancillary services in order to reliably interconnect the Southern Cross DC Tie.[16] Southern Cross is not seeking access to a state market as it presently exists, but is instead attempting to alter the market to its benefit. The conditions imposed upon Southern Cross in the Order are simply a recognition of the unique nature of this project rather than rising to discrimination against interstate commerce. Interpreting the Commerce Clause as requiring intrastate markets to subsidize the participation of out-of-state participants would be a drastic expansion from the existing precedent, which is generally limited to laws prohibiting certain methods of transportation of good in interstate commerce;[17] laws

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[10] Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)

[11] *Id.*

[12] *Id.*

[13] *Id.* at 337.

[14] *Id.*

[15] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472 (1981)

[16] Order at 2–3.

[17] *E.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824) (striking New York law that prohibited all but one company engaging in instate shipping); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978) (striking Wisconsin

limiting out-of-state market participants from in-state markets;[18] laws excluding in-state market participants from out-of-state markets;[19] laws imposing costs on out-of-state market participants that in-state market participants would not have to bear;[20] and laws controlling out-of-state prices.[21] The essential justification for cases struck in all five categories is that the offensive law is unfairly burdening out-of-state interests. As discussed above, the present situation is distinguishable in that Southern Cross is seeking to unfairly burden in-state interests by demanding that those interests pay for the costs associated with the Project, making it the exact opposite of the existing dormant Commerce Clause Supreme Court cases.

B. The assignment of costs in the Commission's decision is well within the Commission's authority.

The Commission has the authority to assign costs associated with the Southern Cross DC Tie and Garland Project because the public interest demands Texas ratepayers not be burdened with subsidizing these projects that provide little to no benefit to them. PURA grants broad authority to the Commission to not only regulate the business of public utilities, but also "to do anything specifically designated or implied by this title that is necessary and convenient" in order to exercise its authority.[22] ; PURA § 37.052(c-2) specifically authorizes the Commission to "prescribe reasonable conditions to protect the public interest" when approving Garland's

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law prohibiting the use of double tractor trailers); and *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662 (1981) (striking Iowa law banning trailers longer than 65 feet except in cities bordering the state line).

[18] *E.g. Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980) (striking Florida law prohibiting out-of-state companies from owning or controlling Florida investment firms); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (striking down law prohibiting in-state landfills from accepting out of state refuse); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Nat. Res.*, 504 U.S. 353 (1992) (striking state ordinance prohibiting private landfill operators from accepting waste that originates outside the county in which their facilities are located).

[19] *E.g., New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (striking a state law prohibiting the export of hydroelectric power); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (striking a state law prohibiting the out-of-state export of minnows); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (striking Alaska law prohibiting purchasers of state-owned timber from processing it outside the state); and *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015) (striking law that unfairly taxed out-of-state income effectively discouraging access to out-of-state markets).

[20] *E.g., Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93 (1994) (striking Oregon tax on the disposal of out-of-state waste); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992) (striking Alabama tax on the disposal of out-of-state waste); and *Hunt v. Washington State Apple Advert. Com'n*, 432 U.S. 333 (1977) (striking North Carolina statute that would increase the cost of importing Washington apples).

[21] *E.g., Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) (striking Connecticut law prohibiting beer distributors from selling beer at lower prices in neighboring states) and *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (striking New York law prohibiting liquor distributors from selling liquor at lower prices in neighboring states).

[22] PURA § 14.001.

application. The Commission exercised this designated authority by finding the public interest demanded ERCOT ratepayers not bear any costs associated with this project.[23] Further, the Commission's decision contains numerous findings of fact stating the allocation of specific costs to Southern Cross is "protective of the public interest."[24] The Commission's allocation of costs is reasonable and necessary for the purposes of exercising the Commission's authority with respect to protecting the public interest in approving Garland's application.

In addition to the Commission having the authority to assign costs for the purposes of protecting the public interest, the assignment of costs in the Order does not violate any other provisions of PURA or Commission rules.[25] Specifically, the Order, by directly assigning transmission upgrade costs,[26] incremental transmission costs to support imports and exports over the Southern Cross DC Tie,[27] and ancillary services to Southern Cross, does not violate PURA §§ 35.004(d-e), 39.001(c), and 39.151(e) and 16 TAC §§ 25.192 and 25.363.

Taken in turn, the conditions directly assigning incremental transmission costs and ancillary service costs to imports and exports over the Southern Cross DC Tie do not violate any provision of PURA. PURA § 39.001(c) prohibits the Commission from discriminating against market participants in ERCOT. The Commission must also ensure ancillary services are available at prices that are not "unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive."[28] The evidentiary record is clear regarding the novel and distinctive characteristics of this project requiring major overhauls to ERCOT protocols and operations.[29]

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[23] Order at 3.

[24] *See id.* at Finding of Fact Nos. 42A, 44A, 48B, 119A, 119B.

[25] Southern Cross in its Motion for Rehearing asserted that the Commission's decision violated a number of provisions of PURA and Commission rules. Southern Cross's Mt. for Rehearing at Point of Error Nos. 3–5, 8–9, and 11–13.

[26] Southern Cross asserts in Point of Error Nos. 3 and 5 that assignment of transmission upgrade costs are contrary to PURA § 35.004(d) and 16 TAC § 25.192. *See id.* at 6–8.

[27] Southern Cross makes this argument in Point of Error Nos. 4 and 10. *See id.* at 7.

[28] PURA § 35.004(e).

[29] Order at 2; *see* Direct Testimony of Dan Woodfin, ERCOT Ex. 2 at 12:2-8 (April 27, 2016) (discussing the challenge the Southern Cross DC Tie presents to the ramp capability of ERCOT); *Id.* at 14 (discussing the changes necessary to incorporate Southern Cross DC Tie into outage coordination); Tr. at 271:9-272:10 (Lasher Cross) (June 1, 2016); Woodfin Direct, ERCOT Ex. 2 at 17:1-14 (citing NERC Standard BAL-002-1 R3 (Disturbance Control Performance)); Direct Testimony of Warren Lasher, ERCOT Ex. 1 at 9:20-10:6 (April 27, 2016) (discussing potential adjustments to ERCOT's planning assumptions for identification of transmission upgrades); Tr. at 271:9-272:10 (Lasher Cross) (June 1, 2016); Bruce Supp. Direct, Southern Cross Ex. 5 at 11:10-22 (noting that there could be modifications to ERCOT's current assumptions that could lead to better modeling).

With respect to ancillary services, the Southern Cross DC Tie will become the most severe single contingency (MSSC),[30] and NERC standards require ERCOT to maintain sufficient contingency reserves to cover the loss of the MSSC.[31] The Southern Cross DC Tie will disproportionately impact incremental transmission costs and ancillary service costs thereby making it appropriate to assign these additional costs to Southern Cross and entities using the Southern Cross DC Tie. Thus, the conditions assigning incremental costs and ancillary services to Southern Cross are not discriminatory, but merely require Southern Cross and its QSEs to bear the full financial burden of the project rather than providing it with a competitive advantage over other market participants in ERCOT.

Further, the Commission's direct assignment of transmission upgrade costs to Southern Cross does not violate PURA § 35.004(d). The Commission is required to price "wholesale transmission services within ERCOT based on the postage stamp method of pricing."[32] This requirement for postage stamp pricing mandates how costs included in TCOS rates are charged to ERCOT customers for transmission services. PURA § 35.004(d), however, does not dictate what costs must be included in a TCOS. The Commission's assignment of transmission upgrade costs merely precludes certain costs from inclusion in TCOS rates and does not make any changes to the method used to determine how the costs are charged to ERCOT customers. The Order is consistent with the Commission's finding that the public interest demands that ERCOT ratepayers not bear any of the costs associated with this project.

The Commission also has the authority to assign ERCOT's costs for studies, protocols, operating guides, and system changes. PURA § 39.151(e) establishes a system administration fee to fund ERCOT's budget. The statute and Commission rules affecting ERCOT's budget activities do not preclude the Commission from acquiring funds for ERCOT's budget through means other than the system administration fee. In fact, pursuant to PURA § 39.151(d), the Commission possesses the "complete authority to oversee" ERCOT's finances, budget and operations. Similarly, the language of 16 TAC § 25.363 does not foreclose the Commission from any other methods of funding ERCOT's activities. Both PURA and Commission rules

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[30] Woodfin Direct, ERCOT Ex. 2 at 17:8–11.

[31] NERC Standard BAL-002-1 R3 (Disturbance Control Performance), Staff Ex. 35.

[32] PURA § 35.004(d).

grant the Commission the authority to directly assign costs especially where such a condition is protective of the public interest.

C. The Commission's order is consistent with FERC's interconnection order.

PURA § 37.052(c-2) authorizes the Commission to place conditions upon the approval of Garland's application so long as those conditions are both reasonable to protect the public interest and consistent with the FERC Order. The FERC Order directs Garland, Oncor, and CenterPoint to provide interconnection and transmission services to Southern Cross consistent with the terms and conditions of a settlement.[33] In addition, in the Offer of Settlement, incorporated by reference in the FERC Order,[34] Southern Cross and Garland agreed to operate the interconnection in compliance with all applicable ERCOT and Commission requirements.[35] The Commission's decision in this proceeding is consistent with the FERC Order because nothing in the Commission's Order prohibits Garland, Oncor, or CenterPoint from providing interconnection and transmission services to Southern Cross. Further, the Commission's conditions assigning specific costs to Southern Cross are not inconsistent with the FERC Order or FERC's exclusive authority to approve interstate transmission rates.[36] There is no language in the FERC Order that FERC considered or required studies to determine whether any changes are needed to ERCOT's Protocols, computer systems, or operations in order to reliably interconnect the Southern Cross DC Tie. The conditions allocating costs affect the ERCOT intrastate market and protect the public interest by ensuring that ERCOT ratepayers are not subsidizing the business of a single market participant. Thus, the Commission's Order is consistent with the FERC Order and serves to protect the public interest.

III. CONCLUSION

The Commission's decision in this proceeding is well-reasoned and supported by abundant evidence. The conditions imposed by the Commission do not discriminate against interstate commerce or Southern Cross, as a market participant, and are well within the authority granted to the Commission by PURA and Commission rules. The Commission's decision is also consistent with the FERC Order requiring Garland, Oncor, and CenterPoint to provide

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[33] FERC Order at P 14.

[34] FERC Order at Ordering Paragraph (C).

[35] Offer of Settlement at 12, Garland Ex. 1 at Attachment 2.

[36] Federal Power Act, 16 U.S.C.A. § 824k (2010 & Supp. 2014).

interconnection and transmission services to Southern Cross. The Commission's Order addresses complex issues and appropriately balances the economic interests of Southern Cross with its statutory duty to protect the public interest. The Commission's decision ensures the continued reliable operation of the ERCOT market for all market participants and Texas ratepayers and provides a clear path forward for Southern Cross's interconnection with ERCOT.

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on December 14, 2016, in accordance with 16 TAC § 22.74.

Jessica L. Morgan