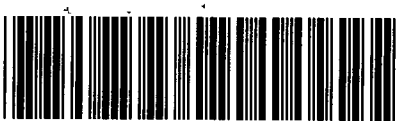

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**PUC DOCKET NO. 45624**
**SOAH DOCKET NO. 473-16-2751**



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

**BRIEF OF LUMINANT GENERATION COMPANY LLC AND LUMINANT ENERGY COMPANY LLC IN RESPONSE TO ORDER REQUESTING BRIEFING**

**TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:**

COME NOW Luminant Generation Company LLC and Luminant Energy Company LLC (collectively, Luminant) and file this brief in response to the limited issues identified in the Order Requesting Briefing issued by the Public Utility Commission of Texas (Commission) on December 1, 2016.

## I. INTRODUCTION

Contrary to the assertions in the motion for rehearing filed by Southern Cross Transmission LLC (Southern Cross or SCT),[1] the final order in this docket does not exceed the Commission's authority under the Public Utility Regulatory Act (PURA),[2] nor does it violate the interconnection order of the Federal Energy Regulatory Commission (FERC)[3] or the Commerce Clause of the U.S. Constitution.[4] SCT's arguments are premised on an incorrect assumption that the proposed merchant SCT Direct Current (DC) Tie is functionally identical to the existing ERCOT DC Ties owned and operated by Transmission Service Providers (TSPs). Because SCT's arguments mischaracterize the governing federal and state regulatory framework, the

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1 Motion for Rehearing of Southern Cross Transmission LLC (Oct. 3, 2016) (SCT Motion).

2 Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-66.016 (West 2007 & Supp. 2015) (PURA).

3 *See Southern Cross Transmission LLC*, 147 FERC ¶ 61,113 (2014) (Final Order Directing Interconnection and Transmission Service); *see also* 137 FERC ¶ 61,206 (2011) (Proposed Order Directing Interconnection and Transmission Services and Conditionally Approving Settlement Agreement).

4 U.S. Const. art. I, § 8.

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balance of authority between the FERC and the Commission, and the record evidence supporting the specific treatment of the SCT DC Tie imposed by the Commission in its order, each of SCT's arguments on rehearing should be summarily rejected.

## II. BACKGROUND

In accordance with Section 37.051(c-2) of PURA, the Commission issued an order approving the application of the City of Garland to amend its certificate of convenience and necessity (CCN) to interconnect the proposed SCT Project on September 8, 2016. In approving the application, the Commission prescribed specific reasonable conditions necessary to protect the public interest, consistent with PURA, the FERC interconnection order in Docket No. TX11-01-001, constitutional mandates, and the record evidence in this proceeding.[5]

On October 3, 2016, SCT filed a motion for rehearing raising 19 points of error. Following consideration of the motion for rehearing at its November 10 and December 1, 2016 open meetings, the Commission requested additional briefing on limited issues: (1) whether the Commission's order violates the dormant commerce clause of the U.S. Constitution;[6] (2) whether the assignment of costs in the Commission's order is within the Commission's authority;[7] and (3) whether the Commission's order violates the FERC interconnection order.[8]

## III. DISCUSSION

### A. The Commission's order does not violate the Commerce Clause of the U.S. Constitution.

In its motion for rehearing, SCT asserts that the Commission's order discriminates against interstate commerce and therefore violates the dormant Commerce Clause of the U.S. Constitution.[9] Specifically, SCT complains that Ordering Paragraphs 31 through 35 "impose discriminatory costs on SCT" that are not imposed on the existing DC ties and place Qualified

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5 Order at 42-47 (Sept. 8, 2016); *see* PURA § 37.051(c-2).

6 SCT Motion Point of Error 1.

7 SCT Motion Points of Error 3, 4, 5, 8, 10, 11, and 12.

8 SCT Motion Point of Error 2.

9 SCT Motion at 3-4; *see* U.S. Const. art. I, § 8.

Scheduling Entities (QSEs) scheduling imports and exports over the SCT DC Tie "at a competitive disadvantage."[10]

The Commission's ordering paragraphs require that SCT must pay for any ERCOT studies, protocol revisions, other ERCOT activities, and additional costs associated with the SCT Project; assign incremental transmission and ancillary service costs necessary to support imports or exports over the SCT DC Tie to users of the SCT DC Tie; and prohibit any utility recovering costs related to the Rusk or Panola substations or the Rusk-to-Panola line specifically, or the Garland project or SCT DC Tie line generally, in the utility's transmission cost of service.[11]

SCT's argument under the Commerce Clause fails. The "dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace."[12] The crux of the inquiry is whether the state law or regulation discriminates by imposing a greater burden on out-of-state companies than in-state companies, thereby subjecting the activities of foreign and domestic companies to inconsistent regulations.[13] "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism."[14] The limitation imposed by the Commerce Clause on state regulatory power "is by no means absolute," however, and the States retain authority "under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."[15]

Under the standards set forth by the Supreme Court, if a state law or regulation discriminates against interstate commerce "either on its face or in practical effect," the burden is on the state to demonstrate that the law or regulation serves a legitimate local purpose and "that

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[10] SCT Motion at 4. In an apparent numbering error, SCT complains of Ordering Paragraphs 31 through 35 in the Commission's order; the text SCT cites, however, corresponds to Ordering Paragraphs 32 through 36. *See* Order at 45.

[11] Order at 45.

[12] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (internal citations and quotations omitted).

[13] *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 894 (1988).

[14] *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

[15] *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Lewis v. BT Invest. Mgrs., Inc.*, 447 U.S. 27, 35, 36 (1980)).

this purpose could not be served as well by available nondiscriminatory means."[16] A state regulation "discriminates" against interstate commerce only if it imposes "commercial barriers or discriminate[s] against an article of commerce by reason of its origin or destination out of state."[17] If, however, the state statute burdens interstate transactions "only incidentally," such statute violates the Commerce Clause only if the burdens imposed on interstate trade are "clearly excessive in relation to the putative local benefits."[18]

Under this test, it is clear that none of the ordering paragraphs in the Commission's order discriminate against interstate commerce. SCT has not identified any way in which the Commission's ordering paragraphs discriminate against non-Texas corporations, directly or indirectly, or impose additional regulatory burdens on non-Texas entities as compared to similarly situated entities in Texas. On the contrary, the Commission's order is nondiscriminatory with regard to its uniform declarations that no utility may recover costs related to the proposed facilities, and that any entity responsible for incremental transmission and ancillary service costs to support imports or exports over the SCT DC Tie will be assigned those costs.[19]

The flaws fatal to SCT's argument are readily demonstrated by the long line of cases addressing challenges to the constitutionality of costs imposed by state and local governments to defray the costs of facilities used by those engaged in interstate commerce—"of which a highway toll is perhaps the quintessential example."[20] In essence, SCT is attempting to compare the costs associated with use of a public highway and a toll road (where only toll road users pay for the privilege of using the toll road) to support a claim that users of the SCT DC Tie will suffer a competitive disadvantage.[21] This type of "apples and oranges" comparison relies on a false equivalency that does not withstand scrutiny.

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16 *Id.* at 138.

17 *C & A Carbone, Inc.*, 511 U.S. at 390.

18 *Id.; see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

19 Order at 45 (Ordering Paragraphs 32, 35, 36).

20 *Am. Trucking Ass'ns, Inc. v. New York State Thruway Auth.*, ___ F. Supp. 3d ___, ___, 2016 WL 4275435, at *15 (S.D.N.Y. Aug. 10, 2016).

21 *Cf. Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 362-63 (1994) ("At least so long as the toll is based on some fair approximation of use or privilege for use, . . . it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.").

Nor can the provisions assigning specific costs to SCT be reasonably characterized as subjecting SCT to discriminatory treatment. As the record evidence overwhelmingly demonstrates, SCT is an entirely new type of market entity for which there is no existing corollary in the ERCOT wholesale market framework.[22] In asserting that the Commission is subjecting the SCT DC Tie to disparate treatment, SCT fails to account for the fundamental ways in which the merchant-owned SCT DC Tie is different from the existing DC Ties in ERCOT. Among those differences, and directly relevant to the question of whether SCT can establish discriminatory treatment for purposes of alleging a cognizable claim under the Commerce Clause, is the fact that the SCT Project is a merchant-owned DC Tie, the objective of which is to compete for profit in the ERCOT market in an entirely new way not presently contemplated under the current ERCOT Protocols and market rules, unlike all the existing DC Ties that TSPs operate in ERCOT today.[23]

Accordingly, any unique treatment of SCT as a merchant DC Tie owner is justified by the record evidence in this case, and the Commission's analysis supporting such treatment could ostensibly apply to other merchant-owned DC Tie projects of a similar nature to the SCT Project, were any to exist. Because SCT has not shown, and cannot establish, that the Commission's order draws distinctions between similarly situated entities in competition with one another, its Commerce Clause argument collapses: "laws that draw distinctions between entities that are not in competition do not 'discriminate' for purposes of the dormant Commerce Clause, because 'in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference.'"[24]

Finally, even if SCT could establish that the Commission's ordering paragraphs somehow have the incidental effect of favoring in-state economic interests over out-of-state interests, SCT would still need to demonstrate that the Commission's order imposes burdens that are clearly

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[22] *See, e.g.*, Direct Testimony of Dan Woodfin, ERCOT Ex. 2 at 6:19-23; Direct Testimony of David Parquet, Southern Cross Ex. 1 at 3:18-22; Direct Testimony of Amanda J. Frazier, Luminant Ex. 2 at 6:2-5.

[23] *See, e.g.*, Direct Testimony of Charles S. Griffey, TIEC Ex. 1 at 28:9-21; Luminant Ex. 2 at 6:2-5; ERCOT Ex. 2 at 6:19-23. In addition, the SCT Project poses substantially different operations and reliability issues as compared to the existing TSP-owned and operated DC Ties in ERCOT. Direct Testimony of Warren Lasher, ERCOT Ex. 1 at 10:20-22; ERCOT Ex. 2 at 16:20-23, 17:11-24.

[24] *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 49 (2d. Cir. 2007) (quoting *Gen. Motors Corp.*, 519 U.S. at 300).

excessive in relation to the local benefits its confers.[25] SCT cannot satisfy this standard. The public benefits posed by the Commission's order include ensuring that proper cost causation principles are adhered to and protecting the functioning of the ERCOT wholesale market. These are matters of fundamental concern that fall squarely within the statutory mandate of the Commission to safeguard.

### B. The Commission's order is consistent with its authority under PURA and does not violate the FERC interconnection order.

In its motion for rehearing, SCT alleges that the Commission's order exceeds its statutory authority and is inconsistent with the FERC interconnection order. Because these two issues are related, and are more fully addressed in Luminant's reply to Southern Cross' motion for rehearing, Luminant provides this brief additional response.

In PURA, the Legislature confers on the Commission broad authority to safeguard the reliability of the ERCOT transmission grid and ensure the competitiveness of the ERCOT wholesale electric market.[26] With the passage of Senate Bill 933 (enacting, inter alia, PURA § 37.051(c-2)), the Legislature further authorizes the Commission to prescribe reasonable conditions to protect the public interest, with the only caveat that any conditions must be consistent with the FERC order directing interconnection of the project with ERCOT. PURA § 37.051(c-2) thereby enables the Commission to fulfill its statutory responsibilities to ensure the reliability of the electric grid and the proper accounting of electricity[27] in ERCOT and to safeguard the competitive electric market in ERCOT by imposing reasonable conditions on interconnection to, and participation in, the ERCOT market.[28]

The Commission's order in this docket, which addresses a number of policy questions of first impression, is consistent with the Commission's statutory grant of policymaking authority with respect to the functioning of the ERCOT wholesale market. What the Commission's order does ***not*** do is usurp the limited jurisdiction of the FERC over the proposed interconnection

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25 *Taylor*, 477 U.S. at 138.

26 PURA §§ 39.001, 39.151.

27 *Id.* § 39.151.

28 *Id.* § 39.001.

between Garland and Southern Cross.[29] Consistent with the FERC's limited jurisdiction with respect to ERCOT, the FERC's interconnection order is necessarily limited in asserting jurisdiction over the interconnecting entities only to the extent necessary to enforce the interconnection orders.[30] But the FERC's authority to order interconnection and enforce the interconnection orders does not equate to authority over the ERCOT transmission grid or the ERCOT wholesale electric market—those matters remain exclusively within the Commission's jurisdiction. Indeed, the FERC interconnection orders acknowledge the Commission's authority over SCT and reiterates that any interconnecting party will be subject to the jurisdiction of the Commission.[31]

## IV. CONCLUSION AND PRAYER

The Commission's order of September 8, 2016, addresses and disposes of the vast majority of Southern Cross' points of error for which additional briefing has been requested. The remaining issue of whether the Commission's order violates the dormant Commerce Clause is without merit and does not warrant any modification of the Commission's order on rehearing.

Accordingly, Luminant respectfully requests that the Commission overrule each and every point of error raised by Southern Cross and affirm its order of September 8, 2016, on rehearing.

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[29] Electric utilities that own the facilities that form the interconnected ERCOT transmission system are not subject to the FERC's plenary jurisdiction and are not deemed "public utilities" under the Federal Power Act (FPA) because they are interconnected with the interstate transmission grid solely by virtue of FERC orders under FPA §§ 210, 211, and 212. *See* 16 U.S.C. §§ 824i, 824j, 824k.

[30] *See id.* § 824(b)(2), (e) (stating that compliance with an order under FPA §§ 210, 211, and 212 does not subject an electric utility to FERC jurisdiction or make the utility a "public utility").

[31] 137 FERC ¶ 61,206 at 4, 9, 11 (2011).

**Respectfully submitted,**

**ENOCH KEVER PLLC**
5918 W. Courtyard Drive, Suite 500
Austin, Texas 78730
512-615-1200 (phone)
512-615-1198 (fax)

By: _____
Kirk D. Rasmussen
State Bar No. 24013374
krasmussen@enochkever.com
Emily R. Jolly
State Bar No. 24057022
ejolly@enochkever.com

**ATTORNEYS FOR LUMINANT GENERATION COMPANY LLC AND LUMINANT ENERGY COMPANY LLC**

## CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing has been served on all parties of record on this, 14th day of December, 2016, in accordance with SOAH Order No. 3 issued in this docket.

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Emily R. Jolly