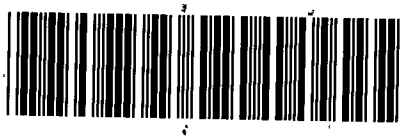

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SOAH DOCKET NO. 473-16-2751
P.U.C. DOCKET NO. 45624

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

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.'S BRIEF OF ISSUES IN COMMISSION'S DECEMBER 1, 2016 ORDER

Electric Reliability Council of Texas, Inc. (ERCOT) submits this brief in response to the Public Utility Commission of Texas's (Commission) December 1, 2016 Order requesting briefing on three questions.

ERCOT notes that it did not take a position on the underlying issues of cost allocation that precipitated these issues in the briefing on the motions for rehearing. However, because the Commission's order has posed these questions without specific application to any particular issue in the case, and because similar concerns could eventually be raised with respect to ERCOT's authority to address matters of reliability and cost allocation, ERCOT believes it appropriate to state its position on these issues at this time.

I. The Commission's September 8, 2016 Order does not violate the Dormant Commerce Clause.

In its Motion for Rehearing, Southern Cross Transmission, LLC (SCT) argues that the Commission's order allocating certain costs to SCT—including costs for ERCOT studies, transmission upgrades, and ancillary services required to support the project—violates the Dormant Commerce Clause. More specifically, SCT argues that allocating costs in this manner discriminates against interstate commerce because it "will artificially raise the cost of exports and

imports" over the SCT DC Tie, and that the Commission has failed to provide a "lawful reason" to justify this alleged discrimination.

ERCOT disagrees with SCT's argument on two grounds. First, the order does not discriminate against interstate commerce because the restrictions imposed on the SCT project are not related to or dependent on SCT's in-state or out-of-state status. Second, even if the assignment of costs were assumed to have an incidental effect on interstate commerce, SCT cannot demonstrate that the alleged burden imposed on such commerce is clearly excessive in relation to the local benefits obtained by the imposition of the complained-of costs.

The U.S. Constitution confers upon Congress the power to regulate commerce among the states. U.S. Const. art. I, § 8, cl. 3. The Supreme Court has interpreted the Commerce Clause as an implicit restriction on the States' power to regulate interstate commerce. *United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). A State violates this "Dormant Commerce Clause" if it treats in-state and out-of-state economic interests differently in order to benefit the former and burden the latter. *Id.* Discriminatory laws motivated by economic protectionism are subject to a "virtually per se rule of invalidity," which can be overcome only by a showing that the State has no other means to advance a legitimate local purpose. *Id.* at 338–39. However, evenhanded regulation that serves a legitimate local public interest and has only incidental effects on interstate commerce is valid, "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

As an initial matter, the Commission's direct assignment of costs to SCT does not intentionally discriminate against interstate commerce. The mere "fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination

against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978). The Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* Accordingly, a regulation discriminates against interstate commerce only when "it provides for differential treatment of *similarly situated* entities based upon their contacts with the State or has the effect of providing a competitive advantage to in-state interests vis-a-vis *similarly situated* out-of-state interests." *Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 501 (5th Cir. 2001) (emphasis added).

Here, the Commission's assignment of costs to SCT is not based on the in-state or out-of-state nature of the proposed facility, but is instead simply aimed at ensuring that the costs that are unique to this project are appropriately borne by the entity causing them—SCT—and not by all ERCOT consumers. For example, the Commission recognized that because the SCT DC Tie would increase the most severe single contingency on the ERCOT grid, greater quantities of ancillary services will need to be procured to ensure reliability in the event of this contingency.[1] The Commission also found that upgrades to ERCOT's systems and procedures would be required "to deal with the import and export of power at the levels proposed" by SCT.[2] The Commission's decision to allocate to SCT the costs of addressing these concerns had nothing to do with the in-state or out-of-state status of the SCT project or whether SCT would be engaging in intrastate or interstate commerce.

Indeed, many of these costs would still be necessary if the project were located wholly inside of Texas and isolated from the rest of the country. For example, if one were to construct a new 2000MW battery in the middle of the ERCOT system, this would also become the single largest contingency (from both an injection and withdrawal standpoint, like the SCT project), and

[1] Docket No. 45624, Order at 21, finding of fact 111.
[2] Docket No. 45624, Order at 2.

any Commission decision to allocate to the owner of that facility (or its Qualified Scheduling Entity) the costs associated with additional ancillary services needed to accommodate that hypothetical, wholly-intrastate facility could be supported by the same public interest grounds that support the Commission's allocation of costs to the SCT project in this matter. As such, and contrary to SCT's claim, there is no basis for the assertion that the Commission's assignment of costs to SCT is motivated by the location of the project or by "economic protectionism."

Even if SCT could establish that the order imposes some incidental burden on interstate commerce, there can be no Dormant Commerce Clause violation unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. In assessing a regulation's putative local benefits, the court may not "second-guess the empirical judgments of lawmakers concerning the utility of legislation," but must instead "credit a putative local benefit so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes." *Allstate Ins. Co. v. Abbott,* 495 F.3d 151, 164 (5th Cir. 2007) (internal quotations and citations omitted).

Here, the Legislature recognized that SCT's planned operations could have significant "impacts on grid reliability, wholesale market prices, and costs to operate the grid" that arise specifically from the unique manner in which the SCT project is structured and intends to operate. *See* House Research Organization Bill Analysis, S.B. 933, 84th R.S. (2015) at 2. Accordingly, the Commission has been expressly authorized by the Texas Legislature to impose reasonable conditions on SCT's operations in order to mitigate these impacts on the ERCOT grid. *See* PURA § 37.051(c-2). The allocated costs that SCT now complain of qualify as rational, "reasonable conditions" imposed, in accordance with section 37.051(c-2), to address the specific public interest concerns identified by the Texas Legislature that are unique to the SCT DC Tie project.

Further, and contrary to any suggestion by SCT, here there is no constitutional requirement that the Commission make a specific "determination of the net economic benefit" prior to allocating the complained-of costs to SCT. Rather, at most all that is required is that the regulations imposed not be "wholly irrational" in light of the government interest at stake. *See Allstate Ins. Co.*, 495 F.3d at 164. Given the significant grid reliability concerns specifically created by the SCT DC Tie project, the cost allocations here survive under this standard.

In sum, SCT cannot show that the complained of cost allocations are "wholly irrational in light of [their] purposes," and, therefore, its Dormant Commerce Clause argument must fail. *See Allstate Ins. Co.*, 495 F.3d at 164.

II. The Commission has authority to allocate costs to SCT.

SCT's assertion that the conditions imposed by the Commission in its order exceed the Commission's authority ignore the plain language and legislative history of PURA § 37.051(c-2). That statute expressly granted authority to the Commission, in approving SCT's interconnection application, to "prescribe reasonable conditions to protect the public interest that are consistent with the final order of the Federal Energy Regulatory Commission." PURA § 37.051(c-2). The legislative history of section 37.051 makes clear that this provision was intended to confer upon the Commission additional rulemaking authority. *See* House Committee on State Affairs Bill Analysis, S.B. 933, 84th R.S. (2015) at 1. The conditions SCT now complains of were imposed in accordance with this delegation of additional authority to the Commission by the Texas Legislature with respect to the Commission's regulation of the SCT DC Tie.

SCT's assertions in its Motion for Rehearing that the complained-of costs are improper because they are not authorized by certain other sections of PURA are without merit. The Commission need not rely on these other provisions to allocate the challenged costs to SCT

because the authority granted to the Commission in section 37.051(c-2), which is specific to the SCT DC Tie project, is sufficient to authorize the Commission's allocation of costs to SCT. Moreover, because section 37.051(c-2) was enacted after the generally-applicable PURA sections that SCT claims serve to bar the Commission from allocating the complained-of costs, Texas law requires that any alleged conflict between the statutes be resolved in favor of section 37.051(c-2), which is specific to the SCT DC Tie project and authorized the Commission's actions in this matter. *See* TEX. GOV'T CODE § 311.026 (a "special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail").

In accordance with its statutory authority, the Commission's order reflects that directly assigning the costs of the SCT project to SCT is a "reasonable condition to protect the public interest." PURA § 37.051(c-2). Specifically, the Commission explains in the order that "the public interest demands that ERCOT ratepayers should not bear any of the costs associated with the Garland project or the Southern Cross DC tie, unless otherwise required by Commission rules." To the extent SCT argues that the findings in the existing Commission order are insufficient, ERCOT does not oppose revision of the Commission's order to further elucidate the factual basis underlying the Commission's conclusion that the costs allocated by the order further the public interest. In their August 22, 2016, brief, Commission staff point to portions of the evidentiary record that support the Commission's overarching finding that the "import and export of power at the levels proposed by" SCT is unique, requires significant changes in the ERCOT system, and justified the allocation of costs set forth in the order. *See* Commission's Aug. 22, 2016 brief at 10-11. It may be beneficial to set forth in the Commission's order such additional, specific facts so

as to remove any doubt that the allocated costs are a reasonable condition imposed to further the public interest.

III. The costs allocated by the Commission do not violate the FERC order.

PURA § 37.051(c-2) requires that the conditions placed upon SCT by the Commission be "consistent with the final order of the Federal Energy Regulatory Commission." In conformance with this requirement, nothing in the existing Commission order conflicts with the FERC interconnection order.

The FERC order recognized, in ordering the interconnection, that the project would be subject to the regulation of the PUC (and ERCOT) over the tie. Specifically, the FERC order repeatedly relies on—and explicitly incorporates by reference—the Offer of Settlement proposed by SCT and the other parties in that proceeding.[3] The parties' Offer of Settlement expressly stated that "Garland and SCT shall operate the Garland-SCT interconnection for any purpose, including the purchase, sale, exchange, transmission, coordination, commingling, or transfer of electric energy in interstate commerce *in compliance with all applicable ERCOT and PUC requirements*."[4] Given this, to the extent the Commission has now imposed certain requirements on the SCT project pursuant to its authority under state law, those requirements are entirely consistent with the terms of the FERC order. Further, because SCT was a key proponent of the Offer of Settlement, SCT cannot now reverse course and argue that it cannot be made subject to reasonable regulations by the Commission (and ERCOT) after it made contrary representations to FERC in order to obtain the interconnection order.

Given the foregoing, the cost allocations in the Commission's order do not conflict with the FERC Order.

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[3] FERC Docket No. TX11-1-001, Order at 8, para. (C).
[4] FERC Docket No. TX11-1-001, Offer of Settlement at 12, para. (F) (emphasis added).

IV. CONCLUSION

The Commission's decision to directly assign to SCT the incremental costs associated with the SCT DC tie project is consistent with the U.S. Constitution and the FERC order authorizing the interconnection of the SCT project. Further, and in conformance with the Commission's authority under PURA § 37.051(c-2), the allocation of these costs to SCT is a reasonable condition necessary to protect the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on all parties of record on December 14, 2016, by posting on the Commission Interchange or by U.S. first class mail in accordance with the provisions regarding service in SOAH Order No. 3 in this proceeding.