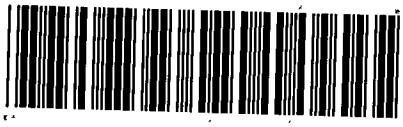

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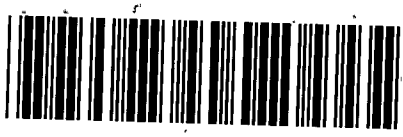

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PUC DOCKET NO. 45624

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**

INITIAL BRIEF ON REHEARING OF SOUTHERN CROSS TRANSMISSION LLC

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INITIAL BRIEF ON REHEARING OF SOUTHERN CROSS TRANSMISSION LLC

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

Southern Cross Transmission LLC (SCT) files this, its Initial Brief on Rehearing, pursuant to the Commission's Order filed on December 1, 2016. The Commission directed SCT, TIEC, and Staff to brief the three issues identified below. Initial briefs are due by 12:00 PM on December 14, 2016; therefore, SCT's brief on these issues is timely filed.

Issue 1. **Does the Commission's order issued on September 8, 2016, violate the dormant commerce clause of the U.S. Constitution?**

Answer: **The Commission's order violates the dormant Commerce Clause by imposing burdens and costs on SCT that would not be imposed on similar projects in ERCOT.**

The Commerce Clause in Article 1, Section 8, Clause 3 of the U.S: Constitution gives Congress the power "to regulate commerce ... among the several states." Under the dormant commerce clause doctrine, the allocation of that power to Congress prohibits states from taking actions that improperly burden or discriminate against interstate commerce.[1] The dormant Commerce Clause acts as a safeguard against state regulatory procedures that enable economic protectionism—"that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[2]

Federal regulation of the wholesale sale and transmission of electricity in interstate commerce can be traced back to the 1927 U.S. Supreme Court decision in *Public Utilities*

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[1] *See Granholm v. Heald*, 544 U.S. 460, 472 (2005); *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *Piazza's Seafood World, LLC v. Odom*, 448 U.S. 744, 749 (5th Cir. 2006).

[2] *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988)).

Commission of Rhode Island v. Attleboro Steam & Electric Co.,[3] which held that the Commerce Clause prohibited states from setting the price of electricity generated in-state but sold across state lines. To fill the gap created by the *Attleboro* decision, Congress in 1935 enacted the Federal Power Act ("FPA"), establishing the Federal Power Commission (now the Federal Energy Regulatory Commission ("FERC")), to regulate the interstate sale and transmission of electricity.

Even with the enactment of the FPA, the dormant Commerce Clause doctrine continues to play vital role in modern federal energy law. While FERC has jurisdiction over wholesale transmission rates in interstate commerce, the dormant Commerce Clause is the protective bulwark against state regulatory measures that discriminate against interstate commerce, even if those state regulatory measures are not expressly prohibited by federal statute.

The Supreme Court has repeatedly recognized that simple state economic protectionism is subject to "a virtually per se rule of invalidity." under the Commerce Clause [4] Courts review regulatory measures that discriminate on their face or discriminate in purpose or effect under a form of strict scrutiny. [5] In such cases, the Supreme Court requires a state to demonstrate that the regulatory measures serve a legitimate, non-protectionist purpose and that there are no less discriminatory means that would advance that purpose.[6] In this case, the Commission's order fails that test on several cost allocation issues.

A. The Commission's Order is facially discriminatory.

First and foremost, the Commission's order is facially discriminatory against SCT. Numerous Ordering Paragraphs ("OPs") from the Commission impose discriminatory costs on SCT, including the following:

- OP 32 prohibits any utility from recovering in cost of service "any costs related to the Rusk or Panola substations or the Rusk to Panola line."

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[3] 273 U.S. 83 (1927).

[4] *Granholm*, 544 U.S. at 476 (quoting *Philadelphia,* 437 U.S. at 624).

[5] *Hughes v. Oklahoma*, 441 U.S. 332, 337 (1979).

[6] *See id.*; *Piazza's Seafood World, LLC*, 448 F.3d at 750; *cf. Philadelphia*, 437 U.S. at 624 ("The crucial inquiry ... must be directed to determining whether ch. 363 is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.").

- OP 33 requires SCT to pay all ERCOT costs for studies, protocol revisions, and other activities required by the SCT project.
- OP 34 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 35 assigns to exports over the SCT Tie any incremental transmission and ancillary services costs required to support exports.
- OP 36 prohibits any utility from recovering in cost of service any costs associated with the SCT project.
- OP 42 requires all flows that pass through the SCT Tie to be accounted for in ERCOT's transmission-cost assignment to ensure that SCT pays for its use of the ERCOT grid.

It is particularly striking that OP 34 expressly acknowledges that SCT is being treated differently by stating that any additional costs "that *would otherwise be borne by ERCOT ratepayers* shall instead be borne by [SCT] . . . ." In other words, those additional costs would *normally* be borne by ERCOT ratepayers for projects *in* ERCOT, but those additional costs are being allocated to SCT's *interstate* project in this instance.

The effect of imposing the above-stated costs on flows over the SCT DC Tie will raise the cost of exports and imports, lower the potential margin on them, and place Qualified Scheduling Entities ("QSEs") scheduling those flows at a competitive disadvantage. The Commission has not imposed such costs on any other DC tie owners.[7] The Commission order would thereby allow a QSE to sell from ERCOT to SPP over the East Tie at one price, but that same QSE attempting a similar transaction from ERCOT to SERC over the SCT DC Tie would be subject to additional costs. The Supreme Court has routinely rejected as impermissible such discriminatory treatment.[8]

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[7] *Cf. John Havlir & Assocs., Inc. v. Tacoa, Inc.*, 810 F. Supp. 752, 756 (N.D. Tex. 1993) ("State statutes that impose burdens on out-of-state businesses that are not applicable to in-state businesses affect interstate commerce just as directly as those that regulate the flow of goods across state lines.").

[8] *See, e.g., Limbach*, 486 U.S. at 475-76 (invalidating Ohio law granting tax credits to ethanol produced in Ohio); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-71 (1984) (invalidating law that exempted local production of liquor and wine from a 20% excise tax on the grounds that it had no purpose other than to insulate local producers from competition); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) ("The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states."); *Philadelphia*, 437 U.S. at 624-28 (applying "a virtually per se rule of invalidity" to express ban on in-state disposal of out-of-state garbage); *see also John Havlir & Assocs., Inc.*, 810 F. Supp. at 756 ("The size and number of businesses, both in-state and out-of-state, affected by a discriminatory statute are irrelevant to the Commerce Clause analysis.").

The Commission Staff's Reply to SCT's Motion for Rehearing acknowledges that SCT is being treated differently from "other DC ties" and "any other market participant," while arguing that discriminatory treatment is justified because of "the unique nature of this project."[9] Similarly, TIEC's Response states that the Commission's order provides "different treatment" in this case, while arguing that discriminatory treatment is appropriate due to different circumstances.[10] Both the Commission Staff and TIEC appear to concede that the Commission has not directly assigned similar costs to the existing DC ties, the existing most severe single contingency (MSSC), or any individual market participant, but instead assigns them to the loads that benefit from such transmission infrastructure and ancillary services. Neither party has provided or cited any evidentiary support for the proposition that the larger size of SCT DC Tie would alone justify the discriminatory treatment under the Commission's order.

B. The Commission's Order fails to identify any legitimate, non-protectionist purpose for discriminatory treatment of SCT and fails to demonstrate that there is no less discriminatory means to achieve such a purpose.

Under a Commerce Clause analysis, the Commission has the burden to identify a legitimate, non-protectionist purpose for its discriminatory treatment of SCT, and it must establish that there are no less discriminatory means to accomplish that purpose.[11] This is a burden that the Commission has not attempted to, did not, and cannot meet.

The Order attempts to justify discriminatory treatment of SCT under the guise of the "public interest," but there is not a reasonable nexus between any specific public interest and the burdens and costs that are imposed on SCT by the Ordering Paragraphs. In its discussion, the Commission determines the public interest requires "that the reliability of the ERCOT system is not jeopardized and cost responsibilities are properly placed on market participants."[12] The Commission then merely includes the phrase "it is protective of the public interest" in most of the findings relating to the conditions imposed. Yet, the record evidence is that Oncor has already completed a reliability study—which was then presented to ERCOT and all TSPs in ERCOT and accepted by FERC—indicating that there is no adverse impact on the reliability of

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[9] *See* Comm'n Staff Reply to Mots. for Reh'g (Oct. 18, 2016) at 6-7.

[10] *See* TIEC's Resp. to [SCT's] Mot. for Reh'g (Oct. 18, 2016) at 7.

[11] *See Kans. City S. R. Co. v. McNamara*, 817 F.2d 368, 376 (5th Cir. 1987).

[12] Order at 3.

the ERCOT grid by interconnecting the SCT project. In practice, under existing protocols that apply to all market participants, ERCOT will allow SCT to operate only up to the point of unresolved congestion. Finally, the ALJs concluded that the evidence in this case does not support assigning costs to SCT.[13] The Commission cannot rely on its public interest statements to pass a rational-basis review, let alone the strict scrutiny standard applied to facially discriminatory state actions.[14]

The Commission's order is inconsistent with its own acknowledgment that FERC "found that the interconnection [with the SCT DC Tie] is in the public interest."[15] Indeed, FERC previously concluded that the ordered interconnection and transmission services related to the project are in the public interest because they will promote efficiency by increasing power supply options and improving competition.[16] Thus, the Commission's invocation of the "public interest" falls flat, particularly in light of the strong evidence in this case that (1) ERCOT already has or will develop the tools to address any operational issues related to maintaining the reliability of the ERCOT grid and (2) SCT customers—i.e., the applicable market participants—will pay for their use of the grid.[17]

In addition, as noted in Issue 3 below, FERC's interconnection order for SCT was premised on ERCOT's existing cost allocation method, which the Commission did not object to. The Commission's complete departure from its existing method solely for the SCT tie is not consistent with that order.

Although this project will be larger in size than other constructed DC ties, that difference alone does not justify the discriminatory treatment in the Commission's September 8, 2016,

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[13] Proposal for Decision at 50.

[14] *See also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (prescribing a balancing test when a state regulation is not discriminatory and regulates even-handedly with only incidental burdens on interstate commerce).

[15] *Id.* at Findings of Fact ¶ 6.

[16] On December 15, 2011, FERC issued its Proposed Order Directing Interconnection and Transmission Services and Conditionally Approving Settlement Agreement (*Southern Cross Transmission LLC, et al.*, 137 FERC ¶ 61,206 (2011) ("Conditional Order") which ordered the rendering of interconnection and transmission services conditioned upon the completion of on-going interconnection and reliability studies and the identification of the facilities to be owned and operated by Southern Cross, Garland and Oncor under the two interconnection agreements appended to the Offer of Settlement. Conditional Order at ¶ 31.

[17] *See also* Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 130 MINN. L. REV. 129, 173-74 (2015), *available at* http://scholarship.law.umn.edu/faculty_articles/426 ("[A] state's claims to benefits cannot be unduly narrow, and cannot be based on a process or substantive choice that ignores out-of-state benefits in making a regulatory choice—any more than a state can ignore out-of-state harms in discriminating against out-of-state firms.")

order. Quite simply, there is no evidence in the record that the project will threaten ERCOT system reliability or that ERCOT protocols and operations cannot accommodate a 2,100 MW project (following reasonable and appropriate updating).[18] No nexus has been shown between the size of the SCT tie and the Commission's discriminatory allocation of costs to that tie. In fact, most of the costs allocated to SCT have nothing to do with project size. In short, the Commission's suggestion that the SCT DC Tie *could* cause reliability problems in ERCOT because of its size is purely speculative and inconsistent with the Commission's actions in the FERC proceeding.[19]

The Commission Staff suggests that the project will require ERCOT to perform multiple studies and protocol revisions, execute coordination agreements, and potentially acquire additional ancillary services.[20] However, ERCOT has routinely undertaken such steps for TSPs, and the Commission has not sought to assign costs to those TSPs as it has in this case. The Commission has not explained how the burdens would be uniquely different for this project so as to justify its clearly discriminatory order, nor can it do so.

The Commission Staff and TIEC suggest that discriminatory treatment of SCT is warranted because the costs should be allocated to external beneficiaries rather than ERCOT ratepayers.[21] But the 2015 Resero/LCG economic analysis shows that by the year 2020, ERCOT would receive substantial benefits, equaling *annual* production cost benefits of $175 million and *annual* consumer benefits of $162 million. In addition, SCT witness Ellen Wolfe's *uncontroverted* testimony shows that tariff charges for exports over the SCT tie will alone produce more than $60 million *annually* in contributions to ERCOT transmission costs.[22] The

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[18] *See* PUC Project No. 46304, *Oversight Proceeding Regarding ERCOT Matters Arising out of Docket No. 45624.*

[19] *See Granholm*, 544 U.S. at 492-93 ("Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods.... The court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable.").

[20] *See* Comm'n Staff Reply to Mots. for Reh'g (Oct. 18, 2016) at 6.

[21] *See id.* at 6 (suggesting that discriminatory treatment is necessary to avoid "subsidiz[ing] the participation of out-of-state participants"); TIEC's Resp. to [SCT's] Mot. for Reh'g (Oct. 18, 2016) at 8 (stating that discriminatory treatment is "clearly justified by the local benefit of preventing ERCOT customers from subsidizing a project that provides them with no benefits").

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

Commission cannot support a finding that there is no benefit to ratepayers or that the benefit is *de minimis*.

Because the record evidence shows such significant benefits to ERCOT ratepayers, the Commission's claim that it is in the public interest to assign discriminatory costs to SCT and entities transacting across the SCT DC Tie is not supported by the evidence. Rather, it is shown to constitute economic protectionism intended to disadvantage and discourage out-of-state renewable energy consumers served by transactions over the SCT DC Tie.[23] Thus, the existing Commission order violates the dormant Commerce Clause by imposing discriminatory burdens and costs on SCT and entities transacting across the SCT DC Tie.

Issue 2: Is the assignment of costs in the Commission's order within the Commission's authority?

Answer: The assignment of costs is not within the Commission's authority for two reasons: (1) The assignment of costs is inconsistent with express provisions of PURA and/or the Commission's rules; and (2) There is no specific, express authority for the Commission to assign costs to SCT as it has done in its order.

A. The Commission may not prescribe conditions that are inconsistent with express provisions of PURA or its own rules.

The cost assignments in the Commission's order are inconsistent with specific provisions of PURA and Commission rules. Obviously, the Commission must comply with express statutory provisions,[24] and Texas courts have made it clear that an agency is bound to follow its own rules.[25]

Pursuant to section 35.004(d) of PURA the price of wholesale transmission services within ERCOT must be based on the postage stamp method. Under this provision, the cost of transmission upgrades in ERCOT is required to be allocated to each utility based on its share of ERCOT's total demand and included in postage stamp transmission rates. Substantive Rule 25.192 implements this requirement. The Commission's assignment of transmission upgrade

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[23] *See* Klass & Rossi, *supra*, at 173 ("Where there is a significant burden on interstate commerce, such laws cannot be justified solely by making reference to protecting reliability or prices for in-state consumers.").

[24] *Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 406 (Tex. 1995).

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

costs to SCT and entities using the SCT tie is fundamentally inconsistent with the postage stamp method required by PURA § 35.004(d) and Rule 25.192.[26]

Ordering Paragraph 34 in the Commission's order requires SCT to bear the cost of any transmission upgrades associated with the Garland project or the SCT DC Tie. Ordinarily, a TSP files an application pursuant to Chapter 37 of PURA, requesting Commission approval of transmission system upgrades that are identified as necessary by the TSP or through the ERCOT planning process. 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 are 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.

Ordering Paragraph 35 in the Commission's order requires incremental transmission service costs necessary to support imports or exports over the SCT DC Tie to 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. Substantive Rule 25.192(c), however, prescribes the FERC expense accounts and plant accounts that are 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 would remove those costs from the calculation of the postage stamp rates, contrary to both section 35.004(d) and Substantive Rule 25.192.[27]

The Commission determined that SCT should directly bear costs incurred by ERCOT for certain system administration activities. Substantive Rule 25.363, which implements this statutory provision, requires ERCOT to maintain a standard chart of accounts and submit annual budgets for approval. Together, PURA and the rule require that a system administration fee be set to fully fund ERCOT's approved budget. Section 39.151(e) further specifies that the fee is to

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[26] The assignment of transmission upgrade costs to entities using the SCT Tie is so clearly inconsistent with the existing rule that no such allocation mechanism even exists in PURA, a rule, or a tariff. It is unclear how the Commission's order would be implemented.

[27] As noted above in footnote 26, there is no allocation mechanism in the current rules to implement the Commission's order.

be collected from wholesale buyers and sellers—a class of market participants that does not include SCT.[28] In addition, it requires that the fee be "reasonable and competitively neutral." The Commission's requirement that SCT bear such costs—particularly costs not imposed on existing DC ties or any existing type of market participant—is inconsistent with section 39.151(e) and Rule 25.363.

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 been ERCOT's practice to pay for the activities in question out of its approved budget. The Commission's special assessment in this case is inconsistent with the Commission's rule, ERCOT's long-standing practices under its protocols, and the method prescribed by the legislature.

Ordering 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." But SCT will not use the ERCOT grid. Moreover, Substantive Rule 25.192(e)(3) clearly makes the entity scheduling an export solely responsible for paying transmission service charges for use of the grid. Requiring SCT to pay for transmission service for exports of power from ERCOT is inconsistent with Substantive Rule 25.192.

B. The Commission may exercise only those specific powers that PURA confers upon it in clear and express language. Notwithstanding section 37.051(c-2), there is no specific, express authority for the Commission to assign costs to SCT as it has done in the final order.

As explained in SCT's motion for rehearing, the Commission's assignment of costs directly to SCT is not specifically authorized by PURA. The Commission may not depart from established cost allocation methods based only on PURA § 37.051(c-2)'s general authorization to impose reasonable conditions to protect the public interest.

In its Reply to Motions for Rehearing, Commission Staff contended that sections 14.001 and 37.051(c-2) grant the Commission authority to assign costs to SCT on the grounds that it is "protective of the public interest."[29] TIEC also cites section 37.051(c-2) as authority for the

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

[29] Commission Staff's Reply to Mots. for Reh'g at 9 (Oct. 18, 2016).

Commission to assign costs to SCT.[30] Neither section, however, specifically grants the power to order a non-Texas utility to bear costs. As shown below, any implied power to do so must be inferred from specific powers expressly granted elsewhere in PURA. No provision in PURA specifically authorizes the Commission to impose such costs on SCT, which is not a public utility and will never be a public utility in Texas.

Moreover, Staff misinterprets section 37.051(c-2), suggesting that it grants broad authority to impose any condition found to be in the public interest. To the contrary, the requirement that conditions must protect the public interest is an express *limitation* on imposing conditions that are specifically authorized elsewhere in PURA. That is, section 37.051(c-2) grants the Commission a *general* authority only to prescribe conditions that are reasonable and protective of the public interest. And it may impose such conditions only based on powers expressly granted elsewhere in PURA. For example, since section 39.151(d) authorizes the Commission to "adopt and enforce rules relating to system reliability," it can condition its approval of the application on SCT's registering with ERCOT as a market participant. But the Commission lacks the power to impose conditions that exercise what amount to new powers not *specifically and expressly* granted in any other provision of PURA—even if the Commission considers them to be reasonable and protective of the public interest.

The other section cited by Staff, section 14.001, is little changed from when it was originally enacted as part of section 16 of the original PURA in 1975.[31] The section grants general authority to the Commission to regulate public utilities and "to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction." The following provision, section 14.002, also from section 16 in the original PURA, is similarly a general grant of power, authorizing the Commission to "adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction."

Notwithstanding the general grants of power in the sections cited by Staff and TIEC, the Commission may exercise only those specific powers that PURA elsewhere confers upon it in clear and express language. The Texas Supreme Court applied this controlling principle in a 1990 Commission case, *Coalition of Cities for Affordable Utility Rates v. Public Utility Commission* (*River Bend*). In its prudence review of the Gulf States Utilities River Bend Nuclear

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[30] TIEC's Response to SCT's Mot. for Reh'g at 9 (Oct. 18, 2016).

[31] Tex. Rev. Civ. Stat. art. 1446c, § 16 (1975).

Power Plant, the Commission contended that section 16 (along with several other PURA provisions) gave it the implied power to reserve judgment regarding the prudence of over $1.4 billion of expenditures on the plant.[32] The Commission intended to review the prudence of those expenditures in a later, separate case.

The Texas Supreme Court rejected the Commission's argument that it had an implied power to revisit the prudence of a portion of the plant expenditures. The Court conceded that section 16 allowed the Commission "to do all things, whether specifically designated by this Act or implied herein, necessary and convenient to the exercise of this power and jurisdiction."[33] Under the Court's construction, however, the quoted language (now in section 14.001) does not grant specific powers to the Commission. Rather, the Court held that the provision only authorized the Commission to exercise such powers that were *specifically* provided by other provisions in PURA:

> [T]he PUC can only do what is necessary and convenient with regard to powers "specifically designated . . . or implied herein . . ." ***by other provisions of PURA.*** There is no language in this or any other section of PURA that allows the PUC to bifurcate into multiple proceedings the issue of a single investment's prudence.[34]

It was undisputed that the original section 16 of PURA broadly granted the Commission the powers to issue orders to "supervise and regulate the business of every public utility within its jurisdiction," to "make and enforce rules reasonably required in the exercise of its powers and jurisdiction," and to "call and hold hearings" with respect to administering PURA. Nonetheless, because nothing in PURA specifically authorized the Commission to bifurcate a prudence review, the Court held that it had no power to call a hearing, make a rule, or issue an order to that end.

River Bend is only one of a series of cases in which Texas courts held that the Commission's broad grant of authority currently in section 14.001 includes only powers specifically provided elsewhere in PURA. In a 1986 case, *City of Lubbock v. Public Utility Commission*, the Commission attempted to overturn a municipal utility charge on the grounds that it conflicted with a Commission substantive rule.[35] The court noted that section 16 of PURA

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[32] *Coalition of Cities for Affordable Utility Rates v. Pub. Util. Comm'n*, 798 S.W.2d 560 (Tex. 1990).

[33] *Id.* at 564.

[34] *Id.* at 564 (ellipsis in original; emphasis added).

[35] *City of Lubbock v. Pub. Util. Comm'n*, 705 S.W.2d 329, 330 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

authorized the Commission to "make and enforce rules reasonably required in the exercise of its power and jurisdiction."[36] Upon examining several other provisions bearing on the issue, however, the court concluded that, under the circumstances of the case, section 16 and the other PURA provisions cited by the Commission did not amount to the "direct statutory authority" required for it to exercise jurisdiction over a municipal regulatory authority.[37] The Court therefore held that the Commission did not have authority to impose its rule on municipalities, notwithstanding the language in section 16 authorizing the Commission to adopt rules. The Court's reasoning demonstrates that sections 14.001 and 14.002 do not specifically authorize the Commission to impose costs on SCT—which is not a public utility in Texas.

Similarly, although the Commission once had broad authority to regulate the rates of telephone companies, the Texas Supreme Court limited its implied ratemaking powers. In a late 1980s telephone rate case, *Public Utility Commission v. GTE-Southwest, Inc.* ("GTE-Southwest"), the Commission attempted to make the company's new rates retroactively effective on a date prior to the issuance of the final order in the case.[38] Again, the Court noted section 16's broad grant of authority, but noted further that an agency may not create and exercise a new power that is not specifically granted:

> [T]he PUC is a creature of the legislature and has no inherent authority. ***An agency may exercise only those specific powers that the law confers upon it in clear and express language.*** As a general rule, the legislature impliedly intends that an agency should have whatever power is reasonably necessary to fulfill a function or perform a duty that the legislature has expressly placed in the agency. ***The agency may not, however, on a theory of necessary implication from a specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and additional power*** or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes.[39]

Finding no retroactive ratemaking authority specifically granted in any provision of PURA under the circumstances of the case, the Court overruled that portion of the Commission's order.[40]

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[36] *Id.* at 330.

[37] *Id.* at 331.

[38] 901 S.W.2d at 406.

[39] *Id.* at 406 (emphasis added; internal quotation marks and citations omitted).

[40] *Id.* at 408.

Applying the same reasoning to this case, an appellate court would overrule the Commission's assignment of costs to SCT.

The courts' reasoning in *City of Lubbock* and *GTE-Southwest* applies with equal force to the Commission's authority to prescribe conditions pursuant to section 37.051(c-2). The Commission cannot use that general power to prescribe conditions that exercise what amounts to a new power. Just as it cannot use its broad rulemaking authority to exercise power beyond its express statutory authority, the Commission cannot prescribe conditions that impose costs or obligations the Commission does not have separate, express authority to impose.

Indeed, the Texas Supreme Court has declined to find Commission implied powers when its express authority seemed fairly clear. In a 2001 case, *Public Utility Commission v. City Public Service Board*, the Texas Supreme Court held that in the absence of express statutory authority, the Commission did not have implied power to adopt the postage stamp method of calculating wholesale transmission rates.[41] It was undisputed in the case that the Commission could regulate wholesale transmission service and set rates for investor-owned utilities.[42] And while it did not have express authority to set municipal utility rates for such service, the Commission contended it had an implied authority to do so by virtue of an express grant of rulemaking authority in section 35.006 of PURA, which provided that it could "adopt rules relating to wholesale transmission service, rates, and access." Since Chapter 35 applies to municipal utilities, the Commission argued, it could adopt a rule prescribing the calculation of wholesale transmission rates for all utilities, which necessarily was the type of rule authorized by section 35.006.[43]

Although it might seem reasonable that the authority to adopt rules relating to wholesale transmission rates implies the authority to prescribe a method for calculating such rates, the Court rejected the Commission's argument. According to the Court, the Commission's rule impinged on municipal utilities' express authority to set their own rates without Commission approval.[44] Therefore, the Court would not infer Commission authority to set municipal wholesale transmission rates from its express statutory authority to adopt rules relating to all

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[41] *Pub. Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 312 (Tex. 2001). The dispute in the case was over the Commission's authority to adopt the postage stamp method before the adoption of the 1999 amendment to PURA that expressly requires that method.

[42] *Id.* at 317.

[43] *Id.* at 318.

[44] *Id.*

wholesale transmission rates. It held that the Commission had exceeded its statutory authority and deemed the rule to be invalid.[45] The same is true in this case, where the Commission lacks express statutory authority to directly assign costs to SCT and, as explained under Issue 2.A, there are express statutory provisions that preclude any implication that an alternative method can be used.

Finally, in a 2007 case, *Texas Municipal Power Agency v. Public Utility Commission*, the Texas Supreme Court revisited the issue of the Commission's authority over municipal utility wholesale transmission rates, when it determined that the Commission could not revise a bundled rate that Texas Municipal Power Agency (TMPA) charged its member cities.[46] The agency's bundled sales rate did not include a separate charge for transmission service.[47] The Court acknowledged that in 1995 the legislature had granted the Commission authority to regulate wholesale transmission service by electrical utilities, including municipal utilities.[48] The Court then examined the mandatory duties relating to transmission service that Chapter 35 imposes on the Commission.[49] Upon concluding that the Commission could reasonably carry out its statutory duties without affecting the sales contracts between municipal utilities, the Court held that the legislature did not impliedly give the Commission the power to revise the contracts.[50] Accordingly, the Court overruled Commission and held that it lacked jurisdiction to unbundle or interfere with TMPA's sales contract.[51]

In the foregoing cases, the Court would not allow the Commission to create what amounted to a new power, no matter how expedient the power might be in administering its other, undisputed powers. The Court's holdings have a clear implication in this case, where the Commission may not extend its authority by implication to impose costs on SCT.

To summarize, the Commission has no specific, express statutory authority to impose the costs in question on an entity such as SCT, which is not a public utility under Texas law. Nor

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45 *Id.* at 325.

46 *Texas Municipal Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184 (Tex. 2007).

47 *Id.* at 187.

48 *Id.*

49 *Id.* at 193-96.

50 *Id.* at 196.

51 *Id.* at 201.

may the Commission assign costs to SCT in a manner that is inconsistent with specific provisions in PURA and the Commission's rules.

Issue 3. Does the Commission's order violate the FERC interconnection order?

Answer: The Commission's order is contrary to the FERC interconnection order.

A. Introduction

As explained below, FERC's interconnection order for SCT includes required findings under FPA § 212 approving the rates, terms, and conditions for the proposed transmission service. FERC's approval under § 212 was premised on the use of existing rates, terms, and conditions established by the Commission and ERCOT protocols, including the existing postage stamp rate allocation of transmission upgrade costs as required by PURA § 35.004(d) as well as the existing load-ratio share allocation of ancillary services costs under PURA § 35.004(e).

Contrary to the premises of the FERC order, the Commission completely departed from its existing cost allocation methods and instead directly allocated transmission upgrade and ancillary services costs to SCT or to users of the SCT tie. The inconsistency is particularly striking, given that the Commission has not adopted a new rule of general applicability here or a new methodology applicable to all similarly situated market participants, but rather is prescribing an ad hoc cost allocation, applicable only to a single entity or to QSEs transacting over only one of six DC ties (i.e., the five existing DC ties plus the future SCT DC Tie).

The Commission recognized in its order that its charge in approving the application is to fashion reasonable conditions to protect the public interest, consistent with FERC's Final Order issued in Docket No. TX11-1-000.[52] Despite that acknowledgment, the Commission's order evidences no consideration for the findings and conclusions reached in the FERC Order, as many of the conditions the Commission's order seeks to impose are contrary to the FERC Order. For that reason alone, the Commission must modify its order to reconcile and make consistent with the FERC Order whatever reliability conditions the Commission has the specific, express authority to impose.

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[52] *Southern Cross Transmission LLC; Pattern Power Marketing LLC,* Final Order Directing Interconnection and Transmission Service, 147 FERC ¶ 61,113 (May 15, 2014) (the "FERC Order").

The FERC Order was issued pursuant to Sections 210, 211, and 212 of the FPA.[53] All three provisions were added by Congress to the FPA in 1978 with the enactment of the Public Utility Regulatory Policies Act of 1978 ("PURPA") and are designed to authorize FERC to order the creation of a new interconnection with the ERCOT transmission system and the rendering of transmission service within ERCOT for transactions over the newly-established interconnection without subjecting ERCOT and utilities operating within ERCOT to FERC's plenary jurisdiction.[54]

Other applicants have utilized the process set forth in FPA Sections 210, 211, and 212 to authorize the creation of a new interconnection with ERCOT while still maintaining the jurisdictional independence of ERCOT and the ERCOT utilities from FERC's plenary jurisdiction.[55] In all of these cases, the rates, terms, and conditions of ordered interconnection and transmission services are set forth in an Offer of Settlement among the parties seeking service and the parties from whom service is requested. FERC's approval of that Offer of Settlement provides the basis upon which FERC issues its final order directing the rendering of interconnection and transmission services.

SCT has been working on its DC Tie project since 2009. It worked initially with Pattern Power Marketing ("PPM") and Garland and later with Oncor and CenterPoint to develop the project, utilizing the statutory framework set forth in FPA sections 210, 211, and 212 and the process employed in earlier proceedings in which new interconnections with ERCOT were ordered.

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[53] FPA Section 210 sets forth the requirements and standards pursuant to which FERC may order the physical interconnection of transmission facilities. Section 211 sets forth the requirements and standards by which FERC may order the providing of wholesale transmission service. Section 212 addressing ratemaking and cost allocation issues pertaining to ordered interconnection and transmission services.

[54] The history of these provisions arises out of what is commonly referred to as the "Midnight Connection." *See* Cudahy, *The Second Battle of the Alamo: The Midnight Connection*, 10 J. NAT. RESOURCES AND ENV'T. 56 (1995). *See also* Fleisher, *ERCOT's Jurisdictional Status: A Legal History and Contemporary Appraisal*, 3 TEX. J. OF OIL, GAS, AND ENERGY LAW 1 (2009).

[55] *See Brazos Electric Power Coop, Inc.*, 118 FERC ¶ 61,199 (2007); *Kiowa Power Partners, LLC*, et al., 99 FERC ¶ 6,251 (2002); *Central Power & Light Co.*, 17 FERC ¶ 61,078 (1981). The interconnection ordered in the *Brazos* order was never built.

A critical aspect of the early development of the SCT Project was to ensure the on-going jurisdictional independence of ERCOT.[56] As a result, SCT considered it vital that the transaction rigorously complied with the statutory requirements and standards set forth in FPA Sections 210, 211, and 212.

Upon reviewing the Application submitted by SCT and PPM in Docket No. TX11-1-000 and accompanying Offer of Settlement entered into among SCT, PPM, Garland, Oncor, and CenterPoint, FERC agreed that the statutory requirements for eligibility for an order issued under Sections 210 and 211 were met.[57] Specifically, FERC found that both SCT and PPM qualified as "electric utilities" and, as such, were entitled to seek orders requiring the provision of interconnection and transmission service pursuant to FPA Sections 210 and 211.[58] Similarly, Garland was also found to meet the requirements of an "electric utility" and could be the subject of an order requiring interconnection under FPA Section 210.[59] Finally, FERC determined that Oncor and CenterPoint, as the transmission and distribution successors of entities that were previously subject to FPA Section 211 transmission service orders, meet the definition of "transmitting utility" and could be the subject of a future order requiring transmission under FPA Section 211.[60]

With respect to the statutory standards that must be met as a condition to the issuance of final orders under FPA Sections 210 and 211, those standards are explicitly set forth in the statute, were commented upon by this Commission and TIEC, and were addressed by FERC in its Conditional Order and its Final Order. It is with respect to those standards that this Commission's order is directly contrary.

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[56] When FPA Sections 210, 211, and 212 were added with the enactment of PURPA, Congress also added Section 201(b)(2) to provide that an entity subject to a FERC order under FPA Sections 210, 211, and 212 is expressly deemed not to be "public utility" and is not subject to FERC's plenary jurisdiction. Congress did not confer any discretion on FERC as to whether an order directing interconnection and/or transmission services must be coupled with the assurance that the jurisdictional status quo of ERCOT is maintained. The status quo is maintained by operation of statute through the express carve-out of entities subject to the FPA Sections 210, 211, and 212 orders from the definition of "public utility" pursuant to FPA Section 201(b)(2).

[57] No party participating in the proceeding claimed that any requirement of FPA Sections 210, 211 or 212 had not been met by the Applicants or the signatories to the Offer of Settlement.

[58] Conditional Order at ¶ 25.

[59] *Id.* In addition, in response to the request of this Commission, FERC went on to determine that Garland's involvement in the transaction did not render Garland a "transmitting utility" under the FPA. *Id.* ¶ 26.

[60] *Id.*

B. The Ordered Interconnection Service

FPA Section 210(c) directs FERC to issue an order requiring the physical interconnection of transmission facilities with the facilities of an eligible applicant only if FERC determines that (1) such order is in the public interest; (2) the order would (a) encourage overall conservation of energy or capital, (b) optimize the efficiency of use of facilities or resources, or (c) improve the reliability of any electric utility system or Federal power marketing system to which the order applies; and (3) the order meets the ratemaking standards set forth in FPA Section 212. The ratemaking standard in Section 212 provides:

> (c)(1) Before issuing an order under Section 210 or subsections (a) or (b) of section 211, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them . . . .
>
> (c)(2)(A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order.

The parties to the Offer of Settlement did reach agreement on the apportionment of costs among them and the compensation or reimbursement reasonably due to any of them. With respect to the costs of interconnection facilities, the Offer of Settlement provides: "Garland further agrees that it will not seek to recover from wholesale or retail customers in Texas the costs incurred in constructing the interconnection facilities identified in the Garland/SCT Interconnection Agreement."

In its comments on the Application and Offer of Settlement, this Commission requested clarification as to whether the commitment made by Garland covers (1) the thirty-mile transmission line from Oncor's Rusk switching station to the new switching station near the Texas/Louisiana border, (2) the switching station at the border and (3) any facilities to be constructed by Garland at Oncor's Rusk switching station pursuant to the Oncor/Garland Interconnection Agreement.[61] In its comments, TIEC contended that the commitment made by the Applicants should not be limited to the facilities to be owned and operated by Garland but, instead, should be expanded to include all ERCOT upgrades that are identified by the

[61] Docket No. TX11-1-000, Comments of the Public Utility Commission of Texas at pp. 5-6 (Nov. 4, 2011).

interconnection and reliability studies.[62] To address this Commission's concerns, the Applicants and Garland made the following revised commitment in the Applicants' Answer to the comments of this Commission and TIEC:

> [T]he existing contractual arrangements pursuant to which Garland is participating in the development of the Project prohibit Garland from seeking to recover from ERCOT ratepayers the original costs of constructing any of the facilities with which Garland is involved and that will be built to connect the Project to the ERCOT transmission system. There is no need, for purpose of this representation, to distinguish between interconnection and transmission facilities—the representation covers the cost of constructing all Garland-owned facilities needed to interconnect the SCT Project to the ERCOT transmission system.[63]

The Applicants objected to TIEC's request to expand the commitment to all ERCOT network upgrades, asserting that the upgrades are already subject to established cost allocation rules within ERCOT and subject to this Commission's oversight, and FERC should not dictate how the costs of those upgrades are allocated.[64]

In its Conditional Order, FERC noted that since the parties to the Offer of Settlement had agreed upon the allocation of costs between them, FERC would not normally need to issue a conditional order.[65] However, FERC also agreed with the comments of this Commission and TIEC that it would not issue a final order directing the interconnection between Garland and SCT, since the interconnection and reliability studies to be performed in connection with the SCT Project were not yet completed and, thus, the interconnection facilities to be built by the parties were not yet finalized. Instead, the parties were directed—upon completion of the interconnection and reliability studies—to revise the interconnection agreements and the Offer of Settlement to "include details regarding the facilities that will be owned, operated and maintained by SCT, Garland and Oncor to facilitate the requested interconnection."[66]

On January 8, 2014, the Applicants received written notification from Oncor that the interconnection and reliability studies within ERCOT necessary to identify the facilities required

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[62] Docket No. TX11-1-000, Comments of Texas Industrial Energy Consumers at pp. 5-6 (Nov. 4, 2011).

[63] Docket No. TX11-1-000, Motion of Southern Cross Transmission LLC and Pattern Power Marketing LLC for Leave to Answer and Answer at p. 5 (Nov. 18, 2011).

[64] *Id.* at p. 6.

[65] FERC Conditional Order at ¶ 29.

[66] *Id.*

to safely and reliably interconnect the SCT Project to the ERCOT grid had been finalized and the requisite review by ERCOT and the ERCOT transmission owners had been completed. As a result, in accordance with Conditional Order, the parties to the Offer of Settlement finalized and filed the executed Interconnection Agreements and revised the Offer of Settlement consistent with the Conditional Order.

To that end, SCT, Garland, and Oncor reached an agreement regarding the specific facilities that each will own, operate, and maintain to facilitate the requested interconnection. These facilities were identified in Exhibit A to each of the final, filed Interconnection Agreements. In addition, the Applicants represented to FERC that the interconnection and reliability studies undertaken by Oncor and reviewed by ERCOT and the ERCOT transmission owners confirmed that, with the construction and operation of the facilities identified in Interconnection Agreements, the SCT Project can be interconnected to the ERCOT grid without any adverse impacts on the continued reliability of the grid. No party to the FERC proceeding—including this Commission and TIEC—took issue with the representation.[67]

Accordingly, FERC issued its Final Order ordering Garland to interconnect to the SCT Project, finding that:

> [T]he Revised Application includes a complete list of facilities that will be constructed. Further, the Revised Application affirms that costs for the facilities identified in the Garland/SCT interconnection agreement are the responsibility of the Project and will not be recovered from ERCOT ratepayers, and that the facilities identified in the Oncor-Garland interconnection agreement will be subject to the jurisdiction of the Texas Commission ***and allocated pursuant to established PUCT rules***. Thus, we find that, with respect to the proposed interconnection, the revised Offer of Settlement meets the requirements of sections 212(a) and 212(k) and will direct Garland to provide the requested interconnection service under the rates, terms and conditions provided for in the revised Offer of Settlement.[68]

Thus, with respect to the FERC-ordered interconnection service to be provided by Garland to SCT, the Applicants agreed to this Commission's request for a clarification of the commitment to ensure that the costs of any facilities to be owned and operated by Garland are not recovered

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[67] The Applicants filed the revised Offer of Settlement and the final executed Interconnection Agreements on February 20, 2014. That same day, FERC issued a Notice of Filing providing March 24, 2014 as the deadline for the submission of comments on or protests to the filing. No comments were submitted before or after the March 24 deadline.

[68] FERC Order at ¶ 20 (emphasis added; footnote omitted).

from Texas wholesale and retail ratepayers. FERC adopted that revised commitment in adopting the Offer of Settlement.

Significantly, FERC agreed with the Applicants that TIEC's request to expand the commitment to cover all ERCOT network upgrades should be rejected, finding that the ratemaking treatment of any upgrades would be addressed under *established* ratemaking principles applied by this Commission to all network upgrades built within ERCOT.[69] This Commission's order is inconsistent with FERC's finding, given that the Commission now seeks to make SCT responsible for all network upgrades associated with the SCT Project.

C. The Offer of Settlement and the Applicable Ratemaking Standards

With respect to a FERC order under FPA Section 211 to provide wholesale transmission service, FPA Section 212(a) requires the "transmitting utility" that is the subject of such order to "provide wholesale transmission service at rates, charges, terms and conditions which permit the recovery by such utility of all costs incurred in connection with the transmission services and necessary associated services. . . ." Furthermore, "such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, *and not unduly discriminatory or preferential*."[70] Finally, FPA Section 212(k) provides that any order "requiring transmission service in whole or in part within ERCOT shall provide that any ERCOT utility which is not a public utility and the transmission facilities of which are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a), on the transmission ratemaking methodology used by the Public Utility Commission of Texas."

In the Offer of Settlement submitted with the Application, the signatories addressed the issue of transmission service over the ERCOT system as follows:

> In connection with the Southern Cross Project, Oncor and CEHE shall transmit power in and out of the ERCOT grid at the rates and under the terms and conditions set forth in Oncor's and CEHE's respective TFO Tariffs,[71] except that each tariff shall be modified as necessary to comply with this Order, for PPM or

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[69] FERC Order at ¶ 20.

[70] Emphasis added.

[71] The reference to TFO Tariff is to the Tariff for Transmission Service To, From and Over Certain Interconnections. The currently effective TFO Tariff on file for Oncor is Revision No. 13 which was accepted for filing by FERC on June 24, 2015 in Docket No. NJ14-10-000. Subsequent revisions to the rates set forth in the Oncor TFO Tariff were filed and accepted for filing in Docket Nos. NJ15-14-000 and NJ15-18-000.

> any other entity that is an eligible customer under the TFO Tariff. Oncor and CEHE shall make compliance filings to modify their respective TFO Tariffs to apply to the import or export of power over the Garland Transmission Facilities and the Southern Cross Project into and out of the ERCOT grid at the Western Point of Interconnection ***at the same rates and on the same terms and conditions under which Oncor and CEHE currently provide transmission services under their respective TFO Tariffs.***[72]

Thus, it was explicitly made clear in the Offer of Settlement that, with respect to transmission service over the ERCOT system, the ordered transmission service applicable to customers transmitting power into and out of ERCOT through the SCT Project would be at the same rates, terms, and conditions provided by Oncor and CenterPoint to their other customers under the existing TFO tariffs, including the existing cost allocation methods employed in ERCOT. No party to the proceeding—and neither the Commission nor TIEC—protested or expressed any reservation with this provision to any degree or at any time. In fact, in its filed Comments, this Commission not only did not object to this provision in the Offer of Settlement but went on to explain to FERC that its existing transmission ratemaking policies were supportive for the transmission of renewable energy:

> Regarding transmission rates, Texas law and PUCT rules for open access to transmission have contributed to the development of wind capacity in ERCOT. The PUCT has adopted open-access rules that differ from [FERC's] rules in several respects. By statute and by PUCT rule, each distribution service provider pays its share of the costs of all the transmission service providers in ERCOT using a postage-stamp method. Rates are not distance sensitive, which helps encourage building transmission lines even though renewable resources are not near load. Moreover, the PUCT's open-access rules provide ease of interconnection. Accordingly, the PUCT's open-access rules encourage development of renewable energy resources.[73]

Given the absence of objections to and, in fact, the affirmative support by this Commission for the application of existing ERCOT transmission ratemaking policies to customers importing and exporting power over the SCT Project, it is not surprising that FERC adopted the Offer of Settlement on this issue. As FERC stated in its Conditional Order:

> The Commission has previously found that the ERCOT protocols and procedures regarding interconnection and transmission service meet the

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[72] Docket No. TX11-1-000, Joint Application of Southern Cross Transmission LLC and Pattern Power Marketing LLC For An Order Directing a Physical Interconnection of Facilities and Transmission Service Under Sections 210, 211, and 212 of the Federal Power Act, Offer of Settlement, Paragraph (K) (Sept. 6, 2011) (emphasis added).

[73] Docket No. TX11-1-000, Comments of the Public Utility Commission of Texas at pp. 6-7 (Nov. 4, 2011) (footnotes omitted).

> requirements of section 212 for purposes of directing interconnection and transmission services under sections 210 and 211, and accordingly, has adopted them for use in the TFO tariffs. Here, under the Offer of Settlement, the parties have agreed to amend their TFO tariffs to apply those ***existing*** rates, terms and conditions to the proposed transmission service. Therefore, we find that, with respect to the transmission services to be provided by Oncor and CenterPoint, the Offer of Settlement meets the requirements of sections 212(a) and 212(k).[74]

FERC re-affirmed this determination in its Final Order, directing that Oncor and CenterPoint provide the requested transmission service under the rates, terms, and conditions provided for in the revised Offer of Settlement.[75]

In light of the unanimous agreement among all of the parties to the FERC proceeding, including this Commission, over the ratemaking standards as well as the ERCOT protocols and procedures to apply to transmission service over the ERCOT system, it is extremely disappointing that this Commission has instead prescribed an entirely new ratemaking methodology applicable only to transmission service to and from the SCT Project. On its face, the Commission's order is in direct conflict with the Offer of Settlement and the FERC Order and contradicts its earlier representations to FERC.[76]

It cannot be reasonably claimed that the discriminatory treatment of SCT and its customers under the Commission's order is necessitated by legitimate operational concerns as to how the SCT Project will impact the ERCOT system. The existing TFO Tariffs provide ERCOT with several tools to address any potential operational concerns. For example, Section 2.19 of the current Oncor TFO Tariff sets forth a number of practices that are available to ERCOT to manage transactions over the transmission system to address transmission congestion, reliability concerns, and emergency situations. The Tariff makes it clear that those practices will be implemented in a non-discriminatory fashion. For example, in addressing transmission constraints, Section 2.19.2 provides:

> To the extent ERCOT determines that the reliability of the transmission system can be maintained by redispatching resources or when redispatch arrangements are necessary to facilitate generation or transmission transactions for an eligible transmission service customer, the Company or transmission service customer will initiate procedures to redispatch its resources, as directed by ERCOT.

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[74] Conditional Order at ¶ 34 (emphasis added; footnote omitted).

[75] FERC Order at ¶ 19.

[76] To be clear, SCT is not asserting that the Commission is somehow prevented from revisiting and refining its rules, only that a wholesale departure in the instant case from its existing rules is contrary to the FERC Order.

> To the greatest extent possible, any redispatch shall be made on a least-cost non-discriminatory basis. Except in emergency situations, any redispatch under this section will provide for equal treatment among transmission service.

SCT has repeatedly pointed out the substance of the above provision in numerous pleadings in proceeding. The Commission's order, however, now makes it clear that SCT and its customers within ERCOT cannot expect non-discriminatory treatment. In fact, the order seems clearly intended to explicitly discriminate against SCT and its customers by making them responsible for the payment of costs that are not allocated to other transmission providers or transmission service customers within ERCOT. Such treatment is directly contrary to the Offer of Settlement and—by virtue of FERC's approval of the Offer of Settlement—the FERC Order itself.

Finally, this Commission might bear in mind that SCT has pursued the development of the SCT Project for nearly eight years and, throughout that process, has worked closely with numerous stakeholders within ERCOT to address legitimate concerns and questions about the Project. The Offer of Settlement was a voluntary agreement reached by SCT, PPM, Garland, Oncor, and CenterPoint to allow the SCT Project to move forward in a way to address the principal regulatory issue of concern throughout ERCOT—i.e., the maintenance of the jurisdictional status quo so that ERCOT and the ERCOT utilities will not become subject to FERC's plenary jurisdiction. The signatories to the Offer of Settlement negotiated the terms of the settlement based on settlements that had been approved in prior Section 210/211 proceedings. Although there were questions and concerns raised by this Commission and TIEC before FERC, for the most part those concerns were addressed and resolved. No party protested the Application or proposed changes to the Offer of Settlement, and no party sought rehearing of the FERC Order.

It is in that context that SCT views this Commission's change in position with respect to the SCT Project as particularly disappointing and unfair. Indeed, the Commission's order could be perceived as not only inconsistent with the FERC Order, but also as an attempt to frustrate the development of a project that has been generally supported by most of the interested Texas stakeholders—including this Commission—over the past eight years. Under the circumstances, SCT would likely have a remedy at FERC pursuant to PURPA Section 205(a),[77] enacted by

[77] Codified at 16 U.S.C. § 824a-1.

Congress with the enactment of FPA Sections 210, 211, and 212, that grants to FERC the authority to exempt electric utilities from any state law, rule or regulation which "prohibits or prevents the voluntary coordination of electric utilities" should FERC "determine that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area."

As discussed above, FERC has already determined that SCT and PPM are "electric utilities" under the FPA and any entity in ERCOT that would seek to sell electricity to purchasers in SERC over the SCT Project would also qualify as "electric utilities."[78] FERC has previously found that the ordered interconnection and transmission services in connection with the operation of the SCT Project are in the public interest because those services will promote efficiency by increasing power supply options and improving competition.[79] If the true purpose of the this Commission's order is to frustrate the development of the SCT Project for discriminatory and protectionist purposes and, as a result, this Commission's order prevents the voluntary coordination of electric utilities seeking the economical utilization of facilities and resources in ERCOT and SERC, then an exemption from the discriminatory provisions of the Commission's order would be warranted.[80] Hopefully, this Commission's reconsideration of the legal issues associated with order indicates a willingness by the Commission to re-evaluate its approach to the SCT Project.

CONCLUSION

SCT urges the Commission to reconsider its September 8, 2016 order in this case and delete those provisions that impose costs on SCT or entities transacting across the SCT DC Tie. SCT is an interstate transmission company. SCT does not, and never will have, facilities in Texas. SCT does not, and will not, engage in energy transactions in Texas. The Commission's direct allocation of costs to SCT or to entities transacting over the SCT tie is contrary to PURA.

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[78] FPA Section 3(22) defines "electric utility" as a person or Federal or State agency (including an entity described in section 201(f)) that sells electric energy."

[79] Conditional Order at ¶ 31.

[80] Indeed, Central and Southwest Corporation ("CSW") filed a petition under PURPA Section 205(a) seeking an exemption from a PUCT order prohibiting the re-establishment of the "Midnight Connection" created by the CSW operating utilities in Texas and Oklahoma. Shortly thereafter, the first DC tie connection between ERCOT and SPP was created by FERC's approval of the first Section 210/211 settlement. *See Central Power & Light Co.*, 17 FERC ¶ 61,078 (1981), *order on reh'g*, 18 FERC ¶ 61,100 (1982).

The Commission does not have the necessary expressed authority to impose costs on an entity that is neither a public utility nor other defined regulated entity under PURA.

Further, the assignment of costs to SCT or entities using the SCT DC Tie that are not assigned to other DC ties or to similar transactions in ERCOT is contrary to SCT's FERC Order. This Commission's order flies in the face of its representations and agreement in the FERC docket regarding the ratemaking standards that apply to transmission service over the ERCOT system, including the SCT DC Tie. Thus, the order violates both PURA § 37.051 (c-2), which specifically applies to this proceeding, and PURA § 35.005(c), which states "The Commission may not issue a decision or rule relating to transmission service that is contrary to an applicable decision, rule, or policy statement of a federal regulatory agency having jurisdiction."

If the Commission imposes new and different ratemaking standards in this case, the resulting facially discriminatory treatment would be a *per se* violation of the dormant commerce clause. Finally, under PURPA Section 205(a), a forum is available at FERC to exempt SCT from a Commission order that is intended to simply thwart the development of the SCT Project.

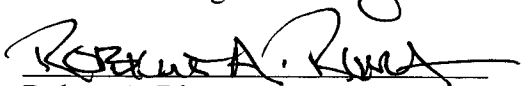
While this brief has focused on the issues designated by the Commission, SCT respectfully requests that the Commission grant SCT's Motion for Rehearing in all respects and provide SCT with such other relief to which it may be entitled.

Respectfully submitted,

Robert A. Rima
State Bar No. 16932500
Law Offices of Robert A. Rima
7200 N. MoPac Expy, Suite 160
Austin, TX 78732-2560
512-349-3449
512-349-9339 Fax
bob.rima@rimalaw.com
Attorney for Southern Cross Transmission LLC

CERTIFICATE OF SERVICE

I certify that on December 14, 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

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