Control Number: 45624

Item Number: 432

Addendum StartPage: 0

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

APPLICATION OF THE CITY OF GARLAND, TEXAS, FOR 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**

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

Pursuant to the Commission's December 1, 2016 Order, the Electric Reliability Council of Texas, Inc. (ERCOT) submits this reply brief in response to arguments set forth in the brief filed by Southern Cross Transmission, LLC (SCT) in this matter on December 14, 2016.

I. The cost allocations in the Commission's order do not discriminate against interstate commerce.

SCT's Dormant Commerce Clause argument misapprehends what constitutes intentional discrimination against interstate commerce and incorrectly places the burden of justifying the Commission's order on the Commission. SCT must produce evidence showing that the challenged parts of the order violate the Constitution, and it has not satisfied this burden.

SCT appears to be asserting that the Dormant Commerce Clause is implicated here because SCT operates outside of Texas. The Dormant Commerce Clause, however, is not violated every time an interstate business is regulated or allegedly placed at a competitive disadvantage. *See, e.g., Texas Manufactured Hous. Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095, 1102 (5th Cir. 1996) (the "mere fact that a statute has the effect of benefitting a local industry while burdening a separate interstate industry does not in itself establish that the statute is discriminatory"). The Supreme Court has made clear that a state does discriminate against interstate commerce by treating an out-

437

of-state business differently than an in-state business, so long as the differing treatment is due to "differences between the nature of their businesses, not from the location of their activities." *Amerada Hess Corp. v. Dir., Div. of Taxation, New Jersey Dept. of Treasury*, 490 U.S. 66, 78 (1989). Because the Commission's decision to assess costs of accommodating the SCT project to SCT is not due to the "location of [its] activities," and is instead the result of the "nature of [its] business," SCT cannot show that the cost allocations it complains of violate the Dormant Commerce Clause. *See id.*

Tellingly, SCT's cited example of alleged disparate treatment fails to support a finding that any alleged differing treatment of SCT is due to the location of SCT's operations. More specifically, SCT asserts the cost allocations are discriminatory because they place SCT at a disadvantage relative to other DC Tie owners.[1] It is unclear from this assertion, however, how this alleged differing treatment constitutes discrimination between "in-state" and "out-of-state" businesses. SCT appears to be claiming that its operations implicate interstate commerce because it seeks to import and export power across a DC Tie. But SCT ignores the fact that the existing DC Ties implicate interstate commerce to the same extent because they engage in the same kinds of transactions. The fact that the Commission's order does not address these other transactions demonstrates that the Commission's order was not aimed at the in-state or out-of-state status of the SCT project, but rather the reliability and cost implications of the project, which are legitimate state concerns. The fact that the cost allocations are unique to SCT therefore supports the conclusion that costs are being allocated to SCT because of the unique *nature* of SCT's operation, not its interstate status. Because this different treatment arises solely from SCT's unique mode of operation, it is constitutionally sound. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–

[1] SCT Brief at 4.

27 (1978) (state's legislative goal "may not be accomplished by discriminating against articles of commerce coming from outside the State *unless there is some reason, apart from their origin, to treat them differently*") (emphasis added).

Notably, SCT does not dispute that significant costs—for, among other things, studies, additional ancillary services, and transmission upgrades—will be incurred as a direct result of this new interconnection. Rather, SCT argues that these costs should be borne by all consumers in the ERCOT market and that operation of the SCT DC Tie should produce sufficient revenue for ERCOT to render the cost allocations unnecessary.[2] The decision as to who should bear costs traceable to SCT's planned operations, however, is a policy choice, not a constitutional infirmity. And, contrary to SCT's assertions, this policy choice is not subject to "strict scrutiny" and need not be the "least discriminatory means" to serve the public interest. It is not the evidentiary burden of the Commission to prove that no other, less discriminatory alternatives to the challenged cost allocations are available, because that burden falls on the State only when the law being challenged intentionally discriminates by treating similar in-state and out-of-state businesses differently. *See Granholm v. Heald*, 544 U.S. 460, 472 (2005) (evidentiary burden on state to justify law that allowed in-state wineries to ship directly to consumers but did not permit similar out-of-state wineries to do the same). As previously explained, SCT is not being treated differently based on its alleged out-of-state status.

To the extent the Commission's order is assumed to have some incidental effect on interstate commerce, it must "be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Supreme Court has noted that "[s]tate laws frequently survive" scrutiny

[2] SCT Brief at 7-8.

under this deferential standard. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008). Further, under this standard it is the burden of the party challenging the action (here, SCT) to prove it is "clearly excessive" relative to the public benefits of the action. *See, e.g., Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 504 (5th Cir. 2001). SCT has not demonstrated how any alleged incidental burden on interstate commerce is "clearly excessive" when compared to the public benefit realized by the cost allocations.

II. The Commission acted within its authority in issuing the order.

In challenging the Commission's authority to impose the cost allocations set forth in the order, SCT argues that PURA § 37.051(c-2) does not grant the Commission any additional rulemaking power, that the cost allocations must instead be authorized by other sections of PURA, and that the Commission's exercise of authority under PURA § 37.051(c-2) cannot conflict with any other section of PURA. SCT's arguments regarding the Commission's authority do not have a sound legal or factual basis.

It is well settled that the PUC "has only those powers expressly conferred upon it by the Legislature." *Public Utility Com'n of Texas v. City Public Service Bd. of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001) (noting that "when the Legislature expressly confers a power on an agency, it also impliedly intends that the agency have whatever powers are reasonably necessary to fulfill its express functions or duties"). In arguing here that the Commission lacks authority to allocate costs to it, SCT cites a number of cases that concerned whether the Commission had *implied* powers to take actions that were not expressly authorized by a specific statute. *See* SCT Brief at 11-15. These cases are not applicable to this matter, however, because the Commission's authority to impose the cost allocations in dispute was expressly conferred upon in it through the Legislature's enactment of a statute directly applicable to this matter, PURA § 37.051(c-2).

SCT's argument regarding the Commission's authority ignores both the plain language and legislative history of PURA § 37.051(c-2). For example, the legislative history of PURA § 37.051(c-2) reflects that the Legislature understood that the "impacts of new large DC ties on consumers and producers are varied and must be formally assessed by the [Commission]." Senate Committee on Natural Resources & Economic Development Bill Analysis, S.B. 933, 84th R.S. (2015) ("S.B. 933 Bill Analysis"). In light of this concern, the amendments to PURA § 37.051—including subsection (c-2)—were enacted to expressly empower the Commission to address these "varied" "impacts." *Id.* The history of the statutory amendment therefore reflects that it was intended to grant the Commission rulemaking power to address any concerns arising from the approval of "new large DC ties"; this specifically included the SCT project. *See id.* Indeed, with respect to the SCT DC Tie, the Legislature specifically empowered the Commission to "prescribe reasonable conditions" when approving SCT's application; the imposition of such reasonable conditions is precisely what has occurred here. PURA § 37.051(c-2).

Given the foregoing, SCT's assertion that the cost allocations at issue must be specifically authorized by sections of PURA *other than* § 37.051(c-2) finds no support in the text or history of the law. Indeed, if SCT were correct, then the 2015 amendment to § 37.051 which introduced this language served no real purpose. Such a reading of § 37.051(c-2) would be contrary to the principle of statutory construction that provides a statute must be read "to give effect to every provision and ensure that no provision is rendered meaningless or superfluous." *Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 248 (Tex. 2010).

Further, SCT's assertion on page 11 of its Brief that PURA § 37.051(c-2) is a *limitation* to the Commission's existing authority ignores the plain language of PURA § 37.051(c-3). Subsection (c-3), which was enacted at the same time as subjection (c-2), can only support the

conclusion that the powers conferred on the Commission under PURA § 37.051(c-1) and (c-2) are *in addition to* the Commission's (and ERCOT's) existing power to adopt rules of "general applicability." *See* PURA § 37.051(c-3) (providing the Commission's authority under § 37.051(c-2) did not restrict its authority to adopt general rules). Indeed, if, as SCT argues, § 37.051(c-2) conferred no additional authority on the Commission other than that which already otherwise existed in PURA, and was instead a limitation to the Commission's authority, then the Legislature would not have needed to make clear in § 37.051(c-3) that the new authority granted under § 37.051(c-1) and (c-2) did not affect the Commission's existing rulemaking authority.

Finally, because PURA § 37.051(c-2) was enacted after the PURA provisions SCT cites as being in conflict with the Commission's actions, and because PURA § 37.051(c-2) grants the Commission authority specifically with respect to the Commission's approval of the SCT application, then any alleged conflicts between PURA § 37.051(c-2) and other existing sections of PURA must be resolved in favor of PURA § 37.051(c-2). *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 light of all of the foregoing, SCT's reading of PURA § 37.051(c-2) cannot be supported, and the Commission acted within its delegated authority under PURA § 37.051(c-2) in allocating costs to SCT.

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

SCT asserts that FERC's order approving the interconnection requires that costs related to the SCT project must be allocated pursuant to only those rules and protocols "existing" at the time of FERC's approval, and that the Commission's allocation to SCT of costs specific to the SCT

project is contrary to this determination. SCT's reading of the FERC order, however, would lead to nonsensical results and is contrary to the Federal Power Act.

SCT's position is founded on two main assertions: (1) that the parties to the Offer of Settlement agreed that costs related to facilities identified in the Oncor-Garland interconnection agreement would be allocated pursuant to "established" Commission rules and (2) that this agreement between the parties was memorialized in paragraph 20 of the FERC order.[3] SCT also argues that Oncor and CenterPoint agreed in the Offer of Settlement that the TFO Tariff for transmission over the SCT DC Tie would be at "the same rate and on the same terms" as the then-existing TFO Tariff used by Oncor and CenterPoint.[4] SCT argues that, as a result, the Commission can now only allocate costs related to the SCT Project in a manner that conforms with methodologies existing at the time the FERC Order was approved. SCT Brief at 23.

SCT appears to be asserting that cost allocations with respect to the SCT DC Tie are somehow frozen in time and must always be calculated in accordance with whatever PUC rules or ERCOT protocols were "existing" or "established" at the time the FERC order was approved. Such a reading of the FERC order is unworkable as a practical matter, because it would prevent the PUC and ERCOT from ever modifying such rules and protocols (at least with respect to the SCT DC Tie), even if conditions change in a manner that warrants amendments to ensure reliability of the grid. Such a result would be nonsensical and cannot be a reasonable interpretation of the FERC order, particularly given that the FERC order contemplates that the SCT Project will be subject to the ongoing jurisdiction of the PUC. Accordingly, to the extent the FERC order refers to cost allocations being controlled by "established" PUC rules, it must necessarily be read as referring to rules the PUC has established *or may establish or amend in the future.*

[3] SCT Brief at 21.
[4] SCT Brief at 23.

Further, the FERC order must be construed to be consistent with the Federal Power Act. Section 212(k) of the act provides that an order approving an interconnection must require that compensation for transmission services be based on the "transmission ratemaking methodology used by the Public Utility Commission of Texas." 16 U.S.C. § 824k(k). If, as SCT appears to suggest, FERC effectively bound the PUC and ERCOT to the ratemaking methodologies existing at the time the SCT interconnection order issued, then that part of the FERC order would be in violation of Section 212(k) because it would usurp the authority left *to the Commission* under Section 212(k). *See id.* Stated another way, FERC lacks authority under the Federal Power Act to make ratemaking decisions for transmission services in ERCOT over interconnections approved under sections 210 and 211 of the Federal Power Act, because Section 212(k) places that authority in the hands of the Commission. Given this, the FERC order cannot be read in the manner SCT appears to suggest, because it would be contrary to the deference granted to the Commission in Section 212(k).

SCT's argument ignores the fact that the SCT DC Tie introduces a number of concerns that are not contemplated or addressed under existing rules. For example, the prospect of the sudden loss of a 2,000 MW DC tie that is exporting from the ERCOT system creates the need to evaluate whether an entirely new ancillary service may be necessary, which would certainly require new rules governing the procurement of such a product.[5] Accordingly, it cannot be said that, at the time the FERC order issued, there were "existing" or "established" rules or protocols that governed the allocation of the costs at issue, which are unique to the SCT Project. Rather, the costs being allocated to SCT in the Commission's order are necessarily separate and apart from any cost allocations that may have been governed by "established PUCT rules" referenced in the Offer of

[5] Direct Testimony of Dan Woodfin (Apr. 27, 2016) at 17-19.

Settlement and FERC order. Indeed, after FERC's order issued, the Texas Legislature recognized the SCT project as a "new large DC tie" that was expected to impose various "impacts" on the ERCOT grid that were yet to be assessed. *See* S.B. 933 Bill Analysis. Given this, it would be entirely unreasonable to read the FERC Order as binding the Commission and ERCOT to then-"established" cost allocation methodologies, when those methodologies had never before accounted for costs impacts associated with a project of the magnitude presented here.

Given all of the foregoing, the FERC Order cannot be read as binding the Commission to any pre-"existing" or then-"established" methodology regarding the complained-of cost allocations to SCT. Rather, and as the Federal Power Act contemplates, cost allocation and ratemaking methodology decisions in this context are left to the ongoing authority of the Commission. The Commission, therefore, has not taken any action in its order that is in violation of the FERC order.

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,

Chad V. Seely
Vice President & General Counsel
Texas Bar No. 24037466
(512) 225-7035 (Phone)
(512) 225-7079 (Fax)
chad.seely@ercot.com

Nathan Bigbee
Assistant General Counsel
Texas Bar No. 24036224
(512) 225-7093 (Phone)
(512) 225-7079 (Fax)
nathan.bigbee@ercot.com

Erika M. Kane
Corporate Counsel
Texas Bar No. 24050850
512-225-7010 (Phone)
512-225-7079 (Fax)
erika.kane@ercot.com

ERCOT
7620 Metro Center Drive
Austin, Texas 78744

ATTORNEYS FOR ELECTRIC
RELIABILITY COUNCIL OF TEXAS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on all parties of record on December 28, 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.