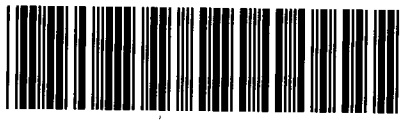

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PUC DOCKET NO. 45624
SOAH DOCKET NO. 473-16-2751

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

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

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

Luminant Generation Company LLC and Luminant Energy Company LLC (collectively, "Luminant") file this reply brief in response to the Initial Brief on Rehearing of Southern Cross Transmission LLC ("Southern Cross" or "SCT") filed on December 14, 2016.

I. REPLY TO SOUTHERN CROSS

A. The Commission's order does not violate the Commerce Clause.

In its supplemental initial brief on rehearing, SCT re-urges the same flawed argument under the Commerce Clause that it raised in its motion for rehearing.[1] Although SCT has now cited case law discussing the Commerce Clause, none of those cases supports SCT's claim that the Commission's order violates the Commerce Clause. And while SCT's argument is still not clear in terms of what "out-of-state" interests have supposedly been treated disparately from "in-state" interests, what is clear is that the activities of similarly situated entities have not been subjected to inconsistent regulations under the Commission's order in this case.[2] In an attempt to allege a Commerce Clause violation, SCT misapplies the governing legal standards about what

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[1] *Compare* Motion for Rehearing of Southern Cross Transmission LLC at 3-4 (Oct. 3, 2016) (hereafter, "SCT Motion"), *with* Initial Brief on Rehearing of Southern Cross Transmission LLC at 3-4 (Dec. 14, 2016) (hereafter, "SCT Initial Brief").

[2] *CTS Corp. v. Dynamic Corp.*, 481 U.S. 69, 88 (1987) (holding the Commerce Clause is intended to invalidate statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations).

constitutes a "facially discriminatory" regulation and mischaracterizes the record evidence supporting the Commission's decision. SCT's argument should again be rejected on rehearing.

The Commission's order is not facially discriminatory. In claiming otherwise, SCT argues that provisions in the Commission's order that are specific to Southern Cross equate to "facial discrimination" against SCT and therefore, apparently, against interstate commerce. But whether SCT has been allocated specific costs under the Commission's order is neither relevant to nor dispositive of the issue of whether the Commission's order is facially discriminatory against interstate commerce. The Supreme Court has been explicit that "facial discrimination" for purposes of a Commerce Clause violation requires a showing that a law or regulation distinguishes between similarly situated in-state and out-of-state products or entities and no nondiscriminatory basis for the distinction can be shown.[3] The "expansive" interpretation of discrimination that SCT is urging here, where "some out-of-state interest" is purportedly burdened and "some in-state interest" is purportedly benefited,[4] has been consistently rejected by the courts as failing to amount to "facial discrimination" in violation of the Commerce Clause.[5]

In effect, SCT is viewing itself as a proxy for all "out-of-state" interests in suggesting that any direct assignment of costs to SCT must be unconstitutional because those costs have not been assigned to "other" entities. As discussed below, none of the cases SCT relies on supports its argument.

- *New Energy Co. v. Limbach*, 486 U.S. 269 (1988): The Court identified as facially discriminatory an Ohio law that awarded beneficial tax treatment for each gallon of ethanol produced in Ohio or in a state that granted similar tax advantages to ethanol produced in Ohio—a law that "explicitly deprive[d] certain products of generally available beneficial tax treatment" on the basis of out-of-state origin.[6]

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[3] *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 96 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)).

[4] Presumably, SCT believes that it is being treated differently from "other DC ties," *see* SCT Initial Brief at 5, although it has not identified—and there is no record evidence suggesting—which "other DC ties" are similarly situated, "local" in-state entities that are afforded favorable treatment under the Commission's order.

[5] *See, e.g., Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 500 (5th Cir. 2001) ("Ford would have us interpret *Oregon Waste Sys.*'s basic definition of discrimination—"differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"—to include all instances in which a law, in effect, burdens some out-of-state interest while benefitting some in-state interest. . . . Ford's expansive interpretation of discrimination is inconsistent with Supreme Court precedent.").

[6] 486 U.S. at 274.

- *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984): The Court held invalid a law that exempted locally produced okolehao liquor and pineapple wine from a 20 percent excise tax that applied to all other sales of liquor and wine, including locally produced non-okolehao liquor and other locally produced fruit wine.[7]

- *New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982): The Court determined that an order of the New Hampshire Commission prohibiting New England Power, a member of the six-state New England Power Pool, from selling its hydroelectric energy out of state of New Hampshire to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states violated the Commerce Clause.[8]

- *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978): The Court struck down a New Jersey state law prohibiting the importation of solid or liquid waste originating or collected out-of-state, except waste to be fed to in-state swine, on the basis that it did not "regulate[] evenhandedly to effectuate a legitimate local public interest."[9]

- *John Havlir & Assocs., Inc. v. Tacoa, Inc.*, 810 F. Supp. 752 (N.D. Tex. 1993): The district judge struck down certain now-repealed Texas Business and Commerce Code provisions that: (1) subjected out-of-state, but not in-state, business principals to treble damages for breach of contract damages; (2) required out-of-state, but not in-state, principals to enter into written contracts with sales representatives; (3) declared certain types of venue agreements in out-of-state principals' contracts, but not in-state principals' contracts, to be void; and (4) prescribed stringent time limits for out-of-state business principals to make commission payments to sales representatives, without subjecting in-state principals to these requirements.[10]

All of these cases are distinguishable because all of them involve some disparate treatment between similarly situated in-state and out-of-state products or businesses—and, in some cases, disparate treatment among similarly situated in-state business (as with the Hawaii tax on liquor and wine applied unevenly across local businesses) or disparate treatment among similarly situated out-of-state businesses (as with the New Jersey waste regulation that was applied unevenly to out-of-state imports of waste based on whether the waste was for swine

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7 468 U.S. at 265, 272-73.

8 455 U.S. at 344. Notably, the U.S. Supreme Court, in analyzing cases addressing export controls like *New England Power Co.*, has specifically considered the complex regulatory scheme set forth in the Federal Power Act (FPA) and the legislative policy embodied in the FPA. *See, e.g., Dep't of Revenue v. Davis*, 553 U.S. 328, 370 (2008); *California v. FERC*, 495 U.S. 490, 498-99 (2000).

9 437 U.S. at 624, 628.

10 810 F. Supp. at 754.

consumption). SCT's complaints implicate no such disparate treatment as to similarly situated entities participating in the ERCOT wholesale market.[11]

Because the Commission's order neither facially, nor in practical effect, violates the Commerce Clause, the only potential remaining question is whether the Commission's order imposes a burden on interstate commerce that is "clearly excessive" in relation to the order's putative local benefits.[12] SCT's claim that the Commission's order fails to identify a legitimate, non-protectionist interest rests on a mischaracterization of the record evidence and the findings of fact supporting the Commission's order. SCT attempts to argue that the reliability and interconnection studies Oncor completed in 2013 show "no adverse impact" on the reliability of the ERCOT grid by interconnecting the SCT Project and suggests that the Commission has therefore overstepped its authority in imposing conditions to protect the public interest.[13] The issue, however, is not simply whether the SCT Project can be interconnected to the ERCOT grid, but what the impacts to ERCOT consumers and producers will be once the DC tie is importing and exporting 2,100 MW into and out of ERCOT. Not only does SCT rely on studies that Oncor itself characterizes as stale,[14] SCT also ignores the undisputed record evidence that ERCOT's existing transmission capacity is inadequate to accommodate current generation in the area of the SCT Project and imports over the tie line—in fact, Oncor did not even study the specific import and export levels presently proposed by SCT.[15] On this record, the Commission's order properly accounts for the tremendous uncertainty posed by the potential impacts of the SCT Project on the

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[11] Assuming *arguendo* that the Commission's order could be found to be discriminatory, on its face or in practical effect, it could still be sustained on the basis that it is a compensatory regime designed to make interstate commerce bear the burdens already borne by intrastate commerce. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996). This principle, which the Supreme Court has recognized as a savings for regulations that are otherwise facially discriminatory, comports with the Commissioners' recognition in this docket that the existing ERCOT transmission infrastructure, funded by ERCOT ratepayers, should not be used to subsidize entities exporting electricity outside of ERCOT, but that those exporting entities should be required to pay their pro rata share of the ERCOT transmission infrastructure (including the CREZ infrastructure).

[12] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This analysis does not demand "strict scrutiny," as SCT wrongly suggests. *See* SCT Initial Brief at 3.

[13] SCT Initial Brief at 5-6.

[14] Letter to Administrative Law Judges Bell and Rodriguez (July 18, 2016) ("Interpolation [by SCT] from Oncor's prior study results is neither an appropriate nor a reliable manner to gauge future transmission needs or the potential impacts of the Southern Cross Project.").

[15] SCT Ex. 10, Exhibit SG-1-R at 4, 13, 21-32; Tr. 201:21-25 (Gray Cross), 276:10-14 (Lasher Cross) (June 1, 2016).

functioning of the ERCOT wholesale market and the reliability and operation of the interconnected ERCOT transmission system.

B. The Commission's order is consistent with its authority under the Public Utility Regulatory Act (PURA)[16] and does not violate the FERC interconnection order.

SCT's remaining arguments, which are fundamentally based on two incorrect assumptions, also fail. First, SCT incorrectly assumes that Section 37.051(c-2) of PURA—the provision pursuant to which the Commission ordered the reasonable conditions it imposed in this case—is a limitation of the Commission's authority. SCT then strains to characterize the conditions the Commission imposed as exceeding the Commission's authority under PURA.

In fact, the Legislature's enactment of Section 37.051(c-2) was an enlargement of the Commission's authority to review a particular subset of applications for a certificate of convenience and necessity (CCN) for new transmission line facilities. Specifically, while the Commission's review of CCN applications had traditionally been confined to consideration under PURA Section 37.056 based on whether the certificate is "necessary for the service, accommodation, convenience, or safety of the public," the Legislature instructed that, for a CCN application for a tie line, the certificate must also be consistent with the public interest.[17] The Legislature further expounded on the issues relevant to the public interest determination, providing a non-exhaustive list of issues it believed could be impacted by the interconnection of large, new merchant DC ties like the SCT Project, including "price formation, resource dispatch practices, reliability, the quantity and cost of ancillary services, and resource adequacy."[18]

Consistent with this intent, the Legislature unambiguously authorized the Commission to formally assess the impacts of large, new merchant DC ties on consumers and producers and impose conditions necessary to protect the public interest from these impacts.[19] The conditions ordered by the Commission in this proceeding are fully consistent with this legislative mandate—and they also relate directly to the Commission's existing authority under PURA to

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16 TEX. UTIL. CODE ANN. §§ 11.001-66.016 (West 2007 & Supp. 2015).

17 Senate Research Center, Bill Analysis, S.B. 933, 84th Leg., R.S. (July 1, 2015).

18 *Id.*

19 *Id.*

ensure the reliability of the electric grid and the proper accounting of electricity in ERCOT,[20] and to safeguard the ERCOT competitive electric market.[21]

Second, SCT incorrectly assumes that the FERC interconnection order expands the FERC's authority with respect to the activities of entities operating within ERCOT. This incorrect and unsupported assumption is fatal to SCT's claim that the Commission's order exceeds the authority conferred on the Commission under PURA and renders the Commission's order inconsistent with the FERC interconnection order. As Luminant has already fully addressed in its Initial Supplemental Brief on Rehearing and its Response to SCT's Motion for Rehearing, the FERC interconnection order cannot and does not expand the FERC's oversight of ERCOT wholesale market operations and other matters within the purview of the PUC.[22] Now, in its initial brief on rehearing, SCT raises for the first time the argument (for which it cites no evidence or authority) that the FERC approval of the SCT interconnection was "premised" on an understanding that "the existing postage stamp rate allocation of transmission upgrade costs," as well as "the existing load-ratio share allocation of ancillary services costs" would be applied in the future to the SCT Project.[23] Even setting aside that there is no evidence of this alleged intent or support for this argument in the FERC interconnection order, this new argument is illogical because it wrongly suggests that the FERC could premise its approval of the interconnection on matters outside its plenary jurisdiction.

SCT's attempts to argue that the FERC interconnection order binds the Commission's exercise of authority with respect to matters that remain wholly within the Commission's jurisdiction under the FPA and that were specifically entrusted to the Commission's review under Section 37.051(c-2) by the Legislature's enactment of Senate Bill 933 are unavailing and should be rejected.

II. CONCLUSION AND PRAYER

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

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20 PURA § 39.151.

21 *Id.* § 39.001.

22 *See also* 147 FERC ¶ 61,113 at 2 n.3, 8 (2014).

23 SCT Initial Brief at 16.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing has been served on all parties of record on this, 28th day of December, 2016, in accordance with SOAH Order No. 3 issued in this docket.

Emily R. Jolly w/permission by Dori House
Emily R. Jolly