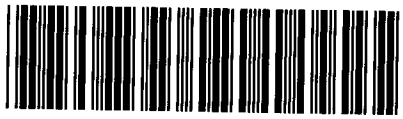

Control Number: 45624

Item Number: 434

Addendum StartPage: 0

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

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	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

COMMISSION STAFF'S REPLY BRIEF IN RESPONSE TO ORDER REQUESTING BRIEFING

Respectfully Submitted,

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434

TABLE OF CONTENTS

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

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COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this Reply Brief. In support thereof, Staff shows the following:

I. BACKGROUND

On September 8, 2016, the Commission issued a final order (Order)[1] in this proceeding adopting the Proposal for Decision (PFD), except as modified in the Order. On October 3, 2016, Southern Cross Transmission LLC (Southern Cross) and Texas Industrial Energy Consumers (TIEC) filed Motions for Rehearing. On December 1, 2016, the Commission granted rehearing to reconsider its decision in this proceeding.

On December 1, 2016, the Commission also issued an Order Requesting Briefing asking the parties to respond to three specific questions. On December 14, 2016, Southern Cross, TIEC, Luminant Generation Company LLC and Luminant Energy Company LLC (collectively, Luminant), the Electric Reliability Council of Texas, Inc. (ERCOT), and Staff all filed initial briefs responsive to the Order Requesting Briefing. The Order Requesting Briefing required the parties to file a reply brief on December 28, 2016. Therefore, this Reply Brief is timely filed.

II. ARGUMENT

Staff supports the Commission's Order in this proceeding. Arguments by Southern Cross in its initial brief attack the Order by charging the Commission with altering changing its

[1] *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*, Docket No. 45624, Order (Sep. 8, 2016).

position from that in the Federal Energy Regulatory Commission (FERC) proceeding[2] and asserting that the Commission's decision violates the dormant Commerce Clause of the U.S. Constitution,[3] exceeds the Commission's statutory authority by allocating costs to Southern Cross,[4] and is inconsistent with the FERC interconnection order.[5] Staff agrees with TIEC, Luminant, and ERCOT's positions that the Commission's Order does not violate the dormant Commerce Clause of the U.S. Constitution or the FERC Order.[6] In addition, Staff also agrees with TIEC, Luminant, and ERCOT that the Commission's decision to allocate costs to Southern Cross is well within its statutory authority. Therefore, Staff recommends the Commission issue an order on the Motions for Rehearing consistent with the Commission's decisions articulated in the Order.

A. The Order does not violate the dormant commerce clause of the U.S. Constitution.

Southern Cross alleges the cost allocations in the Commission's Order violates the dormant Commerce Clause.[7] Specifically, it argues that the cost allocations constitute facial discrimination and that the alleged justification for the cost allocations cannot withstand strict scrutiny.[8] Unfortunately for Southern Cross, the Commerce Clause does not restrict state actions authorized by Congress, such as the state action in this order. Additionally, the Commerce Clause does not regulate the distribution of subsidies, which is essentially what Southern Cross is requesting. Finally, Southern Cross has not and cannot show that they are the victims of discrimination as that term is used in the context of the dormant Commerce Clause.

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[2] *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,* Docket No. TX11-1-000 (2011).

[3] Initial Brief on Rehearing of Southern Cross Transmission LLC at 2–8 (Dec. 14, 2016) (Southern Cross's Brief on Rehearing).

[4] *Id.* at 8–16.

[5] *Id.* at 16–26; *Southern Cross Transmission LLC, et al*, 147 FERC ¶ 61,113 (2014), Garland Ex. 1 at Attachment 4 (FERC Order).

[6] *See* Texas Industrial Energy Consumers' Initial Brief on Rehearing at 1–8 (Dec. 14, 2016) (TIEC's Brief on Rehearing); Brief of Luminant Generation Company LLC and Luminant Energy Company LLC in Response to Order Requesting Briefing at 2–6 (Dec. 14, 2016) (Luminant's Brief on Rehearing); Electric Reliability Council of Texas, Inc.'s Brief of Issues in Commission's December 1, 2016 Order at 1–5, 7 (Dec. 14, 2016) (ERCOT's Brief on Rehearing).

[7] Southern Cross's Brief on Rehearing at 3.

[8] *Id.* at 3-4.

1. The Dormant Commerce Clause is completely inapplicable because the Commission is acting with congressional authorization.

The Commerce Clause grants Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[9] Since the 19th Century, the Supreme Court has consistently held that Congress has authority to consent to State legislation that would otherwise violate the dormant Commerce Clause, and that in such situations, the Commerce Clause is completely inapplicable.[10]

For example, in *Wilkerson v. Rahrer*, the Court upheld the arrest of a wholesaler for possessing out-of-state liquor in violation of a Kansas law which completely banned liquor in the state.[11] Because Congress had passed a law consenting to state regulation of liquor, the Supreme Court reasoned that the dormant Commerce Clause was inapplicable.[12]

Similarly, in *W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, the Supreme Court upheld a California law imposing a retaliatory tax on certain out-of-state insurers that did not apply to in-state-insurers.[13] The Court observed that Congress had passed a law consenting to the state taxation of insurance companies and concluded: "If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."[14]

Congress has ordained that the Commission may regulate intrastate transmission[15] and the rates of utilities providing interconnection service. Further, FERC has authorized the Commission to govern the Garland/Southern Cross interconnection agreement[16] and the

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[9] U.S. CONST. art. 1, § 8, cl. 3

[10] *E.g.*, *Wilkerson v. Rahrer*, 140 U.S. 545 (1891); *W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648,(1981); and *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985).

[11] *Wilkerson*, 140 U.S. 545.

[12] *Id.* at 548.

[13] *W. & S. Life Ins. Co.*, 451 U.S. 648.

[14] *Id.* at 652–53.

[15] Federal Power Act § 202(a); 16 U.S.C. 824(a)

[16] Garland Ex. 1 at Attachment 2, *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,* Docket No. TX11-1-000, Offer of Settlement at 10 (Offer of Settlement); Garland Ex. 1 at Attachment 4, 147 FERC 61,113, at Ordering ¶ (C) (FERC Order).

interconnection agreements between Oncor, CenterPoint and Garland.[17] Thus, the Commission is operating within the scope of congressional authorization and is therefore invulnerable to Southern Cross's Commerce Clause challenge. In other words, the Commerce Clause simply does not apply.

2. The Dormant Commerce Clause is inapplicable because the failure to assign costs to Southern Cross would effectively be a state subsidy.

The Supreme Court has allowed states to favor in-state interests in the distribution of benefits.[18] In *Reeves, Inc. v. Stake*, the Supreme Court reasoned that a law favoring in-state interests is permissible "when it limits benefits generated by a state program to those who fund the State treasury and who the State was created to serve."[19] The present situation is conversely analogous. ERCOT is funded by, and created for, its ratepayers. The Order merely protects ERCOT ratepayers from subsidizing a project that may not provide ERCOT ratepayers any benefit or only a slight benefit not commensurate with the financial burden imposed. And, as the Supreme Court has determined that States have the right to limit their subsidies to their citizens,[20] the Supreme Court would logically also find quasi-governmental agencies such as ERCOT have the same right.

3. Even if the dormant Commerce Clause applied, the Commission's Order is not discriminatory.

The first step in the Supreme Court's Commerce clause analysis is to determine whether or not the order is facially discriminatory.[21] "In this context, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[22] For example, the Supreme Court deemed an Oklahoma law facially discriminatory when it prevented in-state harvested minnows from being sold out-of-state because it explicitly treated out-of-state and in-state interests differently.[23] However, a

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[17] *Id.* at ¶ 20.

[18] *E.g.*, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Mass. Council of Const. Employers, Inc.*, 460 U.S. 204 (1983).

[19] *Reeves*, 447 U.S. at 442.

[20] *Id.*

[21] *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)

[22] Motion for Rehearing of Southern Cross LLC at 3 (Oct. 3, 2016) (Southern Cross's Mt. for Rehearing).

[23] *Id.*

Minnesota law banning the sale of milk in plastic cartons was treated as facially neutral even when it allegedly had the effect of favoring the in-state paper milk carton industry over the out-of-state plastic milk carton industry.[24]

If the order is deemed facially discriminatory, then it is subject to strict scrutiny and the burden falls to the Commission to show that the Order is the least discriminatory means of effecting a valid state interest.[25] If the Order is not deemed facially discriminatory, it is subject to a balancing test and Southern Cross must show that the discriminatory effects outweigh the order's benefit.[26]

Southern Cross observes that they are being treated differently from the existing DC ties, the existing most severe single contingency (MSSC) and any other market participant.[27] Southern Cross alleges that this differing treatment constitutes facial discrimination. Southern Cross offers no further analysis related to the facial discrimination beyond simply stating that "costs that would normally be borne by ERCOT ratepayers for projects in ERCOT" are being allocated to Southern Cross's interstate project. Southern Cross relies on this statement as its sole basis to assert that the Commission's order is an act of impermissible protectionism.[28]

However, in order for Southern Cross to be a victim of "discrimination," it must show that it is an out-of-state interest that is being treated differently to a similarly situated in-state interest.[29] As TIEC, Luminant, and ERCOT have stated, there are no similarly situated entities to Southern Cross.[30] Because Southern Cross seeks to connect an unprecedented massive DC tie to the ERCOT grid, ERCOT will be forced to incur costs that were not incurred during the construction and interconnection of other DC Ties. Specifically, ERCOT must perform multiple studies and protocol revisions, execute coordination agreements, and potentially acquire

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[24] *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981).

[25] *Id.*

[26] *Id.*

[27] Southern Cross's Brief on Rehearing at 2–5.

[28] *Id.*

[29] *Ira 'I Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725 (5th Cir. 2004) (A state "impermissibly discriminates only when a state discriminates among similarly situated in-state and out-of-state interests.").

[30] Texas Industrial Consumers' Response to Southern Cross Transmission, LLC's Motion for Rehearing (Oct. 18, 2016); Luminant's Brief on Rehearing at 5; ERCOT's Brief on Rehearing at 3.

additional ancillary services in order to reliably interconnect the Southern Cross DC Tie.[31] There is simply no comparison. It would be unjust to require ERCOT ratepayers to bear costs created by Southern Cross's merchant line.

B. The Commission has the authority to assign costs to Southern Cross.

TIEC, Luminant, ERCOT, and Staff all agree that the Commission has the authority to assign costs associated with the Southern Cross DC Tie.[32] Southern Cross challenges the Commission's authority on the grounds that the Commission has not been granted the express authority to assign costs to Southern Cross.[33] Southern Cross also asserts that the assignment of costs is improper because it is inconsistent with other provisions in the Public Utility Regulatory Act (PURA)[34] and Commission rules.[35] Despite these assertions, PURA § 37.051(c-2) is a clear grant of express authority for the Commission to assign costs. Further, the Order is well within the Commission's authority because the conditions assigning costs do not violate any other provisions of PURA or Commission rules.

1. PURA § 37.051(c-2) is an express grant of authority to the Commission.

The Commission has the express authority under PURA § 37.051(c-2) to assign costs in this proceeding. Southern Cross attempts to label the authority granted by PURA § 37.051(c-2) as a "general authorization" akin to the general authority pursuant to PURA §§ 14.001 and 14.002.[36] According to Southern Cross, as a consequence of this general authority, the Commission may only impose conditions utilizing powers expressly granted elsewhere in PURA.[37] To support its position, Southern Cross cites to a handful of cases concluding that the Commission is not authorized to expand its powers based upon grants of general authority in

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[31] Order at 2–3.

[32] *See* TIEC's Brief on Rehearing at 7–10; Luminant's Brief on Rehearing at 6; ERCOT's Brief on Rehearing at 5–7.

[33] Southern Cross's Brief on Rehearing at 10–16.

[34] Tex. Util. Code Ann. §§ 11.001-58.303 (West 2016), §§ 59.001-66.017 (West 2007 & Supp. 2015) (PURA).

[35] Southern Cross's Brief on Rehearing at 8–10.

[36] *Id.* at 11.

[37] *Id.*

PURA.[38] However, this interpretation mischaracterizes the type of authority granted to the Commission by PURA § 37.051(c-2) and founded upon distinguishable case law.

As pointed out by TIEC, Luminant, and ERCOT, Southern Cross's interpretation ignores the plain language and legislative history of PURA § 37.051(c-2).[39] The statute expressly authorizes the Commission to impose "reasonable conditions to protect the public interest that are consistent with the final order of the Federal Energy Regulatory Commission."[40] This is an express grant of authority limited only by the requirement that the conditions be reasonable, protective of the public interest, and consistent with the FERC Order. The legislative history also makes clear the intention of the legislature to delegate additional authority to the Commission through the revision of PURA § 37.051(c-2) in 2015.[41] The Texas Legislature recognized the significant impacts such a large DC Tie could have on grid reliability, wholesale market prices, and market operational costs.[42] Rather than dictating a specific procedure for ensuring the reliable interconnection of large, novel DC Ties, the Texas Legislature expressly delegated the authority to the Commission to prescribe conditions in approving Garland's application as a means to navigate the highly technical issues that require resolution before interconnection.

In fact, Southern Cross's interpretation of PURA § 37.051(c-2) reads additional language into the statute by stating the language in PURA § 37.051(c-2) imposes a limitation that the Commission may only prescribe conditions specifically authorized elsewhere in PURA.[43] This restrictive language does not appear in the statute. The legislature was capable of limiting the Commission's authority to actions specifically authorized elsewhere in PURA as evidenced by

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[38] Southern Cross's Brief on Rehearing at 11–15 (citing *Coalition of Cities Affordable Utility Rates v. Pub. Util. Comm'n,* 798 S.W.2d 560 (Tex. 1990), *City of Lubbock v. Pub. Util. Comm'n*, 705 S.W.2d 329 (Tex. App.—Austin 1986, writ ref'd n.r.e.), *Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401 (Tex. 1995), *Pub. Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310 (Tex. 2001), *Tex. Municipal Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184 (Tex. 2007)).

[39] TIEC's Brief on Rehearing at 9; Luminant's Brief on Rehearing at 6; ERCOT's Brief on Rehearing at 5.

[40] PURA § 37.051(c-2).

[41] *See* TIEC's Brief on Rehearing at 9; ERCOT's Brief on Rehearing at 5–6.

[42] *See* TIEC's Brief on Rehearing at 9 (citing to legislative history detailing concerns raised about the impact large DC Tie projects could have to grid reliability, wholesale market prices, and costs to operate the grid).

[43] Southern Cross's Brief on Rehearing at 11.

the restrictions the legislature actually included.[44] The Commission exercised its express authority pursuant to the plain language of the statute by imposing reasonable conditions to protect the public interest. After a hearing on the merits and exhaustive briefing, the Commission determined the public interest demanded ERCOT ratepayers not bear any costs associated with this project and appropriately used its express authority under PURA § 37.051(c-2) to assign costs to the parties directly responsible for the costs.[45]

Further, the sections of PURA granting general authority to the Commission only bolster the Commission's specific and express authority under PURA § 37.051(c-2). Southern Cross attempts to use Staff's prior reference to the general authority provided in PURA § 14.001 as a way to limit the Commission's authority to assign costs.[46] Southern Cross specifically cites to *Coalition of Cities Affordable Utility Rates v. Pub. Util. Comm'n*[47] and *City of Lubbock v. Pub. Util. Comm'n*[48] for the purpose of demonstrating that PURA §§ 14.001 and 14.002, grants of general authority, do not allow the Commission to exercise a new power when no other express grants of authority in PURA permit such an action.[49] Southern Cross references *Pub. Util. Comm'n v. GTE-Southwest, Inc.*[50] to suggest that even where the Commission has broad, exclusive authority, it is not permitted to exercise a new power not specifically expressed in PURA.[51] Staff agrees that the Commission only has the authority to do what is necessary and convenient to fulfill those powers specifically designated or implied through PURA.[52] The

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[44] PURA § 37.051(c-2) requires the conditions to be reasonable, protective of the public interest, and consistent with the FERC Order.

[45] Order at 3.

[46] Southern Cross's Brief on Rehearing at 11–15.

[47] 798 S.W.2d 560 (Tex. 1990).

[48] 705 S.W.2d 329 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

[49] *Coalition of Cities Affordable Utility Rates v. Pub. Util. Comm'n,* 798 S.W.2d at 564 (interpreting PURA Section 16(a) as only allowing the Commission to do what is necessary and convenient for powers specifically designated by other provisions of PURA); *City of Lubbock v. Pub. Util. Comm'n*, 705 S.W.2d at 330–31 (interpreting PURA Section 16(a) as not expanding the Commission's general rulemaking authority over municipalities when another provision of PURA specifically limits such authority).

[50] 901 S.W.2d 401 (Tex. 1995).

[51] *Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d at 405–406 (interpreting the Commission's exclusive ratemaking authority granted in PURA Sections 42 and 43 as being specifically limited to prohibit the Commission from setting a retroactive effective date for the rates).

[52] Southern Cross's Brief on Rehearing at 11–12 (citing *Coalition of Cities for Affordable Utility Rates v. Pub. Util. Comm'n*, 798 S.W.2d 560, 564 (Tex. 1990)).

Commission's express authority to assign costs to Southern Cross emanates from PURA § 37.051(c-2). The general authority under PURA § 14.001, and other provisions of PURA[53] merely supports the Commission's authority to condition approval of Garland's application by assigning costs.

Southern Cross also cites to *Pub. Util. Comm'n v. City Pub. Serv. Bd.*[54] and *Tex. Municipal Power Agency v. Pub. Util. Comm'n*[55] to assert that even an express grant of authority to the Commission cannot supplant another provision in PURA specifically restricting the Commission's authority over a municipality.[56] These two cases are distinguishable on the primary fact that they involve the clear limitations to the Commission's jurisdiction over municipalities. Southern Cross is not a municipality, nor does it claim to be. In addition, unlike the actions of the Commission disputed in these two cases, the conditions assigning costs in the Order do not contradict any other provisions of PURA or Commission rules.[57] Thus, all of the case law cited by Southern Cross limiting the scope of the Commission's general authority is distinguishable. The legislature entrusted the Commission with ensuring the reliable interconnection of large, novel DC Ties into ERCOT. PURA § 37.051(c-2) expressly empowers the Commission to regulate these novel projects to protect the reliability of the ERCOT system.[58] Any assignment of costs included in the Order is within the Commission's express authority granted by statute.

2. The assignment of costs in the Order is consistent with other provisions of PURA and Commission rules.

The Commission's assignment of costs in the Order is within the Commission's express authority because it complies with PURA and all Commission rules. Southern Cross continues to assert the assignment of costs is inconsistent with PURA §§ 35.004(d) and 39.151(e) and 16 TAC §§ 25.192 and 25.363.[59] Specifically, Southern Cross states the Commission's assignment of transmission upgrade and incremental services costs is contrary to the postage stamp method

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[53] PURA §§ 14.002 and 39.151(d).

[54] 53 S.W.3d 310 (Tex. 2001).

[55] 253 S.W.3d 184 (Tex. 2007).

[56] Southern Cross's Brief on Rehearing at 13–15.

[57] *See infra* Part II.B.2.

[58] *See* TIEC's Brief on Rehearing at 9.

[59] Southern Cross's Brief on Rehearing at 8–10.

required in PURA § 35.004(d) and 16 TAC § 25.192.[60] Southern Cross argues the Commission's ordering paragraphs violate the traditional regulatory scheme where the cost of transmission upgrades are included in the utility's rate base subject to approval in the utility's next rate case.[61] However, this argument is premature and, even if timely, the assignment of costs does not violate the postage stamp method.

Southern Cross's attacks on the assignment of transmission upgrade and incremental transmission services costs are premature. The Order directs ERCOT to first study whether any additional transmission upgrades or incremental transmission services to support imports or exports over the Southern Cross DC Tie are even necessary.[62] The evidentiary record makes clear ERCOT may need to change its planning assumptions/criteria to identify transmission upgrades that may be necessary to address congestion related to power flows over the Southern Cross DC Tie.[63] To date, ERCOT has not determined if any additional transmission upgrades or transmission incremental services are needed.[64] It is premature for Southern Cross to claim violations of PURA and Commission rules for changes to cost allocation methods for transmission upgrades and incremental services when, to date, neither the Commission nor ERCOT have required any additional transmission upgrades or incremental transmission services for the safe interconnection of the Southern Cross DC Tie.

Even if transmission upgrade and incremental transmission service costs are realized, the conditions assigning those costs to Southern Cross do not violate PURA § 35.004(d) and 16 TAC § 25.192. Staff agrees that the Commission is required to price "wholesale transmission services

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[60] *Id.* at 8–9.

[61] *Id.*

[62] Order at Finding of Fact No. 56 and 58.

[63] ERCOT's current reliability and economic planning studies model DC ties using assumptions based on historical usage of each DC tie which may fail to identify transmission upgrades that could relieve congestion caused when Southern Cross is exporting large amounts of power over the DC tie. Tr. at 271:9–272:10 (Lasher Cross) (Jun. 1, 2016). *See also* Direct Testimony of Warren Lasher, ERCOT Ex. 1 at 9:20–10:6 (Apr. 27, 2016); Texas Competitive Power Advocates Statement of Position at 1–2 (Apr. 27, 2016); Supplemental Direct Testimony of Mark Bruce, Southern Cross Ex. 5 at 11:10–22 (noting that modifications could be made to ERCOT's current assumptions resulting in better modeling).

[64] ERCOT Response to Staff RFI 1-3, Staff Ex. 4. ERCOT has not made any filings in the Commission project overseeing the implementation of the conditions in the Order. *See Oversight Proceeding Regarding ERCOT Matters Arising Out of The 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)*, Docket No. 46304, Order Creating and Scoping Project (Sep. 8, 2016)

within ERCOT based on the postage stamp method of pricing."[65] But Southern Cross asserts, that the Order removes these costs from the calculation of postage stamp rates thus violating PURA § 35.004(d) and 16 TAC § 25.192.[66] To the contrary, PURA § 35.004(d) does not dictate what costs must be included in a transmission cost of service (TCOS), but merely mandates how the costs included in TCOS rates are charged to ERCOT customers. The Commission's assignment of transmission upgrade and incremental transmission service costs in the Order only precludes certain costs from inclusion in TCOS rates and does not make any changes to the method used to determine how those costs are charged to ERCOT customers. The assignment of these costs is within the Commission's authority because it does not violate PURA § 35.004(d) and 16 TAC § 25.192.

Southern Cross also attempts to discredit the Order by alleging the Commission's assignment of ERCOT costs for studies, protocol, operating guide, system changes, and any other activities by ERCOT as a result of the Southern Cross DC Ties violates PURA § 39.151(e), 16 TAC § 25.363 and departs from ERCOT's long-standing budget practices. PURA § 39.151(e) and 16 TAC § 25.363 establish a system administration fee to fund ERCOT's budget. Southern Cross alleges that any of ERCOT's costs must be paid using money from this competitively neutral system administration fee.[67] However, nothing in the statute or Commission rules affecting ERCOT's budget activities preclude the Commission from assessing costs of ERCOT directly to the market participants outside of the system administration fee. In fact, pursuant to PURA § 39.151(d), the Commission possesses the "complete authority to oversee" ERCOT's finances, budget and operations.

Southern Cross also argues the Commission's assignment of costs is inconsistent with ERCOT's long-standing practice to pay for these types of costs using ERCOT's annual budget. Yet, the evidentiary record is clear regarding the novel and distinctive characteristics of this project requiring major overhauls to ERCOT protocols and operations.[68] In fact, Southern Cross

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[65] PURA § 35.004(d).

[66] Southern Cross's Brief on Rehearing at 9.

[67] *Id.* at 9–10.

[68] Order at 2; *see* Direct Testimony of Dan Woodfin, ERCOT Ex. 2 at 12:2-8 (April 27, 2016) (discussing the challenge the Southern Cross DC Tie presents to the ramp capability of ERCOT); *Id.* at 14 (discussing the changes necessary to incorporate Southern Cross DC Tie into outage coordination); Tr. at 271:9-272:10 (Lasher Cross) (June 1, 2016); Woodfin Direct, ERCOT Ex. 2 at 17:1-14 (citing NERC Standard BAL-002-1 R3 (Disturbance Control Performance)); Direct Testimony of Warren Lasher, ERCOT Ex. 1 at 9:20-10:6 (April 27,

requested the Commission direct ERCOT to implement a large number of these revisions on its behalf.[69] No other market participant or potential market participant is requesting these changes. It is the unique and novel nature of the Southern Cross DC Tie that demands these costs be assigned to Southern Cross, as the existing DC Ties did not require ERCOT to make such extensive changes in order to interconnect. ERCOT market participants and ratepayers should not subsidize costs relating to Southern Cross's own requests for these changes that inure mainly to its benefit. The Commission's allocation of costs to Southern Cross does not violate PURA or Commission rules and directly fulfills the Commission's statutory obligation to protect the public interest by ensuring ERCOT ratepayers do not subsidize a free ride for one market participant, Southern Cross. Both PURA and Commission rules grant the Commission the authority to directly assign costs especially where such a condition is protective of the public interest.

C. The Commission's Order is consistent with FERC's interconnection order.

TIEC, Luminant, ERCOT, and Staff all agree the Order is consistent with the FERC Order.[70] PURA § 37.051(c-2) authorizes the Commission to place conditions upon the approval of Garland's application so long as those conditions are consistent with the FERC Order. The FERC Order states that the costs for the facilities identified in the Oncor/Garland interconnection agreement are to be "allocated pursuant to established ERCOT rules."[71] Southern Cross alleges the Commission's decision is contrary to the FERC Order because the allocation of costs for transmission upgrades and ancillary services directly to it is a departure from existing cost allocation methods.[72] As discussed previously, the Commission's allocation of costs for transmission upgrades and incremental transmission services does not violate PURA or

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2016) (discussing potential adjustments to ERCOT's planning assumptions for identification of transmission upgrades); Tr. at 271:9-272:10 (Lasher Cross) (June 1, 2016); Bruce Supp. Direct, Southern Cross Ex. 5 at 11:10-22 (noting that there could be modifications to ERCOT's current assumptions that could lead to better modeling).

[69] *Id.* at 219:11-220:16 (Bruce Cross) (June 1, 2016). *See* Southern Cross Brief at 4-5 (listing the conditions Southern Cross supports: ERCOT must make changes to bylaws, Protocols and systems to enable Southern Cross to execute the market participant agreement form; ERCOT shall negotiate a coordination agreement with the applicable balancing party and include Southern Cross in negotiations; ERCOT shall adopt a new Nodal Protocol Revision Request to create an Independent DC Tie Operator market participant type and amend its bylaws; ERCOT to evaluate a CMP; ERCOT to evaluate whether the Southern Cross DC Tie can provide Primary Frequency Response and other services).

[70] TIEC's Brief on Rehearing at 7–8; Luminant's Brief on Rehearing at 6–7; ERCOT's Brief on Rehearing at 7.

[71] FERC Order at ¶ 20.

[72] Southern Cross's Brief on Rehearing at 16–26.

Commission rules because the Commission is not changing the method of cost of allocation, but merely determining what costs may be included before the costs are allocated pursuant to the postage stamp method.[73]

Southern Cross is manufacturing an inconsistency between the Commission's Order and the FERC Order by misinterpreting the use of the term "established" in the FERC Order. The Commission's Order is consistent with the FERC Order's pronouncement that costs for facilities identified in the Oncor/Garland interconnection be allocated pursuant to established ERCOT rules because ERCOT has yet to establish any rules relating to the cost allocation of these listed facilities. In conjunction with its Order in this proceeding, the Commission issued an order in a separate project for the purposes of directing ERCOT to update rules, protocols, and standards so that Southern Cross may expeditiously interconnect with ERCOT.[74] ERCOT has not made any status reports in the project apprising the Commission of any new protocols or rules. Since ERCOT has yet to create any rules directly addressing the cost allocation of the facilities at issue, the Order is consistent with the FERC Order.

In addition, Southern Cross's emphasis on the term "established" in the FERC Order ignores the language directly preceding it. The FERC Order preserves the issue of cost allocation for the Commission by affirming that "the facilities identified in the Oncor/Garland interconnection agreement will be subject to the jurisdiction of the Texas Commission."[75] The FERC Order explicitly precludes the recovery of the facilities identified in the Garland/Southern Cross interconnection agreement from ERCOT ratepayers.[76] The FERC Order did not require the same prohibition on the recovery of the facilities identified in the Oncor/Garland interconnection agreement from ERCOT ratepayers.[77] Instead, FERC left the issue up to the discretion of the Commission to make its own cost allocation determination. In finding that the public interest demanded ERCOT ratepayers not be burdened by any costs related to the

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[73] *See supra* Part II.B.2.

[74] *Oversight Proceeding Regarding ERCOT Matters Arising Out of Docket No. 45624 (Application of 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)*, Docket No. 46304, Order (Sep. 8, 2016).

[75] FERC Order at ¶ 20.

[76] *Id.*

[77] *Id.*

interconnection of the Southern Cross DC Tie,[78] the Commission exercised its express authority to impose conditions assigning costs to Southern Cross consistent with the FERC Order.

Southern Cross also highlights the language included in the Offer of Settlement to support its position that the Commission's assignment of costs are contrary to the FERC Order. In the Offer of Settlement, incorporated by reference in the FERC Order,[79] Southern Cross, Pattern Power Marketing LLC (Pattern), Garland, CenterPoint Energy Houston Electric, LLC (CenterPoint), and Oncor Electric Delivery Company LLC (Oncor) agreed the transmission service provided to customers of Southern Cross would be at the same rates, terms, and conditions under which Oncor and CenterPoint currently provide service pursuant to their TFO tariffs.[80] In addition, Southern Cross quotes comments filed by the Commission in response to the Offer of Settlement to demonstrate the Commission did not object to the usage of the same rates, terms, and conditions as currently charged.

Contrary to these assertions, the Offer of Settlement does not preclude the Commission from assigning costs to Southern Cross that are outside of referenced utilities' rates, terms and conditions. Southern Cross describes the Offer of Settlement as merely an agreement among it, Pattern, Garland, CenterPoint, and Oncor regarding the apportionment of costs and the compensation or reimbursement due to each.[81] Nonetheless, the Commission is tasked by statute with protecting the public interest in approving Garland's application.[82] An agreement by Southern Cross, Pattern, Garland, CenterPoint, and Oncor cannot supplant the Commission's statutory duty to prescribe conditions that are protective of the public interest. Only after a hearing on the merits and extensive briefing considering the location and massive size of the Southern Cross DC Tie did the Commission include the necessary condition to allocate costs so that ERCOT ratepayers are not subsidizing a project providing them with little to no benefits. Nothing in the FERC Order or Offer of Settlement precludes the Commission from assigning costs to Southern Cross. Thus, the Commission's Order is consistent with the FERC Order and serves to protect the public interest.

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[78] Order at 3.

[79] FERC Order at Ordering Paragraph (C).

[80] Offer of Settlement at 12, Garland Ex. 1 at Attachment 2, Paragraph (K).

[81] Southern Cross's Brief on Rehearing at 19.

[82] PURA § 37.051(c-2).

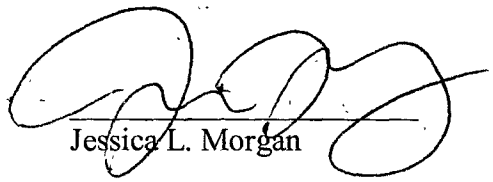
III. CONCLUSION

Staff continues to support the Commission's Order in this proceeding. The conditions imposed by the Commission in approving the Southern Cross DC Tie were a result of careful consideration and supported by ample evidence in the record. Further, the conditions do not discriminate against interstate commerce or Southern Cross as a market participant, are well within the authority granted to the Commission by PURA and Commission rules, and consistent with the FERC Order. The Commission fulfilled its statutory obligation by ensuring the continued reliable operation of the ERCOT market for all market participants and Texas ratepayers.

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

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on December 28, 2016, in accordance with 16 TAC § 22.74.



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