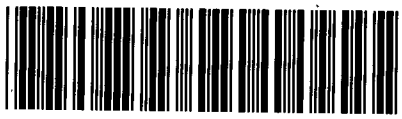

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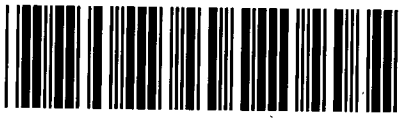

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PUC DOCKET NO. 45624

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

REPLY BRIEF ON REHEARING OF SOUTHERN CROSS TRANSMISSION LLC

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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**

REPLY BRIEF ON REHEARING
OF SOUTHERN CROSS TRANSMISSION LLC

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

In its order, the Commission states that any reasonable conditions imposed by the Commission "must be conditions on the construction, operation, management, and regulatory treatment of the Garland transmission line and on participation in the ERCOT market."[1] While the Commission's discussion identifies the task before the Commission in this case, its actions greatly exceed its statutory authority, are per se discriminatory under the Commerce Clause of the United States Constitution, and are clearly inconsistent with the FERC orders in Docket No. TX11-1-000.[2]

Without significant changes, the Commission's order will be subject to review in three different forums—state court, FERC, and federal district court.[3] To sustain its order, the Commission will have to prevail in all three forums. The state courts will have to find that the Commission has the express, specific authority to impose costs on Southern Cross Transmission LLC ("SCT") in this case and that its order is consistent with the FERC orders. The Commission will have to persuade FERC that the order is consistent with the FERC orders even though it denies the SCT Project and its customers access to the ERCOT grid at the same rates and on the same terms and conditions that Oncor and CenterPoint offer to other transmission service

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1 Order at 2 (Sept. 8, 2016).

2 *Southern Cross Transmission LLC; Pattern Power Marketing LLC* Final Order Directing Interconnection and Transmission Service, 147 FERC ¶ 61,113 (May 15, 2014) ("FERC Order) and Proposed Order Directing Interconnection and Transmission Services and Conditionally Approving Settlement Agreement, 137 FERC ¶ 61,206 (Dec. 15, 2011 ("Conditional Order"). In connection with the SCT Project, FERC also issued two orders relating to rates, and this brief refers to all the orders collectively as the "FERC orders."

3 *See* SCT's Motion for Rehearing (Oct. 3, 2016) for a complete list of reversible errors.

customers under their ERCOT tariffs.[4] Pursuant to PURPA Section 205(a), FERC may be asked to exempt SCT from the Commission's order in this case on a finding that the order prohibits voluntary coordination of electric utilities designed to economically utilize the facilities and resources in the area.[5] Finally, because the Commission order on its face discriminates against exports and imports over the SCT DC Tie, the Commission will have the burden of proving in federal district court that its order does not impermissibly restrain interstate commerce.

In his rebuttal testimony, former Commission Chair Paul Hudson counseled about the peril of attempting to resolve issues in this proceeding that affect market participants across ERCOT without their participation and a well-developed record:

> Although there are those that might utilize this contested proceeding as an available venue to shed certain costs or erect barriers to competitive entry, this is not the appropriate forum to address either complicated technical issues or changes to cost allocation. To address those issues here, without the broadest possible participation of ERCOT stakeholders and commensurate depth of inquiry, is to invite unintended consequences.[6]

Additional litigation is not in the interests of ERCOT customers. The Commission has all the authority it needs over the interconnection to the extent that it may affect the reliability of the ERCOT system. It has the necessary rules in place to regulate transactions over any DC tie, to determine the cost recovery of system upgrades, ancillary services, and ERCOT operations, and to meet NERC-required reserve margins. The Commission should recognize in responding to the briefs filed on rehearing that existing rules currently work to appropriately assign costs to DC tie transactions. In its briefs, SCT has supported the need to address the tasks assigned to ERCOT in the Project No. 46304 scoping order. SCT respectfully urges the Commission to revise its order in this case and limit the findings, conclusions, and ordering paragraphs to relate to interconnection and system reliability.

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4 The specific tariffs in question are the companies' Tariffs for Transmission Service To, From and Over Certain Interconnections ("TFO Tariffs").

5 *See* SCT's Initial Brief at 25-26.

6 Rebuttal Testimony of F. Paul Hudson at 17 (May 24, 2016).

Issue 1: Does the Commission's order, issued on September 8, 2016, violate the dormant Commerce Clause of the U.S. Constitution?

Reply: Yes. There is general agreement among SCT, Staff, and opposing parties about the applicable jurisprudence. In the cases cited by the opposing parties, the courts overturned state measures on grounds that are applicable to the Commission's order.

A. On its face, the order discriminates against export and import flows across the SCT DC Tie.

There is no serious disagreement in the parties' initial briefs about the jurisprudence applicable to the dormant Commerce Clause. The Supreme Court has determined that the Commerce Clause restricts the ability of the states to regulate interstate commerce, particularly in circumstances in which a state treats in-state and out-of-state economic interests differently.[7] The Supreme Court has repeatedly held that state economic protectionism is subject to a per se rule of invalidity.[8] Moreover, state actions that are facially discriminatory or discriminate in purpose or effect are subject to strict scrutiny, and the burden shifts to the state to demonstrate that its action serves a legitimate, non-protectionist purpose.[9]

In SCT's Initial Brief on Rehearing ("Initial Brief"), it identified six separate Ordering Paragraphs from the Commission's order that are facially discriminatory and violate the dormant Commerce Clause. Specifically, SCT pointed to OPs 32, 33, 34, 35, 36 and 42. None of the parties filing briefs—TIEC, Luminant, Commission Staff, or ERCOT—discussed these OPs in any detailed way, let alone identified legitimate, non-protectionist purposes that could legitimately justify the OPs. Instead, each responded to the Commission's Commerce Clause question in conclusory and general terms with unfounded assertions about such matters as alleged reliability issues arising from the SCT DC Tie and the allegedly unique nature of the SCT Project. A review of the OPs with an explanation of why each is facially discriminatory makes SCT's point clear.

OP 32 prohibits a utility from recovering in cost of service "any costs related to the Rusk or Panola substations or the Rusk to Panola line." Cost recovery is historically a ratemaking activity. The OP is facially discriminatory because it short circuits the normal PURA ratemaking

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7 *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008).

8 *Granholm v. Heald*, 544 U.S. 460, 472 (2005); *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

9 *Hughes v. Oklahoma*, 441 U.S. 332, 337 (1979); *Piazza's Seafood World, LLC v. Odom*, 448 U.S. 744, 749 (5th Cir. 2006).

process and instead attempts to bar cost recovery in this CNN proceeding.[10] There is no apparent reason to act contrary to PURA and the Commission's procedural rules other than to burden interstate commerce by increasing the price SCT must charge for users of its DC tie.

OP 33, which requires SCT to pay all the costs of ERCOT studies, protocol revisions, and other activities required by the SCT Project, is unprecedented. In no other instance has there been a similar wholesale allocation of costs to a DC tie, any other addition to the ERCOT grid, or any other individual market participant. Moreover, PURA requires ERCOT to submit a budget with *all* its costs to the Commission for approval. OP 33 carves out costs that supposedly relate to the SCT Project and requires SCT to pay such segregated costs. Regardless of whether SCT can pass the costs on to its own customers, OP 33 discriminates against a project in interstate commerce.

Ops 34 and 35 are facially discriminatory because the Commission has not assigned such cost responsibility to any other DC tie owner or to the owner of the existing most severe single contingency within ERCOT. The discriminatory nature of OP 34 is openly acknowledged in the ordering paragraph itself. In addition, there are specific rules in place for the recovery of transmission upgrades and ancillary service costs that the Commission chose to ignore in order to impose such costs on SCT. The result burdens SCT and the users of the SCT DC Tie transacting in interstate commerce with additional charges.

OP 36 purports to bar any utility from recovering in cost of service any costs associated with the SCT Project. Until this CCN proceeding, the Commission has always dealt with such costs in ratemaking proceedings. There is nothing whatsoever about the SCT Project that justifies the disparate and confiscatory treatment. OP 36 is facially discriminatory because Oncor—the utility that is required by FERC to construct the Rusk substation—will not be permitted to recover plant costs in a subsequent ratemaking proceeding as all other TSPs in ERCOT are allowed to do for new investments.

Finally, OP 42 appears to be aimed at isolating costs for SCT's "use" of the ERCOT grid. Two points are in order. First, that rationale for assessing additional costs to SCT is not supported, because it will be the importing and exporting Qualified Scheduling Entities ("QSEs"), not SCT, who will be using the grid. Second, the order is facially discriminatory

[10] See discussion below at section 2A.

because OP 42 isolates flows over the SCT DC Tie for the purpose of separately identifying transmission costs for payment by SCT, while others who "use" the ERCOT grid are charged transmission costs on a socialized basis. As SCT pointed out in its Initial Brief, imposing the costs on flows as set forth in the OPs will raise the cost of exports and imports, lower the margins on them, and place QSEs transacting across the SCT DC Tie at a competitive disadvantage.[11]

The record evidence clearly establishes that there will be significant benefits to ERCOT customers from this project. There will be millions of dollars in annual customer benefits. The record evidence is uncontroverted that the SCT Project will provide other substantial benefits, including: (1) over $60 million contributed annually toward TCOS; (2) the opportunity for a new bilateral system support agreement with SERC similar to current agreements with CFE and SPP; (3) increased efficiency that occurs with additional transmission capacity; (4) a reduction in ERCOT's operational risk provided by a resource with the technical capability of SCT's DC Tie; (5) an additional margin of safety/reliability benefits such as when ERCOT reliability benefitted from DC tie imports during Energy Emergency Alerts in January 2014; (6) assistance in economic dispatch by allowing access to broader sources of generation, as opposed to captive, less efficient generation; and (7) private party investment in a $2-billion dollar infrastructure asset serving ERCOT and the Southeast.[12] Thus, the record establishes that the Commission's order places burdens on interstate commerce despite the many benefits of the SCT Project to ERCOT customers. Under such circumstances, it is virtually impossible to persuasively argue that the referenced OPs are not facially discriminatory.

Faced with those specific realities, Staff and the opposing parties deal only in generalities in their initial briefs. TIEC argues that the OPs are "cost-based" and "narrowly tailored."[13] The fact of the matter is that the OPs are cost-based in the sense that they shift all costs to SCT when such costs have historically been socialized and have never been shifted to in-state DC tie owners, specific asset owners, or individual market participants. The only sense in which the OPs are "narrowly tailored" is that they burden only SCT and the wholesale market participants who would use the SCT DC Tie. Luminant makes similar arguments, ignoring the fact that

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11 SCT's Initial Brief at 4.

12 Hudson Rebuttal Testimony at 11.

13 TIEC's Initial Brief on Rehearing ("TIEC's Initial Brief") at 1.

requiring SCT to pay all the costs is unprecedented.[14] Staff's argument that the SCT Project will burden in-state interests completely ignores the evidence of the significant benefits to ERCOT customers that will flow from the project, and it overlooks the lack of evidence that any costs will actually be incurred. Totally missing is any acknowledgement by Staff or Luminant that ERCOT already has the necessary tools to prevent any transaction that would impair system reliability or result in unresolved congestion.

As a way of distinguishing the numerous cases that struck down laws violative of the dormant Commerce Clause, Staff contends that the SCT Project burdens in-state interests.[15] But while Staff and the opposing parties have quibbled about the *level* of benefits, they have not disproved the *fact* of the benefits. The record evidence does not support any argument that the SCT Project will burden in-state interests. Quite the contrary, the record shows that it will provide substantial net benefits. Therefore, the cases cited in the opposing briefs in fact support SCT's position because the facts of those cases are closely analogous to the situation presented here and violations of the dormant Commerce Clause were found to exist.[16]

B. Briefs from the Commission Staff and the opposing parties fail to meaningfully distinguish the Commission's order from other state regulatory measures that courts have routinely rejected as violations of the dormant Commerce Clause.

Most of the dormant Commerce Clause cases cited in briefs by the Commission Staff and opposing parties are cases in which courts—particularly the United States Supreme Court—overturned state or local laws and regulatory measures on the grounds that they were discriminatory or unduly burdened interstate commerce.[17] Thus, while the ultimate rulings in these cases support SCT's position on the impact of the Commission's order on interstate commerce, the reliance by Commission Staff and the opposing parties on the cases suggests that there is agreement with SCT about the framework for analyzing challenges under the dormant Commerce Clause.[18]

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14 Brief. of Luminant in Response to Order Requesting Briefing at 3 ("Luminant's Brief").

15 *Id.*

16 *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787 (2015); *Oregon Waste System, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93 (1994); *Chem. Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992); and *Lewis v. BT Invest. Managers, Inc.*, 447 U.S. 27 (1980).

17 *See, e.g.*, Commission Staff's Brief at 5-6 nn.5, 10, 17-21.

18 *Compare* SCT's Initial Brief at 2-3 & nn.1-6, 14 *with* Staff's Brief at 4-5 nn.5, 10-15 *and* ERCOT's Brief of Issues in Comm'n's Dec. 1, 2016 Order at 2 ("ERCOT's Brief") *and* TIEC's Initial Brief at 2-3 nn.3-8.

Instead of contesting the applicable legal framework, the Commission Staff and the opposing parties—including ERCOT, TIEC, and Luminant—try to justify the Commission's plainly discriminatory order by obfuscating the facts in an attempt to argue that the burdens serve a legitimate local purpose. They characterize the project as "unique,"[19] conceding that others have not been burdened like SCT would be, but their attempts fail to justify discriminatory treatment of SCT.

Indeed, ERCOT appears to contradict the notion that the SCT Project is "unique." ERCOT concedes that "many of these costs would still be necessary if the project were located wholly inside of Texas and isolated from the rest of the country."[20] Furthermore, ERCOT suggests that the public interest would justify allocating the same costs to a "hypothetical, wholly-intrastate facility,"[21] but it fails to identify *any* intrastate facility owner that has been treated similarly. In fact, ERCOT has routinely incurred similar costs for market entrants, new technology owners, changes in practices to accommodate evolving system characteristics, and a myriad other factors contributing to system costs. But the Commission has *not* assigned those costs to any other DC tie owner, DC tie user, or other similarly situated entity. Nor has the Commission ever assigned the cost of incremental reserves to the owner of the nuclear plant currently identified as the most severe single contingency.

Moreover, the record demonstrates that SCT Project does not present unique risks. The Oncor reliability study, submitted for review by ERCOT and the TSPs before submission to FERC, concluded that interconnecting with the SCT Project would have no adverse impact on the reliability of the ERCOT grid. SCT offered the only evidence estimating the benefits of the SCT Project to ERCOT customers, and no party offered contrary estimates to rebut a conclusion that the project's benefits will greatly exceed any costs it might impose on the customers.

TIEC and Luminant try to compare the costs imposed on SCT to a toll on a bridge or highway that crosses state lines. The analogy fails, but TIEC's and Luminant's arguments inadvertently advance SCT's dormant Commerce Clause argument. The leading dormant Commerce Clause case involving tolls and similar fees confirms that the Commission's order is unconstitutional.

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19 *See, e.g., id.* at 5; TIEC's Initial Brief at 4.

20 *See* ERCOT's Brief at 3.

21 *See id.* at 4.

In *Evansville-Vanderburgh v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Supreme Court employed a three-prong test to determine whether fees charged for airline passengers using public airports discriminated against interstate commerce: One, whether both interstate and intrastate trade is subject to the fees. Two, whether the charges are approximately and rationally related to the use of the facilities in the commerce. And three, whether the charges are excessive relative to the costs of the facilities used by the trade. A fee must satisfy all three prongs of the test to pass muster under the dormant Commerce Clause.

One simply needs to look at the first prong of the Supreme Court's test to conclude the Commission's imposition of costs on SCT is unconstitutional under the dormant Commerce Clause. The Commission's order will impose costs entirely on SCT and the users of its tie that are not charged to other similar market participants.[22] The allocation of various costs in the Commission's order is clearly discriminatory on its face and in its expressly intended effect. The Commission's order treats SCT differently from other ERCOT market participants and treats QSEs using the SCT DC Tie differently from QSEs using any other DC tie. As previously explained, the Ordering Paragraphs impose costs on SCT that (1) would not normally be imposed, (2) will have the effect of disadvantaging SCT as well as its customers, and (3) will thereby burden interstate commerce.

The costs specially allocated to SCT or to users of the SCT DC Tie also fail to satisfy the second prong of the *Evansville-Vanderburgh* test, *i.e.*, whether the charges imposed are rationally related to the use of facilities involved. Because exporting QSEs already pay their share of transmission and ancillary services costs, the additional costs imposed on users of the SCT DC Tie effectively constitute a double-charge for "use" that no other market participant has been forced to bear under current rules.[23] There is no rational relationship between the additional costs imposed and the use of the grid under the Commission's order.

The Commission's order would ensure that users of the SCT DC Tie pay more for their use of the grid than users of the other DC ties will pay for similar transactions. A QSE delivering power across the North Tie will pay less than if it delivers power across the SCT DC Tie.

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22 *See Evansville-Vanderburgh*, 405 U.S. at 716-17; *accord Am. Trucking Ass'ns*, 2016 U.S. Dist. LEXIS 109584 at *43 (citing *Selevan v. N.Y. State Thruway Auth.*, 584 F.3d 82, 98 (2d Cir. 2009)).

23 *Cf. Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015) (concluding that a Maryland taxation scheme violated the dormant Commerce Clause because it had the effect of taxing twice some income earned by Maryland residents outside of the state).

The Commission's order fails to make any findings that warrant imposition of the charges imposed on SCT and users of the SCT DC Tie, but not on other DC tie owners or QSEs transacting over the other DC ties. Instead, the Commission's order merely invokes blanket and unsupported assertions of the "public interest," without any underlying findings and without acknowledging the benefits flowing from the SCT Project.

Not surprisingly, there is no real dispute about what constitutes a dormant Commerce Clause violation. The elements are well established. Significantly, the evidence in the record makes it clear that the Commission's order violates the dormant Commerce Clause by discriminating against interstate commerce in the ways specifically delineated in SCT's Initial Brief and in this brief.

The arguments advanced by Staff and the opposing parties do not address SCT's points in any specific way even though the points were originally made in SCT's Motion for Rehearing.[24] Rather, those briefs speak in general terms about the project, as for example, describing it as unique. The opposing briefs do not, however, advance a legally compelling argument explaining how the project is "unique" or how project's "unique" characteristics might justify the clearly discriminatory ordering paragraphs. The briefs of the opposing parties do not cite any authority on point to support their position. They fail to show how the Commission can meet its burden of establishing that there is a legitimate, non-discriminatory basis for its order.

In sum, the Commission's order facially discriminates against export and import flows across the SCT DC Tie without justification or evidence to support its discriminatory treatment. The Commission's order fails the three-prong test established by the Supreme Court for evaluating state action under the dormant Commerce Clause under circumstances analogous to this case. The order will thus be subject to strict scrutiny by a federal district court, with the burden on the Commission to prove that its action serves a non-protectionist purpose. This the Commission cannot do based on the record of evidence in this case.[25]

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[24] SCT's Motion for Rehearing at 3-5.

[25] The statutory deadline in section 37.051(c-2) bars reopening the record for additional evidence.

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

Reply: The Commission does not have authority to directly assign costs to SCT. Subsection 37.051(c-2) allows the Commission to prescribe conditions upon the interconnection, but exercising only its existing powers granted elsewhere in PURA. No party has cited a provision in PURA that expressly and specifically authorizes the direct assignment of costs in this case, and none exists.

SCT reaffirms its position that section 37.051(c-2) is a general authorization for the Commission to prescribe conditions on the interconnection subject to three limitations: The conditions must be reasonable, protective of the public interest, and consistent with the FERC order. In exercising this general authority, the Commission is further limited to the specific powers granted to it elsewhere in PURA and must comply with express statutory provisions. The authority to prescribe conditions is a *general* authority in the same way that the authority to promulgate rules is a general authority. Both are regulatory instruments by which the Commission can regulate persons subject to its power and jurisdiction. And just as the Commission cannot promulgate a rule that would exercise what amounts to a new power not specifically and expressly granted in any other provision of PURA, it cannot prescribe a condition that would do so. Thus, in the absence of express, specific statutory authorization—which Commission Staff and opposing parties fail to cite—the Commission's order in this case cannot assign costs to SCT.

The opposing parties fail to distinguish between general and specific grants of authority. TIEC's contention that subsection 37.051(c-2) is an "expansive grant of authority to impose any condition" misconstrues PURA and the pertinent case law.[26] ERCOT and Luminant would similarly construe the subsection to provide broad authority to prescribe conditions.[27] And Commission Staff believes that the Commission has specific authority to prescribe any condition on a finding that it is reasonable and protective of the public interest.[28] To the contrary, the cases cited in SCT's Initial Brief make it clear that inherently general grants of authority to an agency must be limited to the express, specific powers granted elsewhere by the legislature and that an agency must comply with express statutory provisions.[29]

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[26] TIEC's Brief at 8-9.

[27] ERCOT's Brief at 5; Luminant's Brief at 6.

[28] Staff's Brief at 6-7.

[29] SCT's Brief at 11-15.

Tellingly, none of the opposing parties or the Staff notes any limits on the power the Commission might exercise in prescribing conditions. Indeed, their interpretations of subsection 37.051(c-2) imply that the Commission has an unlimited authority to prescribe nearly any condition on the interconnection because there are no guidelines in the subsection to determine what is reasonable or protective of the public interest. But a reviewing court will insist on a limiting case if it is to uphold the Staff's and opposing parties' construction of the subsection. That is, the court will want to know what is the limit on the Commission's authority to impose conditions under their construction. There is none. And neither the text of subsection 35.051(c-2) nor its legislative history—nor the evidence in this case—suggests that the prospect of additional interconnections with ERCOT has justified a grant of unlimited powers to the Commission.

TIEC argues that a general authority to impose conditions would be "moot" if the Commission were limited to its existing powers.[30] But without the express grant of authority to impose conditions in subsection 37.051(c-2), it might have been argued that the Commission had to unconditionally approve the application, without even evaluating its impact on reliability. Similarly, subsection 37.051(c-3) has no apparent function except to forestall any argument that the Commission lacks authority to adopt rules "of general applicability" regarding interconnections. Subsection (c-2) preserves the Commission's general authority to prescribe conditions on the interconnection with the SCT DC Tie, but in prescribing any such conditions, the Commission must only exercise specific powers that are expressly granted in other PURA provisions.

ERCOT argues that since subsection 37.051(c-2) applies in the specific context of this application, it should be considered a specific grant of authority that has priority over other provisions of PURA.[31] That argument is not supported by case law, and the courts will not treat the subsection as a specific grant of authority. For instance, the *City Public Service Board* case,[32] discussed in SCT's Initial Brief, involved the Commission's authority based on section 35.006, by which it can promulgate "rules relating to wholesale transmission service, rates, and access."[33] Even though that rulemaking authority specifically applies to wholesale transmission

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30 TIEC's Brief at 9.

31 ERCOT's Brief at 5-6.

32 *Pub. Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310 (Tex. 2001).

33 *See* SCT's Brief at 14-15 for a discussion of the case.

service rates, the Texas Supreme Court overruled the Commission in the case because there was no other provision in PURA that authorized it to require municipally owned utilities to use the postage stamp method.

Similarly, in the *Texas Municipal Power Agency* case,[34] the issue was whether section 35.006 authorized the Commission to require TMPA to amend its wholesale transmission sales contract with its members so that it complied with a Commission substantive rule.[35] Again, even though section 35.006 specifically authorizes rules relating to wholesale transmission service and rates, the Texas Supreme Court overruled the Commission in the absence of another provision in PURA that specifically authorized it to amend such contracts between municipally owned utilities.

In both of the foregoing cases, the Court declined to construe section 36.006 as authorizing *any* rule that related to wholesale transmission, rates, and service. The Court would likewise reject the position of Staff and the opposing parties who construe subsection 35.051(c-2) to authorize prescribing *any* condition on the interconnection consistent with the FERC orders, but leaving the Commission unfettered in its determination of what is reasonable and in the public interest.

ERCOT contends that section 37.051 is an express grant of authority to impose conditions,[36] reasoning that the authority to prescribe conditions is based on additional rulemaking authority in section 37.051. ERCOT's reasoning is at best confused. In the first place, the Commission did not exercise its rulemaking authority in prescribing the conditions that assign costs to SCT. In the second place, the three express references to rulemaking in section 37.051 cannot be construed to authorize rules to assign costs to SCT, whether in the form of conditions or rules. The rulemaking authority in subsection (c-1) is expressly limited to that subsection, which by its own terms does not apply to this case. Subsection (c-3) simply ensures that the Commission's existing rulemaking authority is not limited by subsections (c-1) and (c-2), but without granting any additional authority. And the rulemaking authority granted in subsection (h) pertains only to providing exemptions to applications filed under subsection (g), which is not applicable to this case. Contrary to ERCOT's argument, there is no rulemaking

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

35 *See* SCT's Brief at 15-16 for a discussion of the case.

36 ERCOT's Brief at 5.

authority in section 35.051 that allowed the assignment of costs to SCT in the Commission's order.

ERCOT's contention that section 37.051(c-2) is a specific provision that prevails as an exception to a general provision misinterprets both section 311.026 of the Texas Government Code and SCT's argument.[37] In quoting the Code, ERCOT neglected to note section 311.026(a), which requires that if a general provision conflicts with a special provision, "the provisions shall be construed, if possible, so that effect is given to both." And pursuant to section 311.026(b), it is only if the conflict between a general provision and a special provision is "irreconcilable," that the special prevails over the general. That situation does not exist here.

ERCOT fails to point to any sections of PURA that are in "irreconcilable" conflict with section 37.051(c-2), and there are none. That is because specific grants of authority elsewhere in PURA work in conjunction with the general grant in (c-2), not in conflict with it. They flesh out the general authority to prescribe conditions.

Furthermore, ERCOT misstates the argument. The conflict is not between the provisions that grant specific powers and the subsection 37.051(c-2) authority to prescribe conditions. Rather, it is the Texas Supreme Court's statutory construction that limits a general grant of authority—such as the authority to prescribe conditions—to exercise only those powers that are elsewhere expressly and specifically granted to an agency. The conflict that ERCOT perceives is actually between the Court's holdings and ERCOT's interpretation of subsection 37.051(c-2), not between that subsection and other provisions of PURA. After all, since each additional, specific grant of power elsewhere in PURA expands, not limits, the Commission's general authority to prescribe conditions, it cannot be reasonably argued that the specific grants of authority constrain and therefore conflict with the authority to prescribe conditions.

In this case, the Texas Supreme Court's holdings and the Government Code allow for subsection 35.051(c-2) to be harmonized with the rest of PURA. That is, notwithstanding the requirement that Garland's application must be approved, the subsection allows the Commission to prescribe conditions upon the interconnection, but exercising only its existing powers granted elsewhere in PURA. ERCOT's arguments based on a perceived conflict between provisions of PURA all fail for lack of an actual, irreconcilable conflict.

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[37] ERCOT's Brief at 5-6.

TIEC likewise misconstrues the prefatory phrase in subsection 37.051(c-1), contending that the phrase "notwithstanding any other provision of this title" gives that subsection priority over all other provisions in PURA.[38] The entire prefatory phrase—which TIEC conveniently neglected to quote in its brief—includes the words "and except as provided by Subsection (c-2)." The portion of the prefatory phrase omitted by TIEC makes it clear that subsection 37.051(c-2) is an exception to the priority granted to subsection 37.051(c-1). Thus, subsection (c-2) prevails over subsection (c-1). And, as noted above, since the rulemaking authority granted in subsection (c-1) is expressly limited to that subsection, it does not apply to Garland's application, which was filed under subsection (c-2).

TIEC contends that the text in the Commission's order assigning costs to SCT is simply "shorthand" that is meant to include assignment to entities transacting over the tie.[39] But the text of the Final Order is clear: OP 33 states that "Southern Cross Transmission must pay all costs incurred by ERCOT." OP 34 states, "Any additional costs . . . shall instead be borne by Southern Cross Transmission." The Commission's order could hardly more clearly assign substantial costs directly to SCT. If, as TIEC suggests, the Commission were to later attempt to assign these costs to other entities, those entities would very likely contend that the order in this case precludes requiring them to pay the costs.

Staff contends that the direct assignment of transmission upgrade costs to SCT does not violate section 35.004(d) of PURA.[40] Substantive Rule 25.192 implements the requirement in section 35.004(d) that the Commission price *all* wholesale transmission services within ERCOT based on the postage stamp method, including the portion of export and import flows transmitted within ERCOT. Furthermore, according to Rule 25.192(c), the TCOS of each TSP shall include the Commission-allowed rate of return based on FERC plant accounts, and the rule specifies the facilities deemed to be transmission facilities. Substantive Rule 25.72 sets forth detailed requirements for keeping uniform accounts. Transmission upgrade costs are properly charged to those accounts pursuant to both the statute and the rules and are therefore to be included in TCOS under the rule. The Commission's order requires that transmission upgrade costs related to the SCT Project be excluded from utilities' TCOS in direct violation of the statute as

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38 TIEC's Brief at 9.

39 TIEC's Brief at 10.

40 Staff's Brief at 8.

implemented by the substantive rules. Courts have made it clear that an agency must comply with express statutory provisions and is bound to follow its own rules.[41]

Staff argues also that the Commission may use its authority to oversee ERCOT's finances, budget, and operations to directly assign costs to SCT.[42] However, section 39.151(d-1) of PURA expressly sets forth the step-by-step procedure that the Commission and ERCOT must follow in the budget proposal, review, and approval process. The provision requires ERCOT to submit its *entire* proposed budget for the Commission to review, and it requires the Commission "to establish a procedure to provide public notice of and public participation in the budget process." After approving the budget, the Commission shall authorize ERCOT to charge wholesale buyers and sellers a system competitively neutral administration fee to fund the approved budget.[43]. Substantive Rule 25.363 implements the provisions of 39.151. The types of ERCOT costs that the order assigns to SCT have historically been included in the statutory budgeting process. They have not been assigned to similarly situated entities under the current rules. Their assignment to SCT in this case violates the procedures set forth in the statute and the substantive rule.

Finally, TIEC implicitly contends that it is proper in this case for the Commission to disallow costs associated with the Rusk substation so the costs will not be borne by ERCOT customers.[44] Pursuant to the FERC orders, however, Oncor is required to construct the Rusk substation, and it is not a party to this case. The Commission's order would thus deny recovery in rates of invested capital by a utility that is not before it and where the Commission has not complied with the statutory requirements for ratemaking proceedings or its own procedural rules pertaining to notice and investigations.[45] This result would occur despite the fact that there is no basis for the Commission to conclude that Oncor's substation costs—mandated by a FERC interconnection order—were not prudently incurred under the legal standard for review of utility investment. As a result, the order violates those statutory requirements and rules, which the Commission is bound to follow.

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41 *Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 406 Tex. 1995); *Flores v. Employees Retirement System*, 74 S.W.3d 532, 542 (Tex. App.—Austin 2002, pet denied).

42 Staff's Brief at 8-9.

43 PURA § 39.151(3).

44 Commission order at OP 32; TIEC's Brief at 10.

45 *See* PURA Chapter 36, Subch. C; Proc. R. §§ 22.51 and 22.241.

Moreover, since this case is a CCN case and not a ratemaking proceeding, the Commission may not legitimately exercise ratemaking authority to disallow recovery of costs in rates. The Texas Supreme Court recognized the bifurcation of the CCN and ratemaking authority of the Commission when it rejected TIEC's challenge to plant costs in a 1991 CCN case, *Texas-New Mexico Power Co. v. Texas Industrial Energy Consumers.*[46] In that case, TIEC had argued that without conditional certification, consumers would lose their right to challenge inefficient or imprudent expenditures by utilities. The Court held rejected TIEC's argument and held that a CCN case is not the proper proceeding in which to disallow costs because those issues are reserved for a subsequent rate case:

> The certificate of convenience and necessity affords only a right to begin construction, not a guarantee that every inefficient or imprudent expenditure will be passed on to the consuming public. *When a new installation begins supplying service, the PUC must still determine what portion of the investment is properly chargeable to ratepayers . . . .*[47]

The Court's holdings necessarily imply that the Commission lacks statutory authority in this case (1) to directly assign costs to SCT or (2) to disallow costs associated with the SCT Project from recovery in rates so that such costs would instead be borne by SCT or its customers.

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

Reply: Commission Staff and the opposing parties have neither acknowledged nor justified the fundamental inconsistencies between the PUCT's order and the FERC Orders in Docket No. TX11-1-000.

On the issue of the consistency between the PUCT order and the FERC orders in Docket No. TX11-1-000, the positions of the Commission's Staff, ERCOT, Luminant, and TIEC, as evidenced by their Initial Briefs, share a common theme of obfuscating the real issue on which the Commission sought guidance in this additional round of briefs. ERCOT and Luminant fail to even acknowledge that the FERC has ordered the rendering of transmission service at the rates, terms, and conditions in the existing TFO Tariffs, portraying the FERC Orders as addressing only interconnection issues. And while the Commission Staff and TIEC recognize that the FERC Order does require transmission service within the ERCOT system for the import and export of electricity over the SCT Project, both parties ignored the FERC-ordered rates, terms,

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46 806 S.W.2d 230, 233 (Tex. 1991).

47 806 S.W.2d at 233 (emphasis added).

and conditions of that service with repeated unsupported claims that SCT is seeking to be subsidized by ERCOT ratepayers. Indeed, with one limited exception,[48] these parties never address the substantive terms of the Offer of Settlement that was submitted and approved by FERC or the FERC's directives in its Orders directing transmission service.

As an initial matter, the focus of ERCOT and Luminant on the ordered interconnection of SCT to the ERCOT system is misplaced because there is no dispute at all as to the terms and conditions of interconnection.[49] As discussed in SCT's Initial Brief, SCT and Garland made it clear in the FERC proceeding that the costs of any Garland facilities built to interconnect to the SCT Project will not be recovered from ERCOT customers but would instead be paid by SCT.[50] Thus, with respect to interconnection, there is no issue in dispute on cost allocation: SCT will pay the cost of all Garland facilities built under both Interconnection Agreements, and it will recover those costs only from entities voluntarily purchasing capacity on the SCT Project.

Similarly, there is no issue with respect to the need of the interconnection parties to comply with all applicable ERCOT and PUCT requirements. As ERCOT points out,[51] the Offer of Settlement and the Interconnection Agreements appended to the Offer of Settlement require that the interconnecting parties construct and operate their interconnection facilities in compliance with Good Utility Practice, ERCOT Requirements, and NERC Reliability Standards, among other applicable standards.[52] SCT has every intention of fully complying with those requirements and is confident that Oncor and Garland will do so as well. However, those requirements cannot be interpreted as SCT's agreement that the PUCT can impose a

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48 *See* discussion of ERCOT's reference to Ordering Paragraph (F) of the Offer of Settlement *infra*.

49 *See Southern Cross Transmission LLC*, 137 FERC ¶ 61,207 P 15 (2011) (authorizing SCT to charge negotiated rates for transmission rights based on SCT's representation that it "will assume full market risk of the Project and that it will have no captive customers"); *Southern Cross Transmission LLC*, 157 FERC ¶ 61,090 P 17 (2016) (authorizing SCT to implement an open solicitation process for the sale of capacity rights given that "Southern Cross assumes full market risk for the Project and has no captive customers").

50 SCT's Initial Brief at 19.

51 ERCOT's Brief at 7.

52 See Docket No. TX11-1-000, Offer of Settlement, Paragraphs (F) and (I); SCT/Garland and Garland/Oncor Interconnection Agreements, Sections 4.2, 4.3 and 5.1.

discriminatory cost allocation regime on SCT and its customers in connection with transmission service over the ERCOT system.[53]

With respect to the FERC-ordered transmission service under the TFO Tariffs, neither Commission Staff nor any of the opposing parties address the unequivocal language of the Offer of Settlement and the FERC Orders approving the Offer of Settlement. The language makes it clear that transmission service for transactions over the SCT Project are to be rendered at the same rates, terms, and conditions as Oncor and CenterPoint offer to their other customers under their existing TFO Tariffs.[54] Not only does FPA Section 211 explicitly require non-discriminatory treatment for transmission service ordered under the section,[55] the requirement was unambiguously incorporated into the Offer of Settlement by the signatories. It was then addressed by FERC, which found that the proposed transmission ratemaking provided for in the Offer of Settlement met the statutory requirements of FPA Sections 212(a) and 212(k).[56]

Having never raised the claim in the FERC proceeding or in this proceeding until now, TIEC claims that the direct assignment of SCT costs is required by both the FERC Order and the language of FPA Section 212(a).[57] TIEC misconstrues the FERC Orders and the Federal Power Act in making this belated claim. First, the provision of the FERC Order cited by TIEC deals solely with the costs of interconnection facilities built under the two Interconnection Agreements. As discussed above, there is no dispute in this proceeding that the costs of interconnection facilities to be owned by Garland will not be recovered from ERCOT customers, and the costs will be recovered only from transmission customers that voluntarily purchase

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53 Thus, accepting Luminant's claim that "the FERC's interconnection order is necessarily limited in asserting jurisdiction over the interconnecting entities only to the extent necessary to enforce the interconnection orders." (Luminant Initial Brief at 7 (footnote omitted)). Accepting this erroneous claim requires that the Commission completely ignore (1) Section 211 of the Federal Power Act, (2) the provisions of the Offer of Settlement that address service under the Oncor and CenterPoint TFO Tariffs, and (3) the FERC's final and non-appealable order requiring the rendering of transmission service at the same rates, terms and conditions as are made available to other customers under those Tariffs.

54 The TFO Tariffs filed by the ERCOT utilities are based on rates approved by the PUCT.

55 "An order under section 211 shall require the transmission utility subject to the order to provide wholesale transmission services at rates, charges, terms and conditions which ... shall be just and reasonable, and not unduly discriminatory or preferential." FPA Section 212(a) (16 U.S.C. § 824k(a)).

56 FERC Final Order at ¶ 19. *See* SCT Initial Brief at 23-24. Given FERC's express finding that the Offer of Settlement's proposed transmission ratemaking standards comply with the requirements of FPA Sections 212(a) and 212(k), TIEC's claim that application of the current TFO Tariffs to SCT-related transmission service would violate Section 212(a) is untimely, and TIEC is estopped for seeking to collaterally attack the FERC's finding before this Commission in the CCN proceeding.

57 TIEC's Initial Brief at 7-8.

transmission capacity from SCT. TIEC's reference to FERC order language ignores the clear context in which the language was used.

Second, with respect to the Oncor facilities under the Oncor/Garland Interconnection Agreement, the Offer of Settlement is clear that the ratemaking associated with the costs of those facilities are to be addressed under established PUCT procedures at the appropriate time by Oncor. No party to the FERC proceeding—including TIEC—objected to that provision of the Offer of Settlement, and FERC accepted it in its Final Order. There is no language in the FERC orders or in the Federal Power Act that authorizes, much less requires, this Commission to circumvent in this case the normal ratemaking procedures that will apply in a subsequent Oncor rate case.

Third, with respect to FPA Section 212(a), TIEC is mistaken in claiming that the provision creates a hard-and-fast rule against the recovery of any SCT-related costs from Texas ratepayers. The statute imposes an obligation on FERC—not this Commission—to ensure that the transmission rates charged for the use of the ERCOT system to deliver power to and from SCT are recovered from SCT customers "to the extent practicable" and that the costs recovered from those customers are "properly allocable to the provision of such services."

Both Oncor and CenterPoint have on file at FERC TFO Tariffs to do exactly that—*i.e.*, ensure that TFO Tariff customers pay for their use of the ERCOT transmission system. *Those tariffs, which apply to transactions across the other existing DC Ties, ensure that Texas ratepayers who utilize the ERCOT system solely for internal transactions will not subsidize customers engaged in export or import transactions.* The Offer of Settlement approved by FERC requires the same regulatory ratemaking regime for SCT as for the other DC ties. That ratemaking regime has been in place and approved by both FERC and this Commission for years and cannot be considered violative of FPA Section 212(a). No party has ever proposed that FPA Section 212(a) requires direct assignment of costs to DC ties until TIEC filed its Initial Brief on Rehearing. The Commission must reject that absurd position.

Having chosen to ignore the Offer of Settlement and the FERC Order, Commission Staff and TIEC seek to justify the discriminatory treatment of SCT and its customers through a series of claims that are not only irrelevant but factually inaccurate. For example, Commission Staff

seeks to dismiss the relevance of the FERC Order by mixing grid reliability with ERCOT system operations and stating:

> There is no language in the FERC Order that FERC considered or required studies to determine whether any changes are needed to ERCOT's Protocols, computer systems, or operations in order to reliably interconnect the Southern Cross DC Tie.[58]

In fact, FERC made clear when it issued its Conditional Order in Docket TX11-1-000 that it was not prepared to issue a final order requiring interconnection or transmission services because reliability studies were underway and had not yet been concluded:

> [W]e note that the regional planners in both SERC and ERCOT and currently studying the impacts of the Project on both affected electric systems and will identify any needed system upgrades to ensure that the operation of the Project will not result in any violations of applicable reliability criteria. We agree with Texas Industrial Consumers that this information is necessary before issuing a final order.[59]

With respect to the ERCOT system, those studies were undertaken by Oncor and presented for review by both ERCOT and the ERCOT transmission owners. Upon completion, SCT reported to the FERC that those studies had been completed and that, with the construction and operation of those facilities identified in the Interconnection Agreements, the SCT Project "can be interconnected to the ERCOT grid without any adverse impacts on the continued reliability of the grid."[60] No party to the FERC proceeding, including this Commission, ERCOT, and TIEC, disputed the accuracy of that statement. Based on that representation, FERC issued its Final Order, finding that the requested interconnection and transmission services would not impair the continued reliability of affected electric systems.[61] Staff's claim that the reliability of the ERCOT grid has not been considered prior to the CCN proceeding is simply not accurate.

Staff also asserts that this Commission's order should be found consistent with the FERC orders because nothing in the Commission's order prohibits Garland, Oncor, or CenterPoint from providing interconnection or transmission services to SCT.[62] This purported justification is

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58 Staff's Initial Brief at 9.

59 FERC Conditional Order at ¶ 32.

60 Docket No. TX11-1-001, Compliance Filing of Southern Cross Transmission LLC and Pattern Power Marketing LLC, Transmittal Letter at p. 2 (Feb. 20, 2014).

61 FERC Final Order at ¶ 17.

62 Staff's Initial Brief at 9.

reminiscent of TIEC's argument that this Commission has the authority to directly assign costs to SCT because SCT then has the choice to either pay the costs or abandon the Project.[63] Seeking to justify discriminatory treatment on the ground that it is ultimately SCT's decision to go forward with the Project cannot be the correct standard for assessing the legality of the Commission's order. The fact that a party can choose to accept discriminatory treatment does not make that treatment reasonable or lawful. Similarly, allowing SCT to interconnect—but only under discriminatory conditions—does not make the Commission's order consistent with the FERC orders, because the FERC orders place terms and conditions on the interconnection that the Commission may not effectively set aside.

Finally, both Commission Staff and TIEC seek to support the Commission's order as necessary in order to protect ERCOT customers from "unjustified costs" or "subsidizing the business of a single market participant."[64] Actually, ERCOT customers are paying the full cost of the existing DC ties, which are included in transmission cost of service. As discussed above, SCT has agreed that it will recover its costs of constructing the SCT Project, if at all, from those entities that voluntarily elect to purchase transmission capacity over the Project, not from ERCOT customers.

With respect to the transmission service to be acquired by its customers over the ERCOT transmission system, SCT is not looking to be subsidized or to push unjustified costs on to captive ratepayers. To the contrary, SCT is simply asking that its customers be able to acquire the same transmission service under the relevant TFO Tariffs currently made available to the users of the other DC ties under those tariffs. That non-discriminatory treatment is required by the Offer of Settlement and, as a result of its approval of the Offer of Settlement, by the FERC Orders. It defies logic that parties have taken the position that wanting non-discriminatory treatment is tantamount to seeking to be subsidized.

SCT understands that the TFO Tariffs and the ERCOT protocols will need to be updated and adjusted to account for the interconnection of the SCT Project with the ERCOT system, and SCT is already working to accomplish that. However, the fact that there are a few operational aspects of the SCT DC Tie that need to be addressed—such as its ability to ramp up or down or

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63 TIEC's Initial Brief at 10.

64 Staff's Initial Brief at 9; TIEC's Initial Brief at 8.

change the direction of flows much quicker than the other DC ties—cannot be used as an excuse to impose a discriminatory and burdensome cost allocation and ratemaking scheme on SCT, particularly one that has never been imposed on another DC tie.

Conclusion

The Commission's order exceeds its authority under PURA, is contrary to the FERC Orders, and is per se discriminatory under the dormant Commerce Clause. SCT urges the Commission to grant its Motion for Rehearing and revise the order to simply address those conditions necessary for Garland to reliably interconnect with the SCT Project and eliminate language assigning costs to SCT and those using the SCT DC Tie.

The Commission has express authority to condition its approval of the Garland CCN regarding the interconnection as it affects reliability of the ERCOT grid. That is all section 35.051(c-2) requires, and that is all the Commission should do. This case is not the forum in which sweeping changes in cost responsibility should be made. Such action is neither reasonable nor lawful under applicable Texas and federal law. Nor does the evidence support a broad allocation of costs to SCT and its customers.

Staff's and TIEC's claims that the SCT DC Tie will be subsidized by domestic ERCOT customers ignore the tie's substantial benefits. ERCOT customers will receive more benefits annually than any known and quantifiable cost involved in interconnecting the SCT Project. In fact, SCT has agreed to pay roughly $115–118 million to interconnect with the ERCOT grid. The new Garland facilities—which will be built at SCT's expense, not ERCOT customers'—can potentially benefit the ERCOT system beyond their intended purpose, as interconnected transmission system elements eventually tend to do. Similarly, the Rusk switch yard will tie together existing 345-kV transmission lines in addition to the Garland line and provide immediate benefits to the ERCOT system.

Retail customer interests and public interest are not synonymous terms even though TIEC and Staff seem to argue otherwise. The public interest must include a balancing of all interests. Interconnecting the SCT Project will make ERCOT more efficient and more reliable by, among other things, providing access to more generation resources. At the same time, it will reduce costs to ERCOT customers and expand the base for the recovery of ERCOT transmission service costs. SCT respectfully requests that the Commission revise its order to remove the conditions

that are beyond its statutory authority to impose, will discriminate against export and import flows over the SCT DC Tie, and are inconsistent with the FERC Final Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 28, 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