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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	§ § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

TEXAS INDUSTRIAL ENERGY CONSUMERS' REPLY BRIEF ON REHEARING

December 28, 2016

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I. INTRODUCTION

The Commission's Order in this case is a well-reasoned, factually supported approach to protecting ERCOT customers from bearing the cost of a DC tie interconnection that will create additional system costs while providing few, if any, benefits. The conditions the Commission imposed upon the Southern Cross Transmission, LLC (SCT) DC tie project (the "SCT Tie") are consistent with the dormant Commerce Clause, are well within the Commission's explicit grant of authority under PURA § 37.051(c-2), and are in accordance with the Federal Energy Regulatory Commission's (FERC's) Interconnection Order in Docket TX-11-001. SCT's arguments to the contrary are flawed and incorrect. As discussed below, if SCT's view of the law were valid, the Commission would be precluded from meaningfully regulating the interconnection or operation of the SCT Tie ***or*** any other existing or future DC ties. SCT's view of the interaction between the Commission's authority and federal law is misguided and should be rejected.

TIEC reurges the limited changes proposed in its Motion for Rehearing, which (1) clarify that costs are being assigned to both SCT and "entities transacting over the tie," and (2) supplement the supporting findings of fact for this direct assignment consistent with the record and the Commission's prior Open Meting discussion. With those changes, the Order should be adopted on rehearing and SCT's motion should be denied.

II. REPLIES TO SOUTHERN CROSS TRANSMISSION, LLC'S INITIAL BRIEF

A. The Commission's Order is consistent with the dormant Commerce Clause of the U.S. Constitution.

1. The Commission's Order was not facially discriminatory.

The Commission's Order is not facially discriminatory because the conditions it contains are not based on SCT's status as an out-of-state business entity or any desire to restrict interstate commerce.

In its initial brief, SCT again offers minimal analysis beyond its conclusory allegation that the Commission's Order is facially discriminatory, primarily because the Order imposes differential treatment on the SCT Tie compared to existing DC ties and transactions within ERCOT. This does not constitute facial discrimination under the dormant Commerce Clause doctrine because it is not based on SCT's status as an out-of-state business or any intent to

restrict interstate commerce. Instead, the conditions are appropriately based on the unique impact the SCT Tie will have on the ERCOT system relative to existing ties or intra-ERCOT transactions. Differential treatment alone does not give rise to a Commerce Clause claim. The federal courts have made clear that "a regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally."[1] Rather, state action is only considered facially discriminatory where "a statute or regulation distinguishe[s] between in-state and out-of-state products and no nondiscriminatory reason for the distinction [i]s shown."[2] In other words, to be facially discriminatory a state law or regulation must treat ***similarly situated*** entities differently based on their status as a domestic or foreign entity.[3] The Commission's Order in this case is not based on the owner/operator's status as a non-Texas company (or a desire to discriminate against out-of-state electricity producers), but the specific costs and burdens the SCT Tie will impose on ERCOT. While SCT attempts to rely on several instances of differential treatment in the Order, it does not, and cannot, identify any examples of facially ***discriminatory*** treatment cognizable under the Commerce Clause. SCT's arguments simply ignore the legitimate, nondiscriminatory rationale for directly assigning costs to the SCT Tie project based on its differential impact to the ERCOT system.

SCT erroneously asserts that the Commission's Order is facially discriminatory because it directly assigns certain costs to the SCT Tie that, if the transactions were wholly within ERCOT, would be borne by ERCOT customers. However, the courts have been clear that differential treatment alone is not a violation of the dormant Commerce Clause doctrine if that treatment is justified on nondiscriminatory grounds. For example, compare the Supreme Court's decision in *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon* with the Ninth Circuit's recent decision in *Rocky Mountain Farmers Union v. Corey*. In *Oregon Waste*, the Supreme Court struck down as facially discriminatory an Oregon statute that imposed a $2.50 per ton surcharge on disposal of out-of-state solid waste, but only a $0.85 per ton surcharge on disposal of in-state solid waste.[4] The Supreme Court held that this statute was facially discriminatory

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[1] *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013).

[2] *Id.*

[3] *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725 (5th Cir. 2004).

[4] 511 U.S. 93, 100 (1994).

because the ***sole*** determinant for which surcharge applied was whether or not the waste was generated out-of-state, and out-of-state waste was no more harmful or costly than in-state waste.[5] But as noted by the Court, "if out-of-state waste did impose higher costs on Oregon than in-state waste, Oregon could recover the increased cost through a differential charge on out-of-state waste."[6] This is consistent with the decision in *Rocky Mountain Farmers Union*, which involved California's Low-Carbon Fuel Standard, a cap-and-trade program that assigned carbon intensity factors to fuels based partly on their place of origin.[7] In that case, the Ninth Circuit determined that the regulation was not facially discriminatory, reasoning that "if producers of out-of-state ethanol actually cause more GHG emissions for each unit produced, because they use dirtier electricity or less efficient plants, [California] can base its regulatory treatment on these emissions."[8]

Similarly in this case, direct assignment of costs to SCT appropriately reflects the differential costs and other impacts the SCT Tie imposes on the ERCOT system relative to existing DC ties or intra-ERCOT transactions. There are unique cost and reliability impacts associated with importing and exporting power out of ERCOT that simply do not exist for transactions that occur wholly within the ERCOT grid, and that were not considered in developing the cost allocations that apply to intra-ERCOT transactions. The dormant Commerce Clause does not restrict states from imposing laws or regulations to recognize these differences. This is evidenced by differential treatment of the existing DC ties based on their disparate impacts to the ERCOT system. Under SCT's view of the law, any existing PUC rule or ERCOT protocol that imposes different requirements on DC ties compared to intra-ERCOT transactions (of which there are many) would violate the dormant Commerce Clause doctrine. This has

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[5] *Id.*

[6] *Id.* at 101 n.5.

[7] 730 F.3d at 1089.

[8] *Id.* at 1090.

simply not been borne out in reality because the dormant Commerce Clause does not require such a result.[9]

SCT also points to differences between the conditions imposed on the SCT Tie and the treatment of existing DC ties as alleged improper discrimination, but this argument again ignores both the factual and legal bases for these differences. While never explicit, SCT implies that the Commission's Order is facially discriminatory against out-of-state business interests because the other DC ties are operated by in-state companies, and the SCT Tie will be operated by an out-of-state entity.[10] Critically, however, the conditions imposed by the Commission's Order were adopted pursuant to a newly enacted statute that was applied for the first time in this proceeding. The SCT Tie is the first DC tie to be regulated under the updated PURA § 37.051, so it is the first example of the Commission tailoring conditions to address the unique operational impacts and costs of a specific facility. As a result, the differential treatment of the SCT Tie and the existing ties represents a change in the regulatory framework, and not unlawful discrimination. The Fifth Circuit has held that facially neutral grandfathering clauses, like the one in PURA § 37.051(c-1),[11] do not violate the dormant Commerce Clause even if only in-state entities qualify for the exemption.[12] It is mere happenstance that the first DC tie regulated under this new statute is owned and operated by an out-of-state company, and there is no evidence that this foreign status was a driver in the conditions imposed by the Commission. Any DC ties in the future will be similarly regulated under the new statute, regardless of whether they are operated by Texas or out-of-state companies.

Finally, the non-discriminatory reasons for imposing differential treatment on the SCT Tie are valid and supported by the facts, despite SCT's strained arguments to the contrary. In its initial brief, SCT acknowledges that general Commission practice is to assign costs "to the loads

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[9] *Id.* at 1107 ("Nor is the dormant Commerce Clause a blindfold. It does not invalidate by strict scrutiny state laws or regulations that incorporate state boundaries for good and non-discriminatory reason. It does not require that reality be ignored in lawmaking.").

[10] SCT Initial Br. at 4 & n.7.

[11] Tex. Util. Code § 37.051(c-1) ("This subsection does not apply to a facility that is in service on December 31, 2014.").

[12] *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 726-27 (5th Cir. 2004).

that benefit from such transmission infrastructure and ancillary services,"[13] which is exactly what the Commission's conditions accomplish. SCT's argument appears to be based on the flawed premise that the SCT Tie will provide benefits to ERCOT customers, which is not supported by the record in this case. Rather, the evidence clearly demonstrated that the SCT Tie will be exporting power out of ERCOT for the majority of the time, essentially acting as additional load and imposing additional transmission costs, ancillary service requirements, and other incremental impacts on the ERCOT system. It is reasonable and consistent with the dormant Commerce Clause to directly assign these incremental costs to the entities transacting over the SCT Tie. The Commission's Order directly assigning certain costs to the SCT Tie is lawful and supported by the facts.

2. The putative local benefits created by the Commission's Order are not outweighed by the incidental burden on interstate commerce.

Because SCT incorrectly asserts that the Commission's Order is facially discriminatory, SCT applies the wrong legal standard in analyzing the Commission's rationale for imposing the conditions. SCT applies strict scrutiny to the Commission's decision, but that standard only applies in the event that a state action is found to be facially discriminatory, which, as discussed above, is not the case here. Rather, this is a case where, at most, a facially neutral regulation may have an incidental burden on interstate commerce. In such circumstances, courts ask only whether the incidental burden on interstate commerce is "clearly excessive in relation to the putative local benefits." Courts are extremely deferential in this analysis. They will not "second-guess the empirical judgments of lawmakers concerning the utility of legislation," and will "credit a putative local benefit so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes."[14] Under the appropriate, highly deferential standard for regulations that have an incidental impact on interstate commerce, the Commission's Order easily satisfies the requirement of pursuing a valid public interest. In particular, the Order protects ERCOT customers from subsidizing the costs of a large, new DC tie interconnection that does not benefit them.

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[13] SCT Initial Br. at 5.

[14] *Int'l Truck & Engine Corp.*, 372 F.3d at 728.

SCT's arguments are also based on the flawed assumption—disproven by the record—that the SCT Tie will benefit ERCOT customers. First, SCT invokes FERC's public interest determination as evidence that the SCT Tie will benefit ERCOT customers. However, FERC's public interest determination is not the same as the Commission's. Whereas FERC's public interest determination relied solely on the fact that "as a general matter, the availability of transmission services enhances competition in power markets,"[15] the Commission's public interest determination focused specifically on the impacts to ERCOT and ERCOT's customers, as required by PURA. The Commission's recognition of FERC's finding that the SCT Tie project is beneficial as a whole does not preclude its determination that it provides minimal benefits to ERCOT customers.

Second, SCT claims that the SCT Tie project will provide significant benefits to ERCOT customers by pointing towards the 2015 Resero/LCG study and Ms. Wolfe's testimony, which purport to show that tariff charges for exports will produce $60 million in contributions to ERCOT transmission costs. However, the Resero study has been completely discredited. The evidence showed multiple fatal modeling errors in the Resero study, including unrealistically forcing power into ERCOT over existing DC ties with Mexico, presuming the addition of thousands of megawatts of new renewables, arbitrarily preventing export flows from ERCOT over the DC ties with SPP, and nonsensically counting opportunities to exploit LMP differentials as "savings" to customers.[16] With regards to the $60 million in tariff charges, that figure merely represents the amount that entities transacting over the SCT Tie will be paying under the current tariff for their use of the existing ERCOT transmission system, and does not address the incremental costs the SCT Tie will impose. The Commission's Order properly ensures that all ***incremental*** costs created by the SCT Tie are directly assigned to the entities transacting over the tie. Protecting ERCOT customers from subsidizing DC tie operations is a valid public interest, and the incidental burden that direct cost assignment places on interstate commerce exactly matches the incremental costs and burdens the tie will impose on ERCOT customers, which is consistent with dormant Commerce Clause doctrine.

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[15] *Southern Cross Transmission LLC, Pattern Power Marketing LLC*, 137 FERC ¶ 61,026 at P 31 (Dec. 15, 2011) (Proposed Order).

[16] *See* TIEC Initial Br. at 12-20; TIEC Reply Br. at 7-12.

3. *The Commission was granted explicit authority to regulate the SCT Tie project, and thus, its Order within the scope of that authority cannot violate the dormant Commerce Clause.*

Finally, it bears repeating that ***even if*** the Commission's Order would otherwise run afoul of the dormant Commerce Clause, which it does not, there is no violation here because Congress expressly authorized the Commission to protect ERCOT's consumers from the costs imposed by DC tie interconnections. As such, both the Federal Power Act (FPA) and FERC's Interconnection Order adopted under that Act support the legality of the Commission's conditions.

As discussed in TIEC's initial brief on rehearing, the dormant Commerce Clause is only a negative implication arising from the federal government's exclusive power to regulate interstate commerce. In other words, it only applies where Congress has not specifically acted. The Supreme Court has stated that "Congress, if it chooses, may exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."[17] As the Court has explained, "[i]f 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."[18]

SCT's application for interconnection was made under Sections 210 and 211 of the FPA. These sections require FERC to make a public interest determination and ensure that the interconnection will satisfy FPA Section 212.[19] Section 212 contains several provisions by which Congress gave state commissions, and the Texas Commission particularly, the authority to allocate costs to entities seeking to make interconnections. As Section 212(a) states:

> Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the

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[17] *Lewis v. BT Inv. Managers*, 447 U.S. 27, 44 (1980).

[18] *W. & So. Life Ins. Co. v. State Bd. of Equalization of Calif.*, 451 U.S. 648, 652-53 (1981).

[19] *See* 16 U.S.C. § 824i-j.

applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.[20]

To the extent that a state has jurisdiction over these costs, the FPA recognizes that costs incurred in providing the wholesale transmission service must be borne by the entity seeking interconnection, and not by the existing wholesale and retail customers. Similarly, Section 212(k)(1) states:

> Any order under section 824j of this title requiring provision of transmission services in whole or in part within ERCOT shall provide that any ERCOT utility which is not a public utility and the transmission facilities of which are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a), ***on the transmission ratemaking methodology used by the Public Utility Commission of Texas***.[21]

Taken together, these provisions make clear that Congress has given this Commission full authority to insulate ERCOT customers from the costs caused by entities seeking new interconnections. Given this explicit Congressional action supporting the Commission's authority to impose conditions on cost assignment, there is no valid argument that the Commission's Order violates the dormant Commerce Clause.

B. The Commission's direct assignment of costs to entities transacting over the SCT Tie is within its statutory authority.

1. The Commission acted well within its statutory authority to impose conditions on the SCT Tie to protect the public interest.

It is telling that SCT's entire argument about the Commission's authority is prefaced with the disclaimer, "[n]otwithstanding section 37.051(c-2),"[22] because the Legislature created that section specifically to give the Commission broad oversight and authority over ***the exact situation*** presented in this case. The Commission exercised that power here, for the first time, by appropriately imposing conditions to prevent ERCOT customers from subsidizing a project whose primary objective is to export low-cost renewable energy from ERCOT to neighboring

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[20] 16 U.S.C. § 824k(a).

[21] 16 U.S.C. § 824k(k)(1).

[22] *See* SCT Initial Br. on Rehr'g at 10, heading B.

regions. The conditions that the Commission placed on the SCT Tie project are well within its mandate to "prescribe reasonable conditions to protect the public interest."[23]

SCT all but ignores the broad grant of authority the Legislature provided through PURA § 37.051(c-2) and simply asserts, without citation, that any conditions imposed under that section must be based on powers expressly granted to the Commission elsewhere in PURA.[24] However, as discussed in prior briefing, if the Commission were bound to apply only its existing rules and policies to a new DC tie of unprecedented size and impact, regardless of whether this makes sense or is in the public interest, then the statutory changes to PURA § 37.051 would have no incremental impact, rendering them meaningless and unnecessary.

The Commission has reasonably interpreted PURA § 37.051(c-2) as authorizing tailored conditions for each new DC tie interconnection, and this interpretation is entitled to significant deference. Texas courts regularly defer to administrative agencies' interpretation of their own authority, and especially so when those agencies are acting under a specific mandate to protect the public interest. As the Texas Supreme Court found in 2011:

> When, as here, a statutory scheme is subject to multiple interpretations, we must uphold the enforcing agency's construction if it is reasonable and in harmony with the statute. As the [US] Supreme Court has explained, governmental agencies have a 'unique understanding' of the statutes they administer. ***In a complex regulatory scheme . . . and with a phrase as amorphous as 'public interest,' this deference is particularly important.***[25]

Texas courts have also found that a grant of authority to protect the public interest gives the Commission the power to impose conditions that are not expressly authorized elsewhere in PURA. For example, when the Commission approved SWEPCO's Turk plant, it capped the costs that SWEPCO could recover from Texas customers in the event that the federal government adopted a carbon emissions cap, relying on nothing more than a general grant of authority to condition power plant CCNs in such a way as to protect the public interest. The courts upheld the Commission's conditions based solely on its authority to "protect the public interest," even though PURA never specifically mentions or authorizes the type of cost caps the

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[23] PURA § 37.051(c-2).

[24] *See* SCT Initial Br. on Rehr'g at 11.

[25] *R.R. Com'n of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 629–30 (Tex. 2011)

Commission imposed. As the Amarillo Court of Appeals found in a 2011 decision related to that plant that the Texas Supreme Court declined to review:

> As the PUC operates within its general and specific areas of authority, it must bear in mind another aspect of its legislative authority: to protect the public interest. *See* Tex. Util. Code Ann. §§ 11.002(c), 31.001(c), 39.001. The PUC's interpretation that would allow it to impose cost caps to shield captive Texas ratepayers from costs in excess of an amount the PUC deemed reasonable is a reasonable interpretation of the PUC's own authority in light of these provisions. Its interpretation is not only consistent with these provisions but also internally consistent with its interpretation of its authority relating to consideration of wholesale load. That is, if it is within the public interest to foster a competitive free market and the PUC has the authority to consider the wholesale load when determining necessity for a facility, then it would follow that the PUC could impose cost caps as a means of fulfilling its legislatively-mandated duty that it protect the public interest during the deregulation process and the transition to a competitive market.[26]

Along these same lines, the Commission has often imposed conditions that are independent of any explicit grant of authority, and are instead rooted solely in a generalized mandate to protect the public interest. For instance, other than a broad grant of authority to investigate utility acquisitions "to determine whether the action is consistent with the public interest,"[27] the Commission had no authority to impose the substantial ring fencing protections and other commitments that it required in approving the 2015 Oncor-Hunt transaction.[28] This prior decision is proof that, contrary to SCT's claims, a grant of authority to impose conditions in the public interest expands the scope of the Commission's power beyond that which is explicitly granted elsewhere in PURA. In fact, the ***very purpose*** of the broad grant of authority under PURA § 37.051(c-2) was to identify areas where this interconnection requires unique conditions to protect the public interest.

The Commission's grant of authority in this case is more explicit than it was in the cases discussed above. PURA § 37.051(c-2) gives the Commission explicit authority to impose

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[26] *Sw. Elec. Power Co. v. Pub. Util. Com'n*, 419 S.W.3d 414, 428 (Tex. App.—Amarillo 2011, pet. denied).

[27] PURA § 14.101(b). *See also* PURA §§ 39.915(b), 39.262.

[28] *Joint Report and Application of Oncor Electric Delivery Company LLC, Ovation Acquisition I, LLC, Ovation Acquisition II, LLC, and Shary Holdings, LLC for Regulatory Approvals Pursuant to PURA §§ 14.101, 37.154, 39.262(l)-(m), and 39.915*, Docket No. 45188, Final Order at FoF 211-292 (Mar. 24, 2016) ("211. The transaction will be in the public interest, only if the following conditions set forth in findings of fact 212 through 292 below are imposed on the transaction.").

conditions on this ***particular*** application. While PURA does not contain explicit provisions regarding assigning interconnection or ancillary services costs to DC ties; such provisions are unnecessary in the face of a generalized mandate to impose conditions to protect the public interest, combined with the Commission's existing power to determine what costs are passed along to Texas customers through transmission cost-of-service (TCOS) rates[29] and how ancillary services costs should be distributed across the market.[30] Taken together, the Commission has both a generalized authority to impose conditions on this transaction and specific authority over the particular mechanisms that it used to impose those conditions. Against this backdrop, SCT's arguments must be rejected.

The cases that SCT cites for the proposition that PURA § 37.051(c-2) does not grant the Commission any additional authority are easily distinguished because none of them address an incremental legislative act that specifically authorizes imposing conditions to protect the public interest.[31] Therefore, it is inappropriate to compare those cases, which deal with PURA § 14.001 and its precursor, to the current situation, where the Commission is exercising specific authority to impose conditions to protect the public interest pursuant to the incremental authority granted by PURA § 37.051(c-2). The legislature made clear that the Commission "may prescribe reasonable conditions to protect the public interest,"[32] which would have no meaning if the Commission were required to apply only existing rules to a new DC tie. As discussed in detail above, the Texas courts have long recognized that explicit grants of authority to protect the public interest provide the Commission with particularly broad powers, and the Commission has done nothing more than exercise the explicit authorization to adopt appropriate conditions in this case.

2. The Commission's Order does not violate PURA or the Commission's rules.

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[29] *See* PURA § 35.004(c); PUC Subst. R. 25.192(c)(1)(A).

[30] *See* PURA § 35.004(e) (requiring the Commission to "ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive").

[31] Only one of the cases that SCT cites, *GTE Southwest*, comes close to discussing a "public interest" standard. However, the provisions of PURA discussed in that case had to do with the Commission's discretion to exclude a specific list of expense categories from rates if it determined that including them was not in the public interest. *See Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 411 (Tex. 1995). This is distinct from the broad power to impose conditions on a CCN to ensure that it is in the public interest that is at issue here.

[32] PURA § 37.051(c-2).

Contrary to SCT's arguments, the Commission's Order directly assigning certain costs to the SCT Tie does not violate the postage stamp method of pricing for transmission assets under PURA § 35.004(d) because that provision applies only to electric transmission service ***within*** ERCOT—not transmission service to support imports or exports.[33] Therefore, by definition, PURA § 35.004(d) does not apply to transmission service provided to entities outside ERCOT, and exports over the SCT Tie are not entitled to be treated as native ERCOT load. Further, PURA § 35.004(d) dictates how costs included in TCOS rates will be charged to ERCOT customers, but it does not dictate whether a specific cost must be included in TCOS rates or preclude direct assignment where appropriate. That is for the Commission to decide, and there are many instances where the Commission has chosen to exclude "transmission" costs from TCOS rates. As in this proceeding, those decisions have the impact of directly assigning certain costs to interconnecting entities, rather than ERCOT customers generally. For example, all transmission facilities on a generator's side of the step-up transformer are the generator's responsibility and are not included in TCOS despite the fact that their only purpose is to facilitate transmission-level service.[34] Additionally, both large customers and generators often require new transmission facilities to interconnect to the ERCOT grid, and the cost of those facilities are recovered directly from the interconnecting party rather than being socialized to all ERCOT customers through TCOS.[35] As for customer interconnections, Section 5.7 of the Commission's pro forma TDSP tariff requires that customers pay for all interconnection costs and upgrades above an allowance or for non-standard facilities, which results in a direct assignment of these costs to the interconnecting customer.[36] The SCT interconnection is no different, and the Commission is soundly within its authority to determine that transmission costs required to

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[33] *See* PURA § 35.004(d) ("The commission shall price wholesale transmission services ***within ERCOT*** based on the postage stamp method of pricing . . .") (emphasis added).

[34] *See* PUC Subst. R. 25.192(c)(1)(A) (excluding "the step-up transformers and a protective device associated with the interconnection from a generating station to the transmission network" from inclusion in the postage stamp rate despite the fact that those facilities are used exclusively to facilitate transmission service).

[35] *See, e.g.,* PURA § 35.004(c) ("When an electric utility, electric cooperative, or transmission and distribution utility provides wholesale transmission service within ERCOT at the request of a third party, the commission shall ensure that the utility recovers the utility's reasonable costs in providing wholesale transmission services necessary for the transaction ***from the entity for which the transmission is provided so that the utility's other customers do not bear the costs of the service.***") (emphasis added).

[36] *See* PUC Subst. R. 25.214(d).

interconnect the SCT Tie do not belong in TCOS rates, as it has done with both generation and load interconnections within ERCOT.

Similarly flawed and unsupported is SCT's claim that the costs of studies and operational changes at ERCOT required solely to accommodate the SCT Tie should be borne by ERCOT customers simply because ERCOT has a budget for system administration. First, ERCOT is not required to fund all activities exclusively through the System Administration Fee, and the Commission was well within its authority to instead require SCT to bear certain ERCOT costs as a condition of approval. SCT has no inherent right to have ERCOT customers pay costs required to facilitate the interconnection or operation of a DC tie that will not benefit them. Additionally, ERCOT has statutory authority to charge rates or fees in addition to the System Administrative Fee,[37] and can implement new fees and rates (or modify existing ones) with Commission approval. This is illustrated by Substantive Rule 25.363(a)(2), which states that "ERCOT shall not implement any new or modified budget, rate or fee ***without commission approval.***"[38] Additionally, individual market participants and loads routinely fund studies that are performed by ERCOT outside of ERCOT's general budget. The Commission can even order parties to fund studies at ERCOT. For example, in the docket related to the integration of Lubbock Power & Light (LP&L) into ERCOT, the Commission has discussed imposing the costs of the necessary studies onto LP&L rather than funding them through ERCOT's budget.[39] Similarly, assigning ERCOT-related costs directly to SCT is consistent with PURA, furthers the public interest, and is not prohibited by PURA or Commission rules.

3. The Commission has the authority to adopt new policies on an ad hoc basis to deal with unique challenges like the SCT Tie interconnection.

Independent of its explicit authority to impose conditions on this interconnection under PURA § 37.051(c-2), the Commission also has the authority to adopt *ad hoc* rules to deal with a unique factual situation like the interconnection of a 2000 MW DC tie that would more than double export demands in ERCOT and create novel operational challenges while promising few

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[37] *See, e.g.*, PUC Subst. R. 25.363(b) ("The accounts shall show all revenues resulting from ***the various fees*** charged by ERCOT . . .") (emphasis added); *see also* PUC Subst. R. 25.363(g).

[38] Emphasis added.

[39] *See, e.g., Project to Identify Issues Pertaining to Lubbock Power & Light's Proposal to Become Part of the Electric Reliability Council of Texas*, Docket No. 45633, Memorandum from Chairman Nelson at 4 (Jul. 19, 2016) ("We also must determine who should bear responsibility for the expense of the studies.").

if any benefits to ERCOT customers. SCT's arguments fail to address this well-established authority, which would provide a separate basis for imposing conditions that directly assign costs to the SCT Tie. It is acceptable for the Commission to create new rules of general applicability in the context of a contested case, especially when that case presents an issue of first impression upon which there is no formal rule.[40] As discussed in detail in prior briefing, the size and impact of the SCT Tie are unprecedented, as is the prospect of interconnecting a DC tie that promises only to increase prices for ERCOT customers, so the Commission is justified in tailoring its regulatory approach to the facts at hand.

The Commission has often adopted new rules of general applicability in response to unique challenges presented during the course of a litigated case. While this is the first time the Commission has directly assigned certain costs to entities transacting over a DC tie, the Commission's decision reflects a general, prospective policy of direct assignment where the facts show it is necessary to protect the public interest. It is appropriate for the Commission to develop new policy in a contested case in this manner when presented with unique facts. For example, in Docket No. 45188—the Oncor-Hunt merger case—the Commission adopted an unprecedented ratemaking approach to resolve the myriad issues posed by the prospect of Oncor being owned by a real estate investment trust.[41] The Commission's regulatory approach can and should evolve in order to fulfill the Commission's duty to effectively regulate the electrical industry. This duty exists regardless of whether new policies or interpretations differ from the outcome in historical cases, prior settlements, or existing Commission rules, so the Commission's prior treatment of DC ties does not limit its authority to tailor appropriate requirements for ***this*** DC tie.[42] Therefore, even if the Commission were not explicitly authorized

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[40] *Texas State Board of Pharmacy v. Witcher*, 447 S.W.3d 520, 535-36 (Tex. 2014) ("Adjudicative rulemaking has been recognized as appropriate in limited circumstances[, including when] an agency is confronted with an issue of first impression . . ."); *see also CenterPoint Energy Entex v. Railroad Comm'n of Tex.*, 213 S.W.3d 364, 369 (Tex. App.—Austin 2006, no pet.) ("Ad hoc rulemaking occurs when the agency makes a determination that has implications beyond the instant parties, but prefers not to make a formal rule because the agency may not have had sufficient experience with the particular problem to support making a rule or because the problem is so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule.").

[41] *See* Docket No. 45188, Final Order at FoF 211-292 (Mar. 24, 2016).

[42] *See, e.g., City of El Paso v. Pub. Util. Com'n of Texas*, 883 S.W.2d 179, 188-89 (Tex. 1994) (approving Commission adoption of an *ad hoc* rule related to deferred accounting treatment for a nuclear generating unit despite the fact that the Commission had adopted a different treatment for an identical unit at the same facility in a prior docket) ("We hold that the Commission was within its discretion in proceeding on a 'case-by-case' or *ad hoc* basis and applying different standards in different proceedings.").

to place conditions on the interconnection of the SCT Tie by PURA § 37.051(c-2), it would still have the inherent authority to do so through an *ad hoc* rulemaking.

C. The Commission's Order does not violate the FERC Interconnection Order.

1. The FERC Interconnection Order does not require the Commission to place the facilities identified in the Oncor-Garland interconnection agreement into TCOS.

In a strained attempt to preclude reasonable, lawful Commission actions to protect ERCOT customers, SCT misconstrues the FERC Order's statement that "the facilities identified in the Oncor-Garland interconnection agreement will be subject to the jurisdiction of the Texas Commission and allocated pursuant to established PUCT rules" as precluding direct cost assignment.[43] SCT claims that this statement requires the Commission to include the interconnection costs in TCOS, and precludes any tailored cost assignment. But the intent of this provision is only to make explicit the PUC's authority to regulate cost assignment associated with the SCT Tie interconnection, not to require any particular treatment. Indeed, FERC acknowledges, as does Section 212(k) of the FPA,[44] that the costs of the Oncor facilities are "***subject to the jurisdiction of the Texas Commission***," and here, the Commission did nothing more than exercise its authority to determine that certain facilities will not be placed into TCOS.

The facts demonstrate that Oncor has recourse to recover the interconnection costs from SCT, so there is no "cost-trapping" as a result of disallowing the cost of the Oncor facilities in TCOS rates. As explained in prior briefing, the interconnection agreement between Garland and Oncor provides that if the Commission does not include the costs of the Oncor facilities in TCOS, then Oncor will be entitled to recover those costs from SCT. In its Order, the Commission appropriately determined that the costs associated with the Oncor facilities should not be recovered from ERCOT customers through TCOS, which triggers SCT's responsibility to pay those costs pursuant to the provisions of the Oncor-Garland interconnection agreement. The Commission is well within its authority to determine that specific facilities should not be included in TCOS during the course of a transmission CCN proceeding if they do not benefit

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[43] 147 FERC ¶ 61,113 at P 20.

[44] 16 U.S.C. § 824k(k) (transmitting utility in ERCOT is "entitled to receive compensation based, insofar as practicable and consistent with subsection (a), on the transmission ratemaking methodology used by the Public Utility Commission of Texas").

ERCOT customers. This authority is not diminished merely because disallowing the cost has the indirect result of requiring SCT to pay for the interconnection facilities, nor is such an outcome precluded by the FERC order. Further, the parties to the Oncor-Garland interconnection agreement implicitly acknowledge that the Commission has jurisdiction to exclude the Oncor facilities from TCOS, because otherwise there would be no reason to create a contractual provision addressing a situation where the costs were disallowed.

SCT also attempts to expand the scope of FERC's Interconnection Order to cover the cost of facilities that were never mentioned in that Order. In its briefing, SCT uses paragraph 20 of the FERC Interconnection Order to support a statement that "***any upgrades*** would be addressed under established ratemaking principles."[45] But the only facilities specifically discussed in FERC's Order are those included in the Garland-SCT and Garland-Oncor interconnection agreements.[46] The FERC Interconnection Order is silent as to the allocation of any other system upgrades that are determined to be necessary to support exports over the SCT Tie. Therefore, the FERC Interconnection Order in no way prevents the Commission from conditioning this interconnection upon SCT and entities transacting over the SCT Tie bearing the cost of any other system upgrades that are ultimately necessary to facilitate exports over that tie, and the Commission should resist SCT's attempt to inject this unsupported intent into the FERC Interconnection Order.

2. The FERC Interconnection Order does not somehow freeze the Commission's authority to regulate rates for transmission service within ERCOT.

SCT also mischaracterizes FERC's statements in an attempt to freeze Commission policy at a point in time before the Commission had a chance to exercise its authority under PURA § 37.051(c-2). Even a cursory review of the FERC orders cited by SCT reveals that FERC did not intend to interfere with the Commission's authority to regulate the terms and conditions of the SCT Tie interconnection, and could not do so under Section 212(k) of the FPA. SCT attempts to rely on paragraph 34 of FERC's Conditional Order[47]—a boilerplate provision that is

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[45] *See* SCT Initial Br. on Rehr'g at 21 (emphasis added and removed).

[46] 147 FERC ¶ 61,113 at P 20.

[47] *See* SCT Initial Br. on Rehr'g at 23-24.

included in several prior DC tie interconnection orders[48]—as a basis for its claim that the FERC Interconnection Order forces the Commission to regulate the interconnection and operation of the SCT Tie according to the ERCOT and Commission rules that existed at the time the FERC Interconnection Order was issued. But this argument focuses exclusively on the phrase "existing rates, terms, and conditions" without paying any attention to what FERC was actually trying to accomplish. In reality, paragraph 19 of the FERC Interconnection Order recognizes that "transmission service [will] be provided under Oncor's and CenterPoint's existing tariffs,"[49] and paragraph 34 of the Conditional Order acknowledges that Oncor and CenterPoint "have agreed to amend their TFO tariffs to apply those [tariffs'] existing rates, terms, and conditions to the proposed transmission service [over the SCT Tie]."[50] Applying the existing rates, terms, and conditions in Oncor and CenterPoint's TFO tariffs in no way prevents the Commission or ERCOT from changing their policies with respect to the SCT Tie, and such a reading would clearly run afoul of federal law. For example, Section 2.2 of CenterPoint's TFO tariff[51] states that "transmission service shall be provided pursuant to Chapter 25 [of the Commission's substantive rules], Commission-approved tariffs, the ERCOT Protocols, and FERC requirements."[52] Critically, the definitions of "Chapter 25"[52] and "ERCOT Protocols"[53] in that tariff both include the phrase "***as amended from time to time***." Therefore, CenterPoint's tariff does not contemplate a particular set of Commission rules and ERCOT protocols, but leaves

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[48] Paragraph 34 of FERC's Conditional Order, which forms the basis of SCT's argument, appears nearly verbatim in prior FERC DC tie interconnection orders. *Cf. Southern Cross Transmission LLC, et. al.*, 137 FERC ¶ 61,206 at P. 34 (2011) (Conditional Order) *with Brazos Electric Power Coop, Inc.*, 118 FERC ¶ 61,199 at P. 42 (2007) ("The Commission has previously found that the ERCOT protocols and procedures regarding interconnection and transmission service meet the requirements of section 212 for purposes of directing interconnection and transmission services under sections 210 and 211, and accordingly, has adopted them for use in the TFO Tariffs. Here, under the Offer of Settlement, the parties have agreed to amend the TFO Tariffs to apply those existing rates, terms, and conditions to the proposed transmission service."); *and Kiowa Power Partners, LLC*, 99 FERC ¶ 62,251 at P. 45 (2002).

[49] *See* 147 FERC ¶ 61,113 at P. 19.

[50] 137 FERC ¶ 61,206 at P. 34.

[51] Available at: http://www.centerpointenergy.com/en-us/Documents/RatesandTariffs/HoustonElectric/FERC-Transmission-Tariff.pdf (CenterPoint TFO Tariff).

[52] CenterPoint TFO Tariff at § 1.5.

[53] CenterPoint TFO Tariff at § 1.14.

room for those rules to evolve over time,[54] and such an evolution is ***exactly what the Commission's Order prescribes***.[55] Therefore, there is no contradiction between FERC's pronouncement that service will be provided under Oncor and CenterPoint's TFO tariffs and the provisions of the Commission's Order that mandate modifications to Commission policies and ERCOT protocols. As articulated in FPA Section 212(a), the Commission retains its authority to properly allocate costs to interconnecting entities.[56]

Additionally, even if SCT's simplistic reading of the FERC orders were correct, SCT's argument that the FERC Interconnection Order binds the Commission and ERCOT to their existing policies proves too much. Essentially, SCT claims that by agreeing to an Offer of Settlement at FERC, Oncor, CenterPoint, and Garland were able to preempt any Commission or ERCOT policy changes regarding the operation of the SCT Tie. This simply cannot be the case, as it would render the Commission powerless to change the rates and policies that apply to the SCT Tie, thereby preventing it from effectively regulating that tie over time. For that matter, SCT's argument would justify continuing to apply the policies existing at the time that FERC signed its Interconnection Order even in the face of legislative action. So if the Legislature were to modify PURA to remove the requirement that transmission costs be allocated through the postage stamp method, SCT's argument would support continuing to apply the postage stamp method to the SCT Tie and other DC ties whose FERC interconnection orders contained similar language. SCT recognizes this flaw in its argument, and attempts to assure the Commission in a footnote that its interpretation of the FERC Interconnection Order would not forever freeze the Commission's authority over the SCT Tie at the moment the FERC Interconnection Order was

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[54] Similarly, the standard Transmission Service Agreement contained within Oncor's TFO Tariff (available at: http://www.oncor.com/EN/Documents/About%20Oncor/Billing%20Rate%20Schedules/FERC%20TFO%20Tariff.pdf) specifies that transmission service will be provided "in accordance with Public Utility Commission of Texas ("PUCT") Substantive Rules, requirements adopted by the Electric Reliability Council of Texas ("ERCOT") relating to the interconnection and operation of transmission systems in ERCOT, ***as amended from time to time***, and any successors thereto . . .." (emphasis added).

[55] *See* Docket No. 45624, Final Order at 2-3 ("Accordingly, the public interest requires that ERCOT, and the Commission, immediately begin the process of updating their respective rules, protocols, operating guides, systems, and standards so the reliability of the ERCOT system is not jeopardized and cost responsibilities are properly placed on market participants.").

[56] 16 U.S.C. § 824k(a).

issued in May of 2014.[57] However, the sections of the FERC Interconnection Order quoted by SCT are not phrased conditionally, and do not have a time limit,[58] so if SCT's interpretation is correct, then there is no principled distinction to be drawn between preventing the Commission from modifying its policies with regard to the SCT Tie *now*, and preventing the Commission from *ever* modifying those policies. Given this absurd result, it cannot be the case that FERC intended to limit the Commission's ability to modify its ratemaking treatment of the SCT Tie.

III. CONCLUSION

For the reasons discussed above, the Commission's Final Order does not violate the dormant Commerce Clause or the FERC Interconnection Order, nor does it overstep the Commission's authority under PURA. To clarify the intent of the Order, TIEC reurges the additional findings and wording changes proposed in its initial Motion for Rehearing. With those changes, the Commission should affirm its Order and reject SCT's arguments.

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[57] SCT Initial Br. at 24, n. 76 ("To be clear, SCT is not asserting that the Commission is somehow prevented from revisiting and refining its rules, only that a wholesale departure in the instant case from its existing rules is contrary to the FERC Order.").

[58] For example, Paragraph 20 of the FERC Order states that "the facilities identified in the Oncor-Garland interconnection agreement will be subject to the jurisdiction of the Texas Commission and allocated pursuant to established PUCT rules."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael McMillin, Attorney for Texas Industrial Energy Consumers, hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 28th day of December, 2016 by hand-delivery, facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.

Michael McMillin